No. 24-3280

United States Court of Appeals for the Eighth Circuit

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

CAREBOURN CAPITAL, LP, ET AL.,

Defendants-Appellants.

On Appeal from the
United States District Court for the District of Minnesota,
Case No. 0:21-cv-02114-KMM

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF PRIVATE FUND MANAGERS, MANAGED FUNDS ASSOCIATION, ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION, LTD., AND TRADING AND MARKETS PROJECT, INC. SUPPORTING DEFENDANTS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* National Association of Private Fund Managers, Managed Funds Association, and Trading and Markets Project, Inc. certify that they have no parent corporation, and no publicly held company owns 10% or more of their stock. The Alternative Investment Management Association, Ltd. (AIMA) states that it is a UK private company limited by guarantee. It does not issue share capital and no publicly held company holds more than a 10% interest in AIMA.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The decision below would make a felon of every institutional investor—every hedge fund, mutual fund, pension fund, and private-investment office—in America. Even the Federal Reserve would be "operating" as an "unregistered securities 'deale[r].'" *Nat'l Ass'n of Private Fund Managers* v. *SEC* (*NAPFM II*), 2024 WL 4858589, at *1 (N.D. Tex. Nov. 21, 2024). That would be absurd, and this Court should reverse.

Amici speak for the global hedge-fund community. Their members manage thousands of hedge funds and collectively invest over ***$4 trillion***. They are deeply concerned that the decision below will have far-reaching and detrimental effects on the proper functioning of the nation's financial markets.

Below, the district court held that a small, private-investment firm, Carebourn Capital, was a securities "dealer," required to register with the SEC, because it "engaged in a high volume of buying and selling securities." R. Doc. 177, at 24. That is utterly incorrect—in the

[1] All parties have consented to this filing. No party's counsel authored any part of this brief; no one other than *Amici* or their members or counsel contributed money for the brief's preparation or submission.

words of the SEC's Acting Chairman, "arbitrar[ily] and even tyrannical[ly]" overbroad. *Comm'r Uyeda Rule Dissent* (Feb. 6, 2024) (Add. 26a), https://tinyurl.com/4dxrn2s7. Institutional investors—like *Amici*'s members—engage in an "enormous volume" of buying and selling securities—tens of thousands percent more than Carebourn. S. Rep. No. 101-300, at 39 (1990). More than $500 billion in stocks, and nearly $1 trillion in Treasuries, trade *each day*. Yet not one institutional investor—*ever*—has been required to register as a "dealer." The "sheer volume" of a person's trading cannot possibly make someone a "dealer." *Contra* R. Doc. 177, at 21.

This Court should set the law straight. The stakes are enormous. Operating as an unregistered "dealer" is a felony. *See* 15 U.S.C. §§ 78o(a)(1), 78ff(a). And even in this civil case, the SEC sought the "'securities industry equivalent of capital punishment,'" *Saad* v. *SEC*, 873 F.3d 297, 306 (D.C. Cir. 2017) (Kavanaugh, J., concurring); *see* R. Doc. 188, at 8, and the district court ordered disgorgement of *all* "profits," R. Doc. 230, at 2. Without this Court's intervention, a sword of Damocles will be left dangling over the head of every institutional investor in America.

The SEC's action is "pretextual." *Nat'l Ass'n of Private Fund Managers* v. *SEC* (*NAPFM I*), 103 F.4th 1097, 1113 (5th Cir. 2024). Over the years, certain members of the Commission have sought "a hook on which to hang more comprehensive regulation" of private investors, such as hedge funds, *Goldstein* v. *SEC*, 451 F.3d 873, 882 (D.C. Cir. 2006), even though "Congress clearly chose" to impose a *different* regulatory framework, *NAPFM I*, 103 F.4th at 1111. In 2004, for example, the Commission, by a 3-2 vote, tried to classify private funds as "investment advisers." *See Goldstein*, 451 F.3d at 882. Two years ago, by another 3-2 vote, the Commission tried to subject private funds to mutual-fund style regulation. *See NAPFM I*, 103 F.4th at 1113. And last year, by another 3-2 vote, the Commission tried (by rule) to classify private funds as "dealers." *See NAPFM II*, 2024 WL 4858589. The courts vacated these rules. As the D.C. Circuit put it, the Commission could "not accomplish its objective"—"more comprehensive regulation" of private funds—"by a manipulation of [the] meaning" of longstanding statutory words. *Goldstein*, 451 F.3d at 882.

The Commission is at it again—this time in litigation. Here, the Commission sued a small defendant, without the means to defend itself,

and pressed a theory that, if taken seriously, would—once again—seem to subject "many of the world's largest, most prominent market participants" to a regulatory scheme Congress has not provided. *NAPFM II*, 2024 WL 4858589, at *1. "'A regulator's temptation may be to put every corner of the market under a regulatory spotlight.'" *Id.* But "[w]hen engaging in that temptation causes an agency to act beyond its authority, the judiciary is obligated to thwart that action." *Id.*

ARGUMENT

When Congress enacted the Securities Exchange Act in 1934, the word "dealer" had a settled meaning "limited"—in the words of the Supreme Court—"to one who … buys and sells securities *to customers*." *Schafer* v. *Helvering*, 299 U.S. 171, 174 (1936) (emphasis added). That original meaning "'is fixed at the time of enactment.'" *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 400 (2024).

This common-sense understanding carries forward today. When small retail investors or giant hedge funds want to execute stock transactions, for example, they typically do so through registered broker-dealers like Fidelity, TD, or Robinhood, which effectuate the buy or sell orders for their customers, "either as a 'broker' or 'dealer.'" *Regulation Best In-*

terest Disclosure Brochure, TD Wealth 9 (June 30, 2020), https://tinyurl.com/s8fa8zdc. "Broker" and "dealer" refers to "*how*" one executes the customer order—as agent for the customer's account ("broker"), or on the opposite side of the trade, from one's own account ("dealer"). *NAPFM II*, 2024 WL 4858589, at *4. As in 1934, so today. *See* Exchange Act Release No. 253, 1935 WL 29145, at *1 (SEC May 31, 1935) (entitling "customer" to "adequate notice of the capacity in which [the] broker-dealer is acting," "whether [it] [is] acting as [a] deale[r] for [its] own account[t]" or "as [a] broke[r] for the customer['s]" account).

As the SEC's Acting Chairman himself acknowledged, the Commission does not allege Carebourn "effect[s] securities transactions for customers." *XY Planning Network, LLC* v. *SEC*, 963 F.3d 244, 248 (2d Cir. 2020); *see Comm'r Uyeda Remarks* (Mar. 5, 2024) (Add. 47a), https://tinyurl.com/bdwbmwyv (because Carebourn "had no customers," and merely traded for itself, it could not have been "on notice of [an alleged] requirement to register as [a] deale[r]"). On the contrary, because Carebourn is merely "acting in its own best interests as an investor" and lender, it "cannot be considered a dealer." *NAPFM II*, 2024 WL 4858589, at *7 (quoting *Chapel Invs., Inc.* v. *Cherubim Interests, Inc.*, 177 F. Supp.

3d 981, 991 (N.D. Tex. 2016)); *see Radzinskaia* v. *NH Mountain, LP*, 2023 WL 6376457, at *4 (S.D. Fla. Sept. 29, 2023) (collecting cases).

I. The Decision Below Cannot Be Right

Below, the Commission insisted—and the district court agreed—that Congress defined "dealer" to include *any* business that "buy[s] and sell[s] securities," regardless of whether that business "provide[s] … dealer services to others." R. Doc. 57, at 24; *see id.* at 25 ("buying and selling" is "[t]he *only* definitional requirement" (emphasis added)); R. Doc. 177, at 16 (finding Carebourn's "conduct—buying … notes … and then selling … stock—constitutes buying and selling securities"). That cannot be what "dealer" means.

On the SEC's theory, virtually every financial professional in America would be an unregistered "dealer," as evidenced by the agency's position in this and other recent enforcement cases. As the Commission "let slip" in proposed jury instructions, *Niz-Chavez* v. *Garland*, 593 U.S. 155, 168 n.5 (2021), "any person" would be guilty of running an unregistered "dealer" when, in "more than a few isolated transactions," he "purchas[ed] and s[old]" "stock" as part of a "'business.'" Proposed Jury Instructions at 24, *SEC* v. *Almagarby*, No. 0:17-cv-62255 (S.D. Fla. Mar. 6,

2020) (Add. 54a); *accord* SEC Br. 1, *SEC* v. *Morningview Fin., LLC*, No. 1:22-cv-8142 (S.D.N.Y. May 19, 2023) (Add. 57a) ("Defendants … regularly bought and sold securities for their own account, and therefore meet the Exchange Act's broad definition"); SEC Br. 6, *SEC* v. *Kramer*, No. 1:24-cv-3498 (S.D.N.Y. Sept. 27, 2024) (Add. 59a) ("to sufficiently allege that a person … acted as a … 'dealer,' … a litigant must plead … that the person … '(1) bought and sold securities, (2) as principal rather than as agent for another, (3) as part of a profit-seeking enterprise, and (4) on more than a few isolated occasions.'").

All 2,046 investment companies (*i.e.*, mutual funds) would, according to the SEC's reading, be unregistered dealers because they, by definition, are "engaged primarily" in the "business of … trading in securities." 15 U.S.C. § 80a-3(a)(1)(A). So would all 12,550 "large trading business[es]"—the "professional market participants" who "employ sophisticated trading methods to trade" more than $20 million per day each. 76 Fed. Reg. 46,960, 46,961, 46,964, 46,992 (SEC Aug. 3, 2011); *see* 17 C.F.R. § 240.13h-1(a)(7)(i).[2] They, and countless others who have

[2] For investment-company and large-trader numbers, see *Inv. Co. Series and Class Info.*, SEC, https://tinyurl.com/2k634hfk (last updated

(cont'd)

never been considered dealers, indisputably meet the SEC's novel test. Warren Buffett's Berkshire Hathaway regularly buys and sells securities—"$75.5 billion in stocks in the three months through June" alone, K. Langley, *Warren Buffet's Berkshire Hathaway Slashes Apple Stake*, Wall St. J. (Aug. 3, 2024), https://tinyurl.com/3wjaramv—yet Berkshire has never been a registered "dealer."

Congress did not adopt such an "excessively broad" definition, which "would embrace as a dealer every securities trader who makes money through buying and selling of securities." *SEC* v. *Federated All. Grp., Inc.*, 1996 WL 484036, at *5 (W.D.N.Y. Aug. 21, 1996).

II. Brokers And Dealers Effectuate Orders For Customers

Congress required the registration of "broker[s]" and "dealer[s]," 15 U.S.C. § 78o(a)(1), terms with "well-settled" legal definitions, *NAPFM II*, 2024 WL 4858589, at *6; *see Johnson* v. *Winslow*, 279 N.Y.S. 147, 156 (N.Y. Sup. Ct. 1935) (The "rights and duties" of "brokers" and "dealers" to their "customers" have "been before the courts for adjudication repeatedly."), *aff'd*, 246 A.D. 800 (N.Y. App.

June 5, 2024); and SEC Supporting Statement 6, OMB Control No. 3235-0682 (Jan. 18, 2024), *available* at https://tinyurl.com/bdz6dxzt.

Div. 1936). As the Supreme Court put it in 1936, a "securities dealer" is "limited" to one who "buys and sells securities to customers." *Schafer*, 299 U.S. at 174. Congress in the Exchange Act "'obvious[ly] transplant[ed]' [these terms] from the preexisting financial-legal landscape." *NAPFM II*, 2024 WL 4858589, at *5.

A. The Exchange Act Uses Well-Known, Widely Used Terms That Refer To The Methods Of Effectuating Customer Orders

The centerpiece of the dealer definition is the word "dealer." 15 U.S.C. § 78c(a)(5)(A). "[T]he word being defined is the most significant element of the definition's context." A. Scalia & B.A. Garner, *Reading Law* 232 (2012); *see Sackett* v. *EPA*, 598 U.S. 651, 672 (2023) ("align[ing]" statutory definition "with the term it is defining"); *Bond* v. *United States*, 572 U.S. 844, 861 (2014); *Johnson* v. *United States*, 559 U.S. 133, 140 (2010); *Janis* v. *United States*, 73 F.4th 628, 636 (8th Cir. 2023); *United States* v. *Brown*, 598 F.3d 1013, 1017 (8th Cir. 2010);. In 1934, all understood "dealers" engage in two related activities: "'bu[y] and sel[l] securities to customers'" and offer other "'services' to investors." *Crypto Freedom Alliance of Texas* v. *SEC*, 2024 WL 4858590, at *3 (N.D. Tex. Nov. 21, 2024).

As a leading treatise put it, "[a] dealer sells to and buys from a client." C.F. Hodges, *Wall Street* 361 (1930) (Add. 2a); *accord* C.H. Meyer, *The Law of Stockbrokers and Stock Exchanges* 32-33 (1933 cum. supp.) (Meyer 1933) (Add. 4a-5a) ("a security *dealer* … sells to his customers … or buys from his customers"); W.O. Douglas & G.E. Bates, *Stock "Brokers" as Agents and Dealers*, 43 Yale L.J. 46, 56 (1933) (dealer's "dominant motive is profit to himself realized by buying … and selling to his customer"); J.W. Maxwell, *The Dealer House*, Magazine of Wall Street, Dec. 5, 1925 at 228, 228 (Add. 11a) ("[d]ealer must be close … to his customers").

As the SEC *itself* said shortly after the Act's adoption, existing law presumed an "intimate relationship between customers and … dealers." *Duker & Duker*, 1939 WL 36426, at *3 n.6 (SEC Dec. 19, 1939); *see Coolidge* v. *Old Colony Tr. Co.*, 156 N.E. 701, 703 (Mass. 1927) (describing the "relation between [dealer] and his customers"); *Donander Co.* v. *Comm'r*, 29 B.T.A. 312, 314-15 (1933) (dealer is a "merchant who holds himself out to sell to customers"); *Harriman Nat'l Bank* v. *Comm'r*, 43 F.2d 950, 952 (2d Cir. 1930) (dealer "purchased securities to fill specific [customer] orders").

By transplanting "dealer" into the Exchange Act, Congress brought the settled meaning with it. *See Taggart* v. *Lorenzen*, 587 U.S. 554, 560 (2019) ("When a statutory term is 'obviously transplanted from another legal source,' it 'brings the old soil with it.'").

Five textual clues confirm Congress adhered to—rather than departed from—"dealer's" ordinary meaning. *NAPFM II*, 2024 WL 4858589, at *5. A "dealer," Congress said, is "engaged in the business of buying and selling securities … for such person's own account … as a part of a regular business." 15 U.S.C. § 78c(a)(5)(A)-(B).

First, "for such person's own account." This is the *exact* way brokers and dealers were distinguished in ordinary parlance. *NAPFM II*, 2024 WL 4858589, at *4. In 1934, there were two—and only two—methods of effectuating customer orders. A firm could trade *for* the customer, as an agent (or "broker"), or *with* the customer, on the opposite side of the transaction, as a principal (or "dealer"). Meyer 1933, at 32 (Add. 4a). In ordinary parlance, the distinction between "broker" and "dealer" was expressed in terms of whose "account" facilitated the customer's order. As the SEC acknowledged, a broker, acting as the customer's agent, would be said to trade "solely for the account of the customer." SEC Report on

Feasibility & Advisability of Complete Segregation of the Functions of Dealer and Broker, at XIV (1936) (SEC Report) (Add. 14a). By contrast, a "dealer," acting across from the customer, would be said to effectuate the customer's order by taking the opposite side in "his own account." *Id.* Instead of trading for the customer's account by helping the customer buy or sell securities from someone else (like a broker), a dealer would effectuate the customer's order—say, a buy order—by selling "to [the] customer" from the dealer's "own account." *Id.*

It is no coincidence Congress used those very terms in the Exchange Act to define the two ways of effectuating customer orders—the exact terminology used for a century by courts,[3] commentators,[4] broker-dealer

[3] *Weisbrod v. Lowitz*, 282 Ill. App. 252, 255 (1935) (differentiating "stock dealer who deals in stocks on his own account" in "transactions to customers" and "stock broker who acts as his customer's agent" "for [the customer's] account").

[4] Meyer 1933, at 32, 34 (Add. 4a, 6a) (dealer "sells to his customers … securities which he had purchased for his own account elsewhere," or "buys from his customer securities for his own account with a view to disposing them elsewhere," while "*brokers*, on the other hand," buy and sell "for [the customer's] account."); Hodges, *supra*, at 361 (Add. 2a) ("dealer sells to and buys from a client whereas a broker buys and sells for the account of the client.").

companies,[5] and the Commission itself.[6] *See Downer* v. *United States ex rel. U.S. Dep't of Agric. & Soil Conservation Serv.*, 97 F.3d 999, 1003 n.3 (8th Cir. 1996) ("Congress is presumed to know the legal background in which it is legislating").

Second, the definite article "the." Congress defined "dealer" as "*the* business of buying and selling securities"—not just "a" or "any" business that buys and sells securities. "The" particularizes. *See Wilson* v. *CTW Transp. Servs., Inc.*, 74 F.4th 924, 927 (8th Cir. 2023) ("*the* delay" is a "particular delay"). It is a "function word," which limits the following noun (business) to a single, "definite" application specified "by context." *Nielsen* v. *Preap*, 586 U.S. 392, 408 (2019); *see* 15 U.S.C. § 78c(a) (definitions should be read in "context"). As the Supreme Court

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[5] TD Wealth, *supra*, at 9-10 ("When we act as your 'broker,' we act as your agent and … buy or sell a security for your account. When we act as a 'dealer,' we act as a principal for our own account …. We may purchase a security ... for our own account and then sell it to you … [or] purchase the security from you ... and then sell on the open market.").

[6] *G.L. Ohrstrom & Co.*, 1938 WL 33306, at *7 (SEC Dec. 16, 1938) (differentiating acting "as agent for such customers" by trading "for [customers'] accounts" and acting "as principal for its own account in transactions with ... customers"); *How to Read Confirmation Statements* 2, SEC (2012), https://tinyurl.com/3t6n78ht ("capacity" is "whether your broker-dealer acts as your agent, on your behalf ... or whether your broker-dealer acts as a principal, for its own account, in the transaction")

recognized in *Skilling* v. *United States*, the definite article indicates the ensuing phrase—there, "*the* intangible right of honest services," here, "*the* business"—has "a specific," preexisting meaning. 561 U.S. 358, 327-28 (2010). In 1934, all understood "'[t]he business'" of dealing "was to effect 'an order … for a customer.'" *NAPFM II*, 2024 WL 4858589, at *5; *cf. Freytag* v. *Comm'r*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) ("definite article 'the' obviously narrows the class" to those "envisioned" by context).

Third, "broker or dealer." Words are known by the company they keep. And "broker" and "dealer" keep close company. Congress in the Exchange Act paired them as "broker or dealer" 262 times. *See* 15 U.S.C. §§ 78o-6, 78q-2, 78k, 78q, 78o, 78o-3, 78h, 78f, 78dd, 78g, 78c, 78l, 78o-5, 78j-l, 78o-10, 78m, 78u-1, 78q-1, 78cc, 78o-7, 78o-4, 78u, 78n. The terms are so related the SEC permits registration *only* "as a broker-dealer," not one or the other. 17 C.F.R. § 249.501(a).

The "'interplay between' broker and dealer" further confirms "that "dealers"—like "brokers"—effect securities transactions for customers. *NAPFM II*, 2024 WL 4858589, at *7 (quoting *Van Buren* v. *United States*, 593 U.S. 374, 389 (2021)). Below, the SEC conceded "broker" refers to

one method of effectuating customer orders, R. Doc. 57, at 25 & n.4: acting as "agent" for the "account of the customer," SEC Report at XIV (Add. 14a). "Dealer" should similarly be read to refer to the *other* method—trading opposite the customer by "sell[ing] securities to [the] customer" or "buy[ing] securities from [the] customer" with the broker-dealers' "own account." *Id.* This reading honors the statutory structure by "treat[ing]" both definitions "consistently," *NAPFM II*, 2024 WL 4858589, at *7 (quoting *Van Buren*, 593 U.S. at 390), and properly accords these paired terms a "common 'core of meaning,'" *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012). As the SEC itself has recognized, serving investor clients is "*equally* indicative" of "broker" and "dealer" activities. *Gordon Wesley Sodorff, Jr.*, 1992 WL 224082, at *5 n.27 (SEC Sept. 2, 1992).

Fourth, "as a part of." Congress clarified "dealers" "bu[y] or sel[l] securities" but only "*as a part of* a regular business." 15 U.S.C. § 78c(a)(5)(B) (emphasis added). "Part" means "portio[n]." *Webster's New International Dictionary* 1781 (2d ed. 1934). "Buying and selling" *alone* is not dealing. A dealer must "be buying and selling," "*and*" be "engaged in the securities business." *Discover Growth Fund, LLC* v. *Camber En-*

ergy, Inc., 602 F. Supp. 3d 982, 989 (S.D. Tex. 2022) (quoting *Sodorff*, 1992 WL 224082, at *4). That is, "the regular business of providing *dealer services* to others such as soliciting investor clients, handling investor clients' money and securities, and rendering investment advice to investors." *Crypto Freedom Alliance*, 2024 WL 4858590, at *4. "These factors"—the SEC itself has said—"distinguish the activities of a dealer from those of a private investor or trader." *Sodorff*, 1992 WL 224082, at *5 n.27.

"If it were possible for an entity whose only activities are buying and selling securities … to be a dealer," "part of" would be superfluous. *Camber Energy*, 602 F. Supp. 3d at 989; *cf. Syngenta Seeds, Inc.* v. *Bunge N. Am., Inc.*, 773 F.3d 58, 62 (8th Cir. 2014) (avoid surplusage); *Burton Secs.*, SEC No-Action Letter, 1977 WL 10680, at *1-2 (Dec. 5, 1977) ("if Burton were to purchase and sell," "it would not, in the absence of any other securities activities," such as "handl[ing] other people's money or securities," "be deemed a 'dealer'").

Fifth, "buying and selling." In 1934, the phrase "buying and selling" had a settled meaning: it referred to buying and selling the "same security simultaneously." *Camber Energy*, 602 F. Supp. 3d at 988;

see, e.g., *State* v. *Yearby*, 82 N.C. 561, 562 (1880) ("buying and selling *the same article and in the same condition*"). Congress chose these words for a reason: Their received meaning tracked how dealers effectuated customer orders at the time of the Exchange Act's enactment—they traded "twice" in quick succession; to facilitate a buy order, a dealer would purchase from another dealer, then promptly resell to the customer. Twentieth Century Fund, *The Security Markets* 266 (1935) (Add. 16a).

B. The Act's Structure Confirms The Customer-Order-Facilitation Interpretation

The unambiguous meaning of "dealer" as a firm that buys and sells securities to customers is confirmed by other provisions of the Exchange Act. The Exchange Act includes over 200 references to "dealer." Every one of those references is consistent with the understanding of a "dealer" as a firm that buys and sells securities to customers. More importantly, many of them are *only* consistent with a firm that buys and sells securities to customers—and flatly incompatible with the district court's reading of "dealer" as *any* business that engages in a high volume of buying and selling securities.

"Investors in securities markets do not interact directly with exchanges … but instead are customers of broker-dealers who effect trans-

actions on investors' behalf." SEC Complaint ¶ 40, *SEC* v. *Coinbase, Inc.*, No. 1:23-cv-04738 (S.D.N.Y. June 6, 2023). Accordingly, the "interlocking requirements" of the broker-dealer regulatory regime are premised on protecting investor customers—*i.e.*, ensuring that securities are sold only "by a salesman who understands and appreciates ... his responsibilities to the investor to whom he sells." *Roth* v. *SEC*, 22 F.3d 1108, 1109 (D.C. Cir. 1994) (cleaned up); *see* 49 Fed. Reg. 20,512, 20,512 & n.4 (SEC May 15, 1984) ("broker-dealers are subject to a comprehensive regulatory scheme designed to ensure that customers are treated fairly"). The Exchange Act, for example, requires brokers and dealers to send "notice[s] to [their] customers," 15 U.S.C. § 78o(e); meet "financial responsibility requirements" to keep "custody … of customers' securities," *id.* § 78o(c)(3)(A); and join a fund to insure "each of [their] customers[']" accounts, *id.* § 78fff-4(c). This makes sense only in the context of customer-order facilitation.

C. The History Reinforces The Customer-Order-Facilitation Interpretation

The Exchange Act's "history if anything only underscores" the conclusion that dealers are intermediaries for customers. *Loper Bright*, 603 U.S. at 393. "Thomas G. Corcoran, spokesman for the

drafters of the statute," *Berger* v. *Bishop Inv. Corp.*, 695 F.2d 302, 310 (8th Cir. 1982), confirmed that Congress *adhered* to dealer's "ordinary" meaning. R. Doc. 53-4, at 4 (*Stock Exchange Regulation: Hearing Before the H. Comm. on Interstate & Foreign Com.*, 73d Cong. 687 (1934)) ("like an ordinary dealer"). A "dealer," like a "broker," Corcoran explained, made "a profit by merchandising" securities. *Id.* "Merchandising" means selling to and buying from "customers." *Harriman Nat'l Bank*, 43 F.2d at 952.

Corcoran was confronted with the exact theory the SEC presses here—that the Act focuses on the "regularity" of transactions (R. Doc. 142, at 24), where an investor "buys stock, and the next day he comes in and buys some more; the next day he sells some, and back and forth," R. Doc. 53-4, at 7 (15 *Stock Exchange Practices: Hearings Before the S. Comm. on Banking & Currency*, 73d Cong. 6581 (1934)). Corcoran rejected this as "not" consistent with dealer's "normal interpretation." *Id.*

Prominent participants on both sides of the aisle agreed with Corcoran's assessment. *See* Doc. 53-4, at 8 (15 *Stock Exchange Practices*, *supra*, 73d Cong. 6727) (statement of F. Pecora) (the broad in-

terpretation is "very exaggerated"); *Stock Exchange Regulation*, *supra*, 73d Cong. 154 (statement of Rep. Mapes) ("not possibly" correct). "Even the [SEC]—an agency with every incentive to endorse [an expansive] view of the … [Act]—opined after its enactment," *Loper Bright*, 603 U.S. at 393, that a "dealer" is a "merchan[t]" who buys and sells "to his customer," SEC Report at XIV (Add. 14a); *cf. NAPFM II*, 2024 WL 4858589, at *5 (for nearly a century, "the SEC took the position that what distinguished a trader and a dealer was not volume or frequency but client-facing action").

D. Precedent Forecloses The Commission's Expansive Reading

What history shows, precedent confirms: A firm, like Carebourn, that "trades for 'its own best interests,' and 'not [to] provide advice or services to other investors,' 'cannot be considered a dealer.'" *NAPFM II*, 2024 WL 4858589, at *8 (quoting *Chapel Invs.*, 177 F. Supp. 3d at 991).

Modern courts have correctly—and repeatedly—understood this concept. *See Crypto Freedom Alliance*, 2024 WL 4858590, at *4 (dealers "buy and sell securities to customers as a regular service" (emphasis removed)); *NAPFM II*, 2024 WL 4858589, at *7 (collecting cases).

The Commission's outlier cases—*Keener* and *Almagarby* (more on them later, pp. 30-32, *infra*)—are beside the point.

This Court's decision in *SEC* v. *Ridenour*, 913 F.2d 515 (8th Cir. 1990), confirms "dealer's" correct reading. *Ridenour* did not hold—and could not possibly have held—that a person is a "dealer" because he engages in a "high" "level of activity." R. Doc. 177, at 21. Institutional investors engage in an *enormous* level of activity. To put this in perspective, the Court in *Ridenour* observed that Ridenour executed 100 securities transactions in "two year[s]." 913 F.2d at 516. Many large investors exceed 100 securities transactions in two *minutes*. This Court does not read its opinions in ways that "lead to absurd results." *Mahlberg* v. *Mentzer*, 968 F.2d 772, 775 (8th Cir. 1992).

To the contrary, as the SEC *itself* told this Court in *Ridenour*, an "active investo[r] who buys and sells with frequency but does not attempt to attract a clientele" is *not* a "dealer." Add. 24a (SEC Br. at 33 n.37, No. 89-2534). As this Court found, therefore, a person is a dealer, not because of the "sheer volume" of his trading (R. Doc. 142, at 37; R. Doc. 177, at 21), but rather because he obtains "a regular

clientele," "purchas[ing] bonds from one client," selling "to another client." 913 F.2d at 516-17. In the SEC's words, a "dealer" "regularly engage[s] in transactions directly with the customers." Add. 24a (SEC Br. at 33 n.37, *Ridenour*); *see* 70 Fed. Reg. 20,424, 20,433 n.98 (SEC Apr. 19, 2005) (Ridenour "established a relationship of trust" with his "customers").

E. A Century Of Regulatory Activity Is Powerful Evidence Against The Commission's Novel Interpretation

Finally, the real-world proof that the Commission's newfound interpretation of "dealer" is wrong is that between 1934 and today, no one—not any investment company, not any private fund, and not the Commission itself—thought the definition swept so broadly as the Commission claims today. *See West Virginia* v. *EPA*, 597 U.S. 697, 725 (2022) ("'want of assertion of [regulatory] power by those who presumably would be alert to exercise it'" is "'significant in determining whether such power was actually conferred'").

As noted, in 2004, for example, the SEC searched for a "hook on which to" force hedge funds to register with the SEC. *Goldstein*, 451 F.3d at 882. The stated concern was that hedge funds, although not registered, had (among other things) come to "dominate the market for con-

vertible bonds" through convertible arbitrage. 69 Fed. Reg. 72,054, 72,056 & n.26 (SEC Dec. 10, 2004). Convertible arbitrage involves doing what the SEC alleges here: acquiring a convertible security that "may be converted to shares … at a discount to the market value," "convert[ing]" the security "to shares," and immediately "sell[ing]" the shares for "gain." M. Hudson, *Funds* 38 (2014). It did not occur to the SEC that hedge funds might be "dealers." That idea was so foreign the SEC—in a decision struck down by the D.C. Circuit as "manipulat[ing] [the] meaning" of words—declared hedge funds to be "investment advisers" instead. *Goldstein*, 451 F.3d at 882. Of course, if regularly buying and selling securities were enough to subject hedge funds to registration as "dealers," the SEC could have said so when it was straining to find *any* way to force hedge funds to register. Yet the SEC said nothing.

III. The Commission's Usual Attempts To Support Its Implausible Conception Of Dealing Are Unavailing

With no evidence Congress intended to depart from "dealer's" traditional sense, the Commission in other cases has offered additional arguments to support its overbroad, ultimately implausible conception of "dealing." None withstands scrutiny.

A. Literalism. The SEC fixates on "the literal meaning" of twelve words—"the business of buying and selling securities … for such person's own account." R. Doc. 142, at 30. But "the textualist's touchstone" is "fair meaning," not "literalism." *Reading Law* 356; *see Niz-Chavez*, 593 U.S. at 168-69. There's only one *fair* interpretation here: A "'dealer in securities' ... is limited to one who, as a merchant, buys and sells securities to customers." *Schafer*, 299 U.S. at 174.[7] That the word "customer" does not appear in the Act's definition here is as irrelevant as "pain or injury" not appearing in the definition of "violent felony" in *Johnson*, 559 U.S. at 140, or "permanent, standing or continuously flowing" not appearing in the definition of "navigable waters" in *Sackett*, 598 U.S. at 671-72. The ordinary meaning of the defined term—"dealer" *itself*—describes a means of effectuating customer orders. *See* pp. 9-10, *supra*. "Customer" does not appear in the definition of "broker," either, yet no one disputes brokers execute customer orders. *See* 15 U.S.C. § 78c(a)(4); pp. 14-15, *supra*.

[7] In *Schafer*, the Court applied the Revenue Commissioner's definition. He was *required* to define dealer consistent with ordinary meaning. *Old Colony R. Co.* v. *Comm'r*, 284 U.S. 552, 560 (1932). Courts approved this definition because dealer *itself* meant a "merchant" "sell[ing] to customers." *Donander*, 29 B.T.A. at 315.

The "far-reaching consequences" of the SEC's literal "reading," moreover, "underscores the implausibility of [its] interpretation." *Van Buren*, 593 U.S. at 393-94; *see* pp. 6-8, *supra*. Congress did not effect a "major alteration in established legal relationships based on nothing more than an overly literal reading of" a few words in the dealer definition, "without any regard for [their] context or history." *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 616 (1978); *cf. Donander*, 29 B.T.A. at 315 ("[i]f Congress had intended the word 'dealer'" to extend beyond "a merchant who holds himself out to sell to customers," "we think that it would have used language which would more aptly convey that thought").

B. Fictitious Factors. When confronted with the absurd breadth of its literal interpretation, the SEC offers atextual factors to "cabin i[t]," *Van Buren*, 593 U.S. at 383—for example, the stock is "newly issued" or "discount[ed]." R. Doc. 127, at 1. But this has no basis whatsoever in the statutory text. And the acquisition and resale of discounted stock by non-dealers is *extremely* common anyway. *See Comm'r Uyeda GHS Invs., LLC Dissent* (Aug. 19, 2024) (Add. 39a), https://tinyurl.com/4mm7uf9t.

Not even the SEC believes these factors offer true limits on its "dealer" interpretation. When confronted with the fact that these factors have no basis in the text, the SEC typically retreats to its original position that all it needs to show is that the defendant is a for-profit business that bought and sold securities on more than a few occasions. *See* R. Doc. 57, at 24-25. Moreover, elsewhere, the SEC insists that a person "does not have to exhibit all or any given number of these [supposed] dealer characteristics in order to be considered a dealer." SEC Br. 10, *Almagarby*, No. 17-cv-62255 (Nov. 4, 2019), 2019 WL 6520680. That the SEC resorts to an *ad hoc* effort to label factors "significant" in some cases and not "dispositive" in other cases is a "damning indictment" of its theory. *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 258-59 (2010).

C. "Underwriter." The SEC also argues that firms like Carebourn are dealers because they are supposedly engaged in "underwriting." R. Doc. 151, at 2. This is doubly wrong. First, many underwriters are "not … Dealers." *Chapel Invs.*, 177 F. Supp. 3d at 990; *see Ackerberg* v. *Johnson*, 892 F.2d 1328, 1335 (8th Cir. 1989) (potential underwriter "[c]learly" not "dealer"). Second, all parties *agree* Carebourn complied with SEC Rule 144 (R. Doc. 1 ¶¶ 16, 32-33), which states in the clearest

possible terms that if a party complies with certain requirements in the rule, including holding the note for at least six months before selling converted shares, it is "not an underwriter," 17 C.F.R. § 230.144 prelim. note. It is entirely improper for the government to tell Carebourn that it is "not an underwriter," *id.*, but then turn around and say that it *is* an "underwrit[er]" and therefore a "dealer." R. Doc. 151, at 2. As the SEC's Acting Chairman put it—criticizing this precise bait-and-switch—if the Commission believes that Carebourn's activity is "underwriting," it should amend the definition of underwriting in Rule 144, as it has proposed to do. *Comm'r Uyeda GHS Invs., LLC Dissent* (Add. 38a). It should "not be implementing that policy objectiv[e]," *sub silentio*, "through enforcement of novel theories under the 'dealer' definition." *Id.*

D. Meyer's 1934 Treatise. "[C]herry-pick[ing]" sentences from a post-enactment treatise by Charles Meyer, the SEC also usually asserts a "dealer" traditionally includes a trader with "no customers." *Comm'r Uyeda Rule Dissent* (Add. 29a). But when Meyer posed the question whether "a trader who has no customers but merely trades for his own account through a broker is a 'dealer' under the Act," he was *not* attempting to describe the established understanding of what "dealer" meant.

C.H. Meyer, *The Securities Exchange Act of 1934 Analyzed and Explained* 34 (1934) (Meyer 1934) (Add. 20a). He expressly acknowledged this possible interpretation was *contrary* to "common usage." C.H. Meyer, *Legal Pitfalls of the Stockbrokerage Business and How They May Be Avoided* 7 (1936) (Add. 22a). Rather, Meyer simply offered an initial opinion of how the new Act *might* be interpreted. *NAPFM II*, 2024 WL 4858589, at *6. The SEC promptly rejected this interpretation, because—as the SEC put it in 1936—a dealer buys and sells securities "to his customer." SEC Report at XIV (Add. 14a). The "leading study of the time" (as christened by the SEC, *see* 70 Fed. Reg. at 20,428 & n.41) agreed, because (again) a "Dealer" handles "order[s] ... for a customer." Twentieth Century Fund, *supra*, at 266 (Add. 16a).

Meyer posited a test of his interpretation: "[I]f" it "is correct" to read dealer this broadly, Meyer predicted, then all "professional traders" "will be classed as a 'dealer.'" Meyer 1934, at 34. But all professional traders have *never* been classified as dealers. Investment companies, for example, are (by definition) professional traders. *See* 15 U.S.C. § 80a-3(a)(1)(A). Yet the "contemporaneous" understanding of those "called upon to carry" the Exchange Act "into effect," *United States* v. *Pugh*, 99

U.S. 265, 269 (1878), including the SEC, was that investment companies were *not* dealers. *See* 2 H.R. Doc. No. 76-279, at 1523 n.434 (1939) (acknowledging investment companies were not subject to rules applicable to "'brokers and dealers' only"). By Meyer's own lights, the SEC's current interpretation is wrong.

E. "Exchange Act Provisions." The SEC also typically points to several "Exchange Act provisions" that purportedly apply to a dealer "who does *not* carry customer accounts" "or hold funds or securities for customers." This is a double sleight of hand. The quoted provisions are not "Exchange Act provisions"; they are SEC regulations. And they are a red herring. *Carrying* or *holding* customer "funds and securities" and *effectuating* "customer orders" are separate activities. *See* Exchange Act Release No. 37,882, 61 Fed. Reg. 56,990, 56,990 (Nov. 5, 1996) (explaining difference between "prime" and "executing" brokers). Although a dealer need not "carr[y]" customer accounts or "hold" customer securities, dealers *must* "execut[e] [their] customer's order[s]," 17 C.F.R. § 240.15c3-1(a)(2)(vi)(A), and "effectuat[e] … transactions" with "customers," *id.* § 240.15c3-3(k)(2)(i), including indirectly, as stock-exchange specialists and market makers, *see id.* §§ 240.15c3-1(a)(6)(ii), 240.15b9-1(a), by ef-

fectuating other exchange members' customer orders, *see, e.g.*, *Equitec Proprietary Mkts.*, 2009 WL 536632, at *2 ¶ 6 (SEC Mar. 4, 2009).

F. Almagarby & Keener. In the end, the Commission typically relies almost entirely on two decisions from the Eleventh Circuit, both issued last year, ninety years after the Exchange Act's adoption. *See SEC* v. *Almagarby*, 92 F.4th 1306 (11th Cir. 2024); *SEC* v. *Keener*, 102 F.4th 1328 (11th Cir. 2024). Neither carries the weight the Commission places on them. *Almagarby*, for its part, expressly acknowledged private funds are "*not* traditionally understood as dealers." 92 F.4th at 1318 (emphasis added). And to avoid adopting too "expansive [a] definition [that] might sweep in all manner of market participants," *Almagarby* explicitly limited its "holding" to Almagarby's "specific conduct," *id.*, which the court characterized as "underwriting," *id.* at 1316 ("[this] is called 'underwriting'"). *Keener* simply applied *Almagarby*. *See* 102 F.4th at 1334 ("Keener's business model was materially similar to Almagarby's"). Again, however, Carebourn is *not* an underwriter, and many underwriters are not dealers, anyway. *See* pp. 26-27, *supra*.

The Commission hangs its hat on three sentences from *Almagarby* and *Keener*: a "customer requirement has no grounding in the statutory

text”; the “‘dealer’ definition has been understood to cover a trader ‘who has no customers but merely trades for his own account’”; and “several Exchange provisions apply to a dealer ‘who does *not* carry customer accounts’ ‘or hold funds or securities for customers.’” *Keener*, 102 F.4th at 1334-35 (quoting *Almagarby*, 92 F.4th at 1318). But this is dicta; “*Almagarby* and *Keener* are not dispositive on this issue.” *NAPFM II*, 2024 WL 4858589, at *8. As the Commission conceded in *Keener* and *Almagarby*, whether the “dealer definition extend[ed] only to those who ‘effectuate customer orders’” was “beyond the scope” of the appeals. SEC Br. 35, *Almagarby* (No. 21-13755); *see* SEC Br. 33, *Keener* (No. 22-14237) (“Keener forfeited the argument” “dealers” “effecuat[e] customer orders” “because it was not raised below”).

This Court should not be persuaded by the Eleventh Circuit’s cursory, three-sentence analysis anyway. As discussed, a “‘customer requirement’” has *clear* “‘grounding in the statutory text,’” *contra Keener*, 102 F.4th at 1334; among other things, that is what “dealer” and “the business of” dealing meant, *see* pp. 9-10, *supra*. Moreover, *no one* at the time “understood [dealer] to cover a trader who has no customers,” *contra Keener*, 102 F.4th at 1335 (quotation marks and emphasis omitted); the

source quoted in *Keener* says that "*if*" that were the interpretation, all "professional traders" would be "dealers." *See* pp. 28-29, *supra*. But, again, no one has ever understood that to be the case. *See* pp. 7-8, 28-29, *supra*; *cf. NAPFM II*, 2024 WL 4858589, at *8 ("neither *Almagarby* nor *Keener* held that merely regularly buying and selling securities renders someone a dealer"). And while, of course, dealer regulations apply to dealers who do not "carry" or "hold" customer funds, *Keener*, 102 F.4th at 1334, *all* those regulations apply to dealers that "execute [a] customer's order," *see* pp. 29-30, *supra*. At every step, the Commission is demonstrably wrong.

CONCLUSION

The decision below should be reversed.

Dated: February 5, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2025, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF system, and service will be accomplished on all registered counsel by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because, excluding the parts exempted under Federal Rule of Appellate Procedure 32(f), it contains 6,497 words.

I certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 29(a)(4), 32(a)(5), and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in 14-point New Century Schoolbook LT.

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Daily Balance. A bookkeeping balance taken off daily by the control clerks which shows that all entries for that day are in balance. The term is also used for a certain kind of customers statement on which the interest is figured on the daily balance in each account, instead of figuring on each individual item during the month.

Date of Trade. The day on which an order is executed or a trade consummated. This is distinguished from clearance date, (to which refer).

Day Clearing Branch. That part of the Clearing House which handles all deliveries and payments in the Central Clearing Department, in addition to making proper cash adjustment for securities delivered between brokers against receipt, such as result from three-way transactions. This has proved a great convenience to clearing members who settle all transactions through the Clearing House with one settlement check.

Day Order. An order which is automatically cancelled if not executed on the day it is given.

Dealer. One who deals in securities as a principal rather than as a broker. A dealer sells to and buys from a client whereas a broker buys and sells for the account of a client. The dealer buys and sells at a net price, the broker charges a stipulated commission.

Classed as dealers are the odd-lot brokers on the floor of the Exchange, who trade only with fellow members, houses of issue which sell their own underwritings to the investing public and the great number dealing in unlisted securities.

Debit Balance. The sum representing a client's debit, or the amount owed, against long securities. Of course there may be a debit balance against no securities. In this case it is called an unsecured account.

Definitive Certificates. Actual and permanent certificates of bonds or stock given in exchange for temporary receipts. These temporary receipts are usually issued at the time of a new offering before the engraved certificates are available.

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THE LAW
of
STOCKBROKERS
and
STOCK EXCHANGES
and of
COMMODITY BROKERS AND COMMODITY EXCHANGES

BY
CHARLES H. MEYER
of the
New York Bar

1933 CUMULATIVE SUPPLEMENT
Embracing Decisions Published up to October 1, 1933.

New York
BAKER, VOORHIS & CO.
1933

As between pledgor and pledgee of stock, the right to subscribe to new stock belongs to the pledgor. *Murdock v. Murdock*, 304 Pa. 565, 156 Atl. 303.

The pledgee's lien on stock extends to dividends on the stock pledged. *Commercial National Bank v. National Surety Co.*, 259 N. Y. 181, 181 N. E. 92.

Addendum to § 42.

Title to stock passes to customer on purchase by broker.

Title passes directly to the customer on a purchase by the broker for the customer's account, even though the broker has not delivered the certificate to the customer. *Hobart v. Vanden Bosch*, 256 Mich. 686, 240 N. W. 1; *Englehart v. Cassatt*, 305 Pa. 117, 157 Atl. 256.

(§ 43-a) Stock Dealer as Distinguished from Stock Broker.

We have seen that the relationship existing between a broker and his customer is that of agent and principal, and not of vendor and vendee; that the broker does not himself sell to or buy from the customer, but acts as the customer's representative in making a purchase from or a sale to a third party.[1]

However, there is nothing in the law which prevents a person from engaging in the business of buying and selling securities for his own account as principal. Such a person is a security *dealer* as distinguished from a *broker*. His rights and duties have been before the courts for adjudication repeatedly.[2] He sells to his customers, at a price which

1. § 39.

2. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *Community Nat. Corp. v. Kahle*, 233 App. Div. 334, 252 N. Y. Supp. 804; *Heimerdinger v. Schnitzler*, 231 App. Div. 649, 248 N. Y. Supp. 597; *Aupperle v. Doherty*, 137 Misc. 444, 242 N. Y. Supp. 185; *In re Banker's Capital Corporation*, 51 F.(2d) 737; *In re B. Solomon & Co.*, 268 Fed. 108, at p. 113; *Schofield v. Jackson*, 99 Conn. 515, 122 Atl. 98; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701; *Trowbridge v. O'Neill*, 243 Mich. 84, 219 N. W. 681; *Stein v. Broder*, 8 N. J. Misc. 357, 150 Atl. 194, aff'd on opinion below 107 N. J. L. 536, 154 Atl. 768; *Hornblower v. James*, 155 Atl. 568 (R. I.).

In *Coolidge v. Old Colony Trust Co.*, *supra*, the court in discussing the manner in which business was conducted by the stock dealer involved in that case said (p. 520): "If one of his customers wanted one of the real estate stocks in which Burroughs (the dealer) specialized he quoted a price, intended to be sufficiently above the price at which he could buy to insure himself a satisfactory profit. When his customer accepted the price quoted, Burroughs then went into the market

usually affords him a profit, securities which he has purchased for his own account elsewhere, or buys from his customers securities for his own account with a view of disposing of them elsewhere at a profit. Among those who ordinarily act as stock *dealers* rather than as stock *brokers* are "over the counter" houses, which deal in securities not listed on exchanges,[3] and investment bankers who float or sell new issues.[4] However, a stock *broker* may also become a stock *dealer* towards his customer in any one transaction, even though he has acted as broker in other transactions.[5]

Frequently circumstances are such as to render it difficult to determine whether the relationship between the parties is that of stock *broker* and customer or stock *dealer* and customer. In such a case the question ordinarily becomes one of fact.[6] If at the time the order is given the language used

and bought the stock as cheap as he could and kept the difference. If he could not get the stock at a price that gave him a profit, he would go back to the buyer and get him to raise his bid. When a customer wanted to sell, the method was reversed. The practice was to get as wide a spread as possible between the bid and asked prices and to conceal from each customer the price paid or received by the other. In only rare cases was stock bought or sold on a commission basis. The relation between Burroughs and his customers was that between buyer and seller or debtor and creditor.''

3. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *Heimerdinger v. Schnitzler*, 231 App. Div. 649, 248 N. Y. Supp. 597; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701; *Russell v. Bond & Goodwin, Inc.*, 276 Mass. 458, 177 N. E. 627; *F. C. Adams, Inc. v. Elmer F. Thayer Estate*, 85 N. H. 177, 155 Atl. 687, aff'd 85 N. H. 177, 156 Atl. 697.

4. *Aupperle v. Doherty*, 137 Misc. 444, 242 N. Y. Supp. 185; *Schofield v. Jackson*, 99 Conn. 515, 122 Atl. 98; *Trowbridge v. O'Neill*, 243 Mich. 84, 219 N. W. 681.

5. *In re B. Solomon & Co.*, 268 Fed. 108, at p. 113; *Leahy v. Lobdell, Farwell & Co.*, 80 Fed. 665; *Cohen v. Paine, Webber & Co.*, 113 Conn. 295, 155 Atl. 71; *McNulty v. Whitney*, 273 Mass. 494, 174 N. E. 121; *Trowbridge v. O'Neill*, 243 Mich. 84, 219 N. W. 681.

Where the course of dealings between the parties has established a relationship of customer and *broker*, the customer is justified in assuming that that relationship will continue, and will not become one of buyer and seller, unless he is notified by the broker of the latter's intention to change the relationship. *McNulty v. Whitney, supra.*

6. *Howell, MacArthur & Wiggin, Inc. v. Weinberg*, 260 N. Y. 250, 183 N. E. 379; *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *Community Nat. Corp. v. Kahle*, 233 App. Div. 334, 252 N. Y. Supp. 804; *Schofield v.*

by the parties makes clear the relationship which they intended to assume, their agreement as expressed in that language will of course control.[7] If, however, an express agreement cannot be definitely established, other circumstances may be considered in ascertaining what the parties intended. The following practices of stock *dealers* usually serve to distinguish them from stock *brokers*:

(1) Transactions are usually confirmed by stock *dealers* to customers in language somewhat as follows: "We are pleased to confirm sale to you," or "We are pleased to confirm purchase from you." Stock *brokers*, on the other hand, usually couch their confirmations in language somewhat as follows: "We have this day bought for your account and risk," or "We have this day sold for your account and risk."

(2) A stock *dealer* ordinarily charges no commission, whereas a stock *broker* usually does make such a charge.

(3) A stock *dealer* usually sells to his customer at a price different from that at which he has purchased the securities elsewhere, or buys from his customer at a price different from that at which he resells elsewhere. A *broker*, on the other hand, must confirm the purchase or sale to his customer at the exact price at which he himself buys or sells. He is not permitted by law to make a secret profit;[8] nor is he permitted to supply his own stock in fulfillment of a purchase made for a customer, or take for his own account stock which he has sold for a customer.[9]

The presence of these three circumstances in any particular transaction is strong evidence that the relationship between the parties was that of stock *dealer* and customer rather than that of stock *broker* and customer.[10] However,

Jackson, 99 Conn. 515, 122 Atl. 98; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701; *McNulty v. Whitney*, 273 Mass. 494, 174 N. E. 121; *Trowbridge v. O'Neill*, 243 Mich. 84, 219 N. W. 681; *F. C. Adams, Inc. v. Elmer F. Thayer Estate*, 85 N. H. 177, 155 Atl. 687, aff'd 85 N. H. 177, 156 Atl. 697; *Stein v. Broder*, 8 N. J. Misc. 357, 150 Atl. 194, aff'd on opinion below 107 N. J. L. 536, 154 Atl. 768.

An interesting analysis of *Howell, Mac Arthur & Wiggin, Inc. v. Weinberg, supra*, will be found in an article by Geo. E. Bates and Wm. O. Douglas, 43 *Yale Law Journal* (November, 1933) at p. 46, citing *Meyer on Stockbrokers and Stock Exchanges* for various propositions therein referred to.

7. *Farr v. Fratus*, 277 Mass. 346, 178 N. E. 657.

8. § 55.

9. § 51.

10. *Schofield v. Jackson*, 99 Conn. 515, 122 Atl. 98; *Farr v. Fratus*, 277 Mass. 346, 178 N. E. 657; *Trowbridge*

it is not conclusive, as the inference which ordinarily would be drawn may be rebutted or explained.[11] In the last analysis, the question to be determined is the relationship which the parties intended to assume, and the intention of the parties, if not disclosed by an express agreement, must be gathered from all of the facts and circumstances of the particular case.[12]

The legal rights and duties of a stock dealer are, in the main, no different from those of a dealer or jobber in merchandise.[13] No fiduciary or trust relationship arises out of the sale to or purchase from his customer.[14] The contract which he makes with his customer is regarded as a contract for the sale of "unascertained goods," entitling the seller to deliver any shares of the kind sold.[15] Title does not pass

v. O'Neill, 243 Mich. 84, 219 N. W. 681; *F. C. Adams, Inc. v. Elmer F. Thayer Estate*, 85 N. H. 177, 155 Atl. 687, aff'd 85 N. H. 177, 156 Atl. 697.

In *Kinney v. Lisman*, 147 Misc. 431, at pp. 436, 437, 263 N. Y. Supp. 828, the fact that a commission was charged established to the court's satisfaction that the brokers were acting as agents for the customer.

11. *McNulty v. Whitney*, 273 Mass. 494, 174 N. E. 121; *Williams v. Bolling*, 138 Va. 244, 121 S. E. 270.

The fact that the confirmation read "We have this day bought for your account and risk" does not establish the relationship as that of broker and customer, where the broker charged no commission but instead made a profit on the transaction. *Trowbridge v. O'Neill*, 243 Mich. 84, 219 N. W. 681.

A broker whose report of a sale reads "Bought of (name of the customer)" may show that the report is erroneous, and that the securities were in fact sold by him as the customer's agent to a third party. *Porter v. Wormser*, 94 N. Y. 431, at pp. 447, 448.

12. *Howell, MacArthur & Wiggin, Inc. v. Weinberg*, 260 N. Y. 250, 183 N. E. 379; *McNulty v. Whitney*, 273 Mass. 494, 174 N. E. 121; *Trowbridge v. O'Neill*, 243 Mich. 84, 219 N. W. 681.

The omission of a broker to report to a customer the name of the party with whom the broker contracts on the customer's behalf does not change the relationship between the broker and the customer to one of seller and buyer. *American Cotton Mills v. Monier*, 61 F.(2d) 852.

For an extended discussion of this subject see "*Secondary Distribution of Securities*," by Geo. S. Bates and Wm. O. Douglas, 41 *Yale Law Journal* (May, 1932) 949, at pp. 980–994.

13. *In re Banker's Capital Corporation*, 51 F.(2d) 737.

14. *In re Banker's Capital Corporation*, 51 F.(2d) 737; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701.

As to fiduciary duty of stock dealer under the Federal Securities Act of 1933 not to make false or misleading statements to customers, see § 194-a, this supplement.

15. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701.

to the purchaser until there has been an appropriation by the seller of specific stock to the contract,[16] and mere notice of purchase or sale given by the dealer does not constitute a sufficient appropriation to effect transfer of title even if the customer has made payment.[17] If a dealer who has received payment in full fails to deliver or to allocate securities to the customer, the customer's remedy is merely one for breach of contract.[18] He has no cause of action in conversion, as he would have against a broker.[19] A stock dealer is not required to make delivery to his customer until he has

16. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *Agar v. Orda*, 144 Misc. 149, 258 N. Y. Supp. 274; *In re Broomhall, Killough & Co., Inc.*, 61 F.(2d) 760; *In re Banker's Capital Corporation*, 51 F.(2d) 737; *Sackville v. Wimer*, 76 Colo. 519, 233 Pac. 152; *Goodhue v. State Street Trust Co.*, 267 Mass. 28, 165 N. E. 701; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701.

In *Wills v. Investors Bankstocks Corp., supra*, it was held that (1) title to stock does not pass to the purchaser until there has been an appropriation by the seller of specific stock to the contract; (2) placing the stock in transfer at the buyer's request would constitute a sufficient appropriation to effect the transfer of title; (3) mere notice of purchase given by the seller, coupled with payment by the purchaser, does not constitute a sufficient appropriation to effect the transfer of title; (4) mere purchase of stock from a third party with intent to apply it to the contract is not sufficient appropriation to pass title.

See also, *Gill Printing Co. v. Goodman*, 224 Ala. 97, 139 So. 250.

Under the Massachusetts doctrine that title to stock bought by a broker for a customer remains in the broker until paid for, payment is not sufficient in and of itself to effect the transfer of title, but there must be an act of transfer on the broker's part. *Hammon v. Paine*, 56 F.(2d) 19, at p. 21.

17. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *In re Broomhall, Killough & Co., Inc.*, 61 F.(2d) 760; *In re Banker's Capital Corporation*, 51 F. (2d) 737; *Goodhue v. State Street Trust Co.*, 267 Mass. 28, 165 N. E. 701; *Coolidge v. Old Colony Trust Co.*, 259 Mass. 515, 156 N. E. 701.

Confirmation of sale, and payment of dividends by the dealer out of his own funds, do not constitute an appropriation sufficient to pass title. *In re Broomhall, Killough & Co., Inc., supra.* Putting the stock in transfer in the name of the purchaser or his nominee is the only act which could constitute an appropriation. *Ibid.*

18. *In re Broomhall, Killough & Co., Inc.*, 61 F.(2d) 760; *In re Banker's Capital Corporation*, 51 F.(2d) 737.

19. *Wills v. Investors Bankstocks Corp.*, 257 N. Y. 451, 178 N. E. 755, motion for rearg. den. 258 N. Y. 578, 180 N. E. 340; *Sackville v. Wimer*, 76 Colo. 519, 233 Pac. 152.

But see *Smith v. Baum, Bernheimer Co.*, 50 S. W.(2d) 1058 (Mo. App.), *contra*, under the construction of the particular pleading involved.

received payment,[20] nor can he be compelled to make part delivery against part payment.[21]

In case of a sale of stock on the installment plan, the seller assumes the status of dealer supplying his own stock.[22] He is not acting as a broker who makes a purchase for a customer on margin,[23] and title ordinarily does not pass until the stock has been fully paid for.[24] However, if circumstances are such as to vest title in the customer at once, notwithstanding the fact that full payment has not been made, the subsequent relation of the parties, as long as the dealer retains possession of the stock, will be that of pledgor and pledgee, as in the case of customer and broker.[25]

20. *Russell v. Bond & Goodwin, Inc.*, 276 Mass. 458, 177 N. E. 627; *Smith v. Baum, Bernheimer Co.*, 50 S. W.(2d) 1058 (Mo. App.).

It was also held in *Russell v. Bond & Goodwin, Inc., supra*, that a stock dealer may regard the person with whom he contracts as the principal in the transaction, even though that person is acting as agent for another, where he is ignorant of the agency.

21. *Russell v. Bond & Goodwin, Inc.*, 276 Mass. 458, 177 N. E. 627.

22. *Aupperle v. Doherty*, 137 Misc. 444, 242 N. Y. Supp. 185; *Leahy v. Lobdell, Farwell & Co.*, 80 Fed. 665; *Sackville v. Wimer*, 76 Colo. 519, 233 Pac. 152. See also *Maw v. Fay*, 248 Mass. 426, 143 N. E. 315.

23. *Leahy v. Lobdell, Farwell & Co.*, 80 Fed. 665; *Sackville v. Wimer*, 76 Colo. 519, 233 Pac. 152.

24. *Leahy v. Lobdell, Farwell & Co.*, 80 Fed. 665; *Sackville v. Wimer*, 76 Colo. 519, 233 Pac. 152. See also *Maw v. Fay*, 248 Mass. 426, 143 N. E. 315.

25. *Schofield v. Jackson*, 99 Conn. 515, 122 Atl. 98.

(§ 44) Employment of Broker by Customer.

Footnote No.

1. *Smithers v. Light*, 305 Pa. 141, 157 Atl. 489; *E. A. Pierce & Co. v. Aronoff*, 60 S. W.(2d) 796 (Tex. Civ. App.).

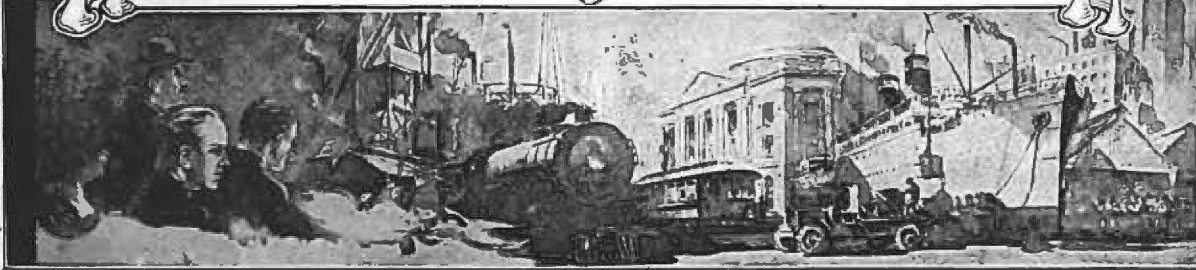
Where the broker asserted that the customer gave an order on his own behalf, and the customer contended that it was given on behalf of a third party, the question was held to be one of fact for the jury. *E. A. Pierce & Co. v. Aronoff, supra.*

A broker's employment by a customer need not be in writing. *Stewart Bros. v. Beeson*, 177 La. —, 148 So. 703.

6. The question of whether the contract between the customer and the broker for the execution of an order is bilateral or unilateral, and the nature of the contract which the law implies, was discussed in "*Secondary Distribution of Securities*" by Geo. E. Bates and Wm. O. Douglas, in 41 *Yale Law Journal* (May, 1932) 949, at pp. 964, 965:

"It would seem that the placing of an order to buy or sell by the customer and an indication to the customer by the broker of his willingness to undertake to execute the order give rise to a bilateral contract. The mutual promises are all implied in fact being based

The MAGAZINE of WALL STREET



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INVESTMENT & BUSINESS TREND

Significance of Increases in Rediscount Rate—Business Activity on Up-Grade—Foreign Financing Heavier—Will There Be Strikes? —Future of Building and Land Values—The Market Prospect

THE inflation of credits for stock market speculation may be taken as the direct cause of the recent increase in the rediscount rates of the Boston, Cleveland and Philadelphia Federal Reserve banks. Member bank borrowings in the interior have been increasing at a lively pace in the past few months. The amount of available credit in the interior, however, would have been ample for local needs without recourse to rediscounting were it not for the fact that so much of it had already been drawn off to New York for the purpose of facilitating stock market speculation. Evidently, in most parts of the country there is not sufficient capital to finance the growing needs of business and the current huge stock market activity at the same time. At least, it cannot be done without the member banks making invasions on the credit facilities of the Federal Reserve system.

From a purely banking viewpoint, therefore, the action of the Boston, Cleveland and Philadelphia banks was inevitable. In fact, competent banking opinion is to the effect that it should have been done several months ago before the inflation of credit commenced. However this may be, there are today only two banks in the entire system of twelve, New York and San Francisco, which are still maintaining their rediscount rates at the comparatively low level, 3½%.

It is commonly believed that the New York rate will not be increased unless the Bank of England takes this step first. But at the rate gold is being exported from London, it is only a question now of a short time before the English banking authorities take the anticipated step. This would then be followed by the New York bank.

It is of practical importance, however, to note that the open market rate on money has for some time been considerably above the New York rediscount rate of 3½%. Time money is slightly above 5%, call money has been hovering between 4½ and 5½% and commercial paper is almost 5%. Consequently, an advance in the New York rate to 4% would be without effect at least for the time being on the open rates for money, which are already in excess of the bank rate.

There is, however, a phase of the new Federal Reserve attitude toward extension of credits which deserves attention. It may be accepted that in raising their rediscount rates, the Federal Reserve authorities are not unmindful of the psychological effect on the speculative public. Bankers for some time have been growing apprehensive lest further continued advances in securities lead to wholesale credit inflation with attending possibilities which might lead to a severe and prolonged break not only in stock values but in prices generally. That the Reserve officials intend to watch the speculative situation closely and make credit less available for such purpose seems the chief practical significance of the increase in their rediscount rate. In fact, they cannot do otherwise unless the Federal Reserve intends to create a situation which would speedily affect the business boom.

POSITION OF LAND VALUES

IN New York recently, one of the largest savings bank institutions has refused to lend further funds on

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The Dealer House

What It Is, and Why It Is

By JAMES W. MAXWELL

IN a series of articles which might well have been published under the title "Behind the Scenes in Wall Street," Mr. Maxwell has written entertainingly and instructively on topics of direct interest to investors. The accompanying article has been preceded by "The Professional Manipulator," "The Swindling Circular" and "Standards."

THERE are many organizations in The Street known as "Dealer Houses," or just plain "dealers." There are also many brokerage offices which have Trading Departments.

The function of both the Dealer House and the Trading Department is about the same—viz., to purchase, for the house, securities (generally unlisted) in which the organization believes; then, to sell these securities to individual clients.

Commissions are not generally charged on business of this character. The Dealer, having made a commitment, offers it for sale at a stipulated price; and the price, if the commitment was wisely made, will be at a level sufficiently high to pay the Dealer for his pains.

This Dealer business is, perhaps, one of the most interesting branches of the financial field. At its best, it calls for a very rare combination of judgment, capital and selling ability.

Dealer business is also, perhaps, one of the most satisfying of all investment fields; for the Dealer is, in the last analysis, a constructive force. His immediate, current profits arise from establishing, or helping to establish, a higher price for a given security than that prevailing at the time of his purchase; his cumulative, year-in and year-out profits depend, largely, upon the merit of the issues for which the higher price is made. Manifestly, if the dealer sells to his clients only for the sake of making an immediate profit himself, those clients will gradually draw away from him. The better the judgment exercised by him in making his own commitments, the readier his clients will be to purchase future offerings by him and the larger, and more dependable, his marketing facilities.

A Broad Field

As said above, the Dealer House engages, largely, in unlisted securities. As the investing public may some day realize, however, that does not mean that the dealer-field is a narrow one. On the contrary, it is a field almost unlimited in scope and possibilities. There are, for example, thousands of financial institutions in this country—banks, trust companies, insurance companies, etc.; in the great majority of cases, the stocks of these institutions, where publicly held at all, are not listed on any exchange. Add to these the myriad public utility securities and industrial securities which are unlisted and you begin to believe that the Dealer's field, in actual scope, may be considerably larger than that of the typical brokerage house.

Advantages of Being a Dealer

The large and best-managed Dealer House enjoys quite a few advantages—or so it seems to this writer—over the typical brokerage house. Most of these advantages hinge upon the fact that such Dealers do not accept marginal accounts but require that all securities purchased from (not through) them be bought on an outright basis. *Advantage No.* 1: In such an office, the worries of customers' debit balances are either eradicated entirely, or reduced to an absolute minimum. *Advantage No.* 2: The securities dealt in, as a broad rule, are at least somewhat less sensitive to the influences of speculative excesses than they would otherwise be. *Advantage No.* 3: Clients are discouraged, if not entirely deterred, from over-trading and have less to worry—and give worry—about when the broad trend is downward.

Of course, there must be disadvantages to this field, too. Chief among them is the obvious truth that, in order to reap the same proportionate profit as would be possible from a marginal business, there must be a greater profit per transaction to offset the, usually, smaller volume. However, since the same amount of capital does not, as a general rule, have to be employed in the business, the necessary profit for the purpose need not be excessive.

Relationship With Corporations

The Dealer is often very close to the personnel of the company in whose securities he deals—as close, sometimes, as the underwriting house. Why? Because he takes it upon himself to get close. And he takes it upon himself to get close for the simple reason that he knows better than to establish a commitment in a security, either through outright purchase or under the form of an option, in a company about which he does not know about everything that is to be learned.

The better-class Dealer is, furthermore, very close to his customers. Again for the why of it: Often, the Dealer wishes to bring to his customers' attention securities of which they have never heard, and concerning which, not infrequently, the only available information is that supplied by the Dealer himself. *Ergo*, the Dealer must be close enough to his customers to have their respect and personal confidence.

For both the above reasons, the successful Dealer, much like the successful broker, is often one of the most engaging of men. He is, perhaps, about two steps ahead of the high-class salesman. He not only has the sales-personality and the ability to sell but also the shrewdness and ability of the canny buyer.

A Dealer's Clientele

The clientele of the more successful Dealer House is, as a broad rule, composed largely of persons of wealth. For one reason, persons of wealth are better placed to forego the marketability which some of the most attractive dealer-stocks do not enjoy. For another thing, it takes a considerable amount of money to purchase many of the better-grade unlisted issues.

The latter consideration should not, to be sure, exert the influence it does exert. In an article published here some weeks ago, the writer endeavored to explode the low-priced-stock fallacy, and to show that it is the proportionate return on total capital invested that counts, not the number of shares one

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holds, or the number of "points" per share which a given stock gains in price. However, just as King Somebody-or-other learned, several centuries ago, that brooms are of no avail against the ocean tides, so Wall Street has learned that reason is of no avail against the low-price-per-share fallacy. It is almost universally entertained, and we might as well float with the tide, rather than struggle and strive against it.

Every once in a while, nowadays, though, employes of a Dealer House will be surprised, and not at all displeased, by discovering some comparatively "poor" individual amongst the clients of the organization. This, too, has a logical explanation: More and more of our present-day corporations are encouraging their employes to buy, and hold, some of their outstanding securities; more and more employes are acting on the suggestion.

The Dealer's Service

If the Dealer were at all inclined to stress the service he does the community, which he is not, he might—in this writer's opinion, at any rate—claim to occupy quite important a niche in the scheme of things. After all, he does help to establish a market and a sales-and-purchase price for securities which would otherwise be the next thing to non-negotiable. Incidentally, too, the Dealer frequently serves investors in about the most practical way imaginable by calling their attention to income-and-profit-producing mediums about which they might not otherwise hear.

The unscrupulous Dealer, of course, is a distinct factor for ill. He establishes unjustifiable markets for securities which would far better be draining the pockets of incompetent or dishonest corporate promoters than the strong boxes of trusting investors.

Admitting the existence of the unscrupulous Dealer, it is probably not out of the way to suggest that the investor who contemplates patronizing a Dealer House should exercise the utmost care and caution in selecting that house. To be sure, he will not, perhaps, be incurring the same degree of risk as the active investor who opens an account with a doubtful brokerage house and permits that house to hold for him both his securities and his credit balance. There are offsetting risks, however—particularly the risk of being inveigled into buying a security which

(Please turn to page 269)

Announcement of Prize Winners in the 1925 Contest

AFTER burning the midnight oil for several weeks to read BYFI'S 1925 Prize Winning Contest articles, the judges announce their selection of the winners. The three prize winners, as well as three other contestants who are awarded Honorable Mention, are listed elsewhere on this page. In addition to these highest ranking articles, a great many of the participants have written such interesting and valuable experiences, that we are pleased to announce that BYFI'S readers will have the opportunity of reading them in future issues.

From the standpoint of the high standard of excellence of the articles submitted, this is BYFI'S most successful contest by a wide margin. Practically every State is represented among the contestants, not to speak of many articles which were sent from other places outside of the United States. Investors from every walk of life have written about their own personal experiences and have given intimate, personal accounts of their own solution of the universal problem of attaining Financial Independence.

The Judges, to whom the discussion of investment problems is a daily topic, are especially impressed by the intelligent conceptions which BYFI'S readers have on investment matters. Even the intricacies of trading in securities for profits over and above the current rate of income apparently are not unknown to most of those who have been following this department for some time. It is noticeable that in every such case the distinction between investing for profit and gambling for quick gain is clearly recognized. And again, when conservative regard for safety is the requirement, the selection of investments, whether for large or small funds, is based on an unusually comprehensive knowledge of the essential criterions of investment strength.

Where are these people who still consider Wall Street an impenetrable mystery? One thing is clearly indicated by the 1925 Prize Winning Contest just closed. There are few of this specie remaining among the readers of this department. This naturally is pleasant for the Building Your Future Income editors to consider.

The Prize Winning Articles

First Prize: $100.

"The BEST Investment—What Is It?"
By ALBERT S. KEISTER,
Professor of Economics,
North Carolina College for Women

Second Prize: $50.

"American Workers' Financialization"
By "INVESTOR-LABORER"
Cristobal, Canal Zone

Third Prize: $35.

"Out of the Frying Pan Into Financial Independence"
By G. H. TUFTS
New York City

Honorable Mention:

"My Thirty-Year Financial Plan"
By RALEIGH E. ROSS
Oak Park, Ill.

"A $6000-a-Year-Man Plans His Budget"
By "P. S. E."
Rutherford, N. J.

"Charting Your Future Income"
By HAROLD S. STROUSE
Milwaukee, Wis.

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SECURITIES AND EXCHANGE COMMISSION

REPORT

ON

THE FEASIBILITY AND ADVISABILITY OF THE COMPLETE SEGREGATION OF THE FUNCTIONS OF DEALER AND BROKER

PURSUANT TO SECTION 11 (e) OF THE SECURITIES EXCHANGE ACT OF 1934

WASHINGTON, D. C.
June 20, 1936

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1936

definitions, the great majority of persons engaged in the securities business in the United States combine the functions of dealer and broker. Hence, a survey of the activities of all such persons is pertinent to this study.

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 buys securities from his customer with a view to disposing of them elsewhere. In any such transaction he acts for his own account and not as agent for 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.

On the other hand, a broker employed to execute an order for the purchase or sale of securities is the agent of his customer. He does not undertake to sell to or buy from his customer but rather to negotiate a contract of purchase or sale between the customer and a third party. The transaction is solely for the account of the customer who becomes the owner of securities purchased by the broker on his behalf, is entitled to the profits realized and is liable for the losses incurred. The broker has no beneficial interest in the transaction except the commission or other remuneration which he receives for his services.

The relationship between broker and customer is fiduciary in its nature. The legal incidents of that relationship are well-established in existing law. They are of the same character as those which pertain to any agent to whom money or other property is entrusted for the purposes of the agency. In the performance of his duties, the broker is held to the same high standard of conduct as the law imposes upon attorneys, administrators, executors, guardians, bankers, public officials, and other persons vested with fiduciary powers. He is required to exercise the utmost fidelity and integrity. He is under a duty to act solely for the benefit of his principal in all matters connected with his agency. The degree of care and skill which he is expected to employ has been defined by the New York Court of Appeals as follows:

> "Those who dealt with him contracted for, and had a right to expect a degree of care commensurate with the importance and the risks of the business to be done, and a skill and capacity adequate to its performance. That care and skill is such as should characterize a banker operating for others in a financial center, and different in kind from the ordinary diligence and capacity of the ordinary citizen."[4]

[4] *Isham* v. *Post,* 141 N. Y. 100, at p. 105.

THE SECURITY MARKETS

FINDINGS AND RECOMMENDATIONS
OF A SPECIAL STAFF OF THE
TWENTIETH CENTURY FUND

DIRECTOR OF SURVEY:
ALFRED L. BERNHEIM

STAFF CONTRIBUTORS:

N. R. DANIELIAN   G. WRIGHT HOFFMAN
PAUL D. DICKENS   FREDERICK W. JONES
WILFORD J. EITEMAN   GEORGE SOULE
WILLIAM HOWARD STEINER

EDITORS:

ALFRED L. BERNHEIM
MARGARET GRANT SCHNEIDER

TWENTIETH CENTURY FUND, INC.
NEW YORK CITY
1935

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The over-the-counter business is carried on over the telephone and by telegraph. Indeed, it was made feasible on a large scale only by the development of these means of communication. Houses doing a large business with insurance companies ordinarily have branches in the principal insurance centers. When such a house receives a selling order for a large block of bonds, it immediately notifies its branches that such a block is available. Various insurance companies and other institutions believed to be interested in the security offered, are then contacted, and the whole lot is probably soon sold without depressing the price unreasonably.

Over-the-counter transactions in stocks are ordinarily conducted about as follows: Dealer Blank, having an order to buy 100 shares of Third National Bank stock for a customer, may call Dealer Doe and ask him for the market in that stock. Dealer Doe replies 113–115, meaning that he will buy at 113 and sell at 115, though usually, without at the time indicating the size of the market.[1] The 2 point difference represents the profit Dealer Doe expects to make on deals in that stock, though his expectation may not be fulfilled. Dealer Blank may accept, may ask for a better price or may go to another dealer. Dealer Blank may have several competing brokers on the wire at one time, and get the best prices of each. After purchasing the stock, Dealer Blank notifies his customer, "I have sold to you 100 shares of Third National Bank stock." In the case of a selling order, the same routine would be followed, except that Dealer Blank would find a purchaser for the stock and would notify the customer, "I have bought from you 100 shares of Third National Bank stock." In both cases Dealer Blank is a principal twice, that is, he both buys and sells for his own account. He seldom charges a commission for his services, but gets a profit from the difference between his buying and selling prices. This difference will vary according to his judgment of how good a buy he has made, how valuable a customer this particular individual or company is, how much difficulty he had in filling the order and, above all, how much the traffic will bear—that is, how big a spread can be obtained between the purchase and sale prices.

in which they might wish to operate. It is known that security affiliates of banks, and others, have, in some instances, been able to borrow stock for delivery against short sales with no difficulty whatsoever.

[1] The dealer, in the negotiations, may say that he will only buy or only sell. If he does not wish to bind himself to do business at once he may quote prices which indicate that he thinks it possible to find a buyer or seller at those prices.

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THE SECURITIES EXCHANGE ACT OF 1934

ANALYZED AND EXPLAINED

CHARLES H. MEYER

OF THE NEW YORK BAR

AUTHOR OF

"THE LAW OF STOCKBROKERS AND STOCK EXCHANGES"

"LEGAL PITFALLS OF THE STOCKBROKERAGE BUSINESS AND HOW THEY MAY BE AVOIDED" ETC.

FRANCIS EMORY FITCH, INC.

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NEW YORK, N. Y.

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READ THIS FIRST

How to use this book

This book consists of two parts: *Part I*, the Securities Exchange Act of 1934 (Fletcher-Rayburn Act), and *Part II*, the Securities Act of 1933, as amended in 1934.

Each part contains (1) a summary of the Act to which it relates, and (2) a detailed analysis of the Act, section by section.

The summary of each Act is intended not only as a brief outline for those whose interest is confined to the more important features of the Act, but also as a general introduction to the Act for those who wish to make a more thorough study. *The summaries of the two Acts should be read first by everyone who uses this book.*

The detailed analysis of each Act takes up each section separately. There is first reproduced the exact text of the section. Then follows a full explanation.

A word of caution

A book on a legal subject cannot give more than the author's interpretation of the law. Particularly is this the case with the Securities Exchange Act, which is sailing uncharted seas. Intelligent differences of opinion may arise as to its construction. Views expressed now, no matter how well founded they appear, may ultimately be found not to be in accord with decisions of courts or rulings of government regulatory agencies. The author believes the opinions expressed in this book to be sound. Nevertheless he recognizes that some of his views on a subject covering so broad a field may not be concurred in by others. The reader should therefore constantly bear in mind that the explanation of the law contained in this volume *is merely the author's opinion on a novel statute which has never been officially or judicially construed.* In no case should the book be used to supplant legal advice where any action which may be affected by the Act is contemplated.

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(2) Facility

The term "facility" of an exchange is used repeatedly throughout the Act. It includes the use of the exchange's premises and other property, and any service it may render for the purpose of *effecting* or *reporting* a transaction, including its ticker system.

(3) Member

The term "member" of an exchange is defined as a person who may personally effect transactions on the exchange, or who may use the facilities of an exchange without payment of a commission or with the payment of a commission less than that charged to the general public. *The term includes a firm of which a member is a partner. It includes also any partner in such firm.* The provisions of the Act applicable to exchange members are equally applicable to their firms and partners.

(4) Broker

A "broker" is a person* engaged in the business of effecting transactions in securities for the account of others. A broker is an agent. He does not sell his own securities to his customers nor buy his customers' securities for his own account. His business is to effect purchases and sales on his customers' behalf with third parties. Firms and individuals doing a commission business are brokers.

A broker is not necessarily a member of an exchange.

A bank is not considered a broker within the meaning of the Act even if it effects transactions in securities for others.

(5) Dealer

A "dealer" is a person* engaged in the business of buying and selling securities for his own account. A dealer, as distinguished from a broker, acts as principal and not as agent for customers.

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*The word "person" includes not only an individual but also a partnership, corporation etc. See definition of "person" in paragraph (9).

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Professional traders as dealers

A question arises whether a trader who has no customers but merely trades for his own account through a broker is a "dealer" under the Act. A fair interpretation of the Act would seem to indicate that if the operations of a trader are sufficiently extensive to be regarded as a regular business he would be considered a "dealer." Among those who will be classed as a "dealer," if this interpretation is correct, are professional traders, whether or not they conduct their activities on the floor of an exchange.

Investors and non-professional traders not dealers

A person* who buys and sells securities for his own account *but not as part of a regular business*, whether he is acting for himself individually or as executor, trustee, etc., is not a "dealer." Undoubtedly there will be many border line cases when it may be difficult to determine whether a person is or is not a "dealer" within the meaning of the Act. The ultimate test is whether his operations are sufficiently extensive to be considered "part of a regular business."

Banks not dealers

A bank is not considered a "dealer" within the meaning of the Act even if it engages in the business of buying and selling securities for its own account.

(6) Bank

A bank is (A) a national bank, (B) a member bank of the Federal Reserve System, (C) any other bank or banking institution performing normal banking functions, which is subject to supervision and examination by State or Federal authorities, and which is not operated for the purpose of evading the Act†, (D) a receiver, conservator or other liquidating agent of any of the foregoing.

*The word "person" includes not only an individual but also a partnership, corporation, etc. See definition of "person" in paragraph (9).

†The provision excluding from the definition of banks such institutions as might be

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Legal Pitfalls

of the

Stockbrokerage Business

and

How They May Be Avoided

by

CHARLES H. MEYER

of the New York Bar

Author of

"The Law of Stockbrokers and Stock Exchanges", "The Securities Exchange Act of 1934 Analyzed and Explained", and other authoritative works on stockbrokerage law.

BAKER, VOORHIS & CO.
119 Fulton Street
New York
1936

ness, continuing with the types of customers with whom a broker may or may not safely deal, and then proceeding with solicitation of orders, execution of orders, confirmation of orders, and consummation of orders by payment and delivery, and concluding with the opening of margin accounts, the carrying of securities for customers on margin, and the closing of margin accounts.

1. BROKERS AND DEALERS.

a. Distinction between broker and dealer.

A broker acts as *agent* for his customer in buying securities for his customer from third persons or in selling securities for his customer to third persons. He is compensated by a commission from his customer, but is not allowed by law to make a profit on the transaction. In transacting business for customers on stock exchanges, members of exchanges and their firms act for their customers in the capacity of brokers.

A dealer acts *not* as agent for his customer but as *principal* for his own account. As such he sells his own securities to customers, or buys his customer's securities for himself. A dealer who is selling a security to a customer need not necessarily own the security at the time he makes the sale, but may have made arrangements to acquire it from some third party for his own account in order to enable him to sell it to his customer. A dealer does not charge commissions but is entitled to make a profit on the sale or purchase. Over-the-counter houses usually transact business as dealers but are not required to do so. Investment bankers likewise usually act as dealers.

The same firm may act as broker for a customer in some transactions and as dealer in others. Under the Securities Exchange Act a person transacting business as both broker and dealer must notify the customer of the capacity in which he is acting (see Sec. 5 b below).

In the Securities Exchange Act the word "dealer" is given a broader definition than that accepted by common usage. Under that Act anyone "engaged in the business of buying and selling securities for his own account, through a broker or otherwise" (other than a bank) is a dealer. Under this definition a professional trader might be considered a dealer. Accordingly a broker, all of whose relations with his customers are on a broker or agency basis, might nevertheless be considered also a dealer if he engages regularly and extensively in trading for his own account.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2534 SI

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

ROBERT L. RIDENOUR,

Defendant-Appellant.

On Appeal from the United States District
Court for the Southern District of Iowa

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

DANIEL L. GOELZER
General Counsel

JACOB H. STILLMAN
Associate General Counsel

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Assistant General Counsel

CATHERINE A. BRODERICK
Counsel to the Assistant
General Counsel

Securities and Exchange Commission
Washington, D.C. 20549

Of Counsel
PAUL GONSON
Solicitor

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with the Commission, in violation of Section 15(a)(1) of the Securities Exchange Act. As discussed above, Ridenour acted as a "broker," as defined in Section 3(a)(4) of the Exchange Act, in that he was engaged in the business of effecting securities transactions for the account of others, including UCB and his other bank customers. 37/

Nor does Ridenour dispute that he was not exempt from registration. Although the Act exempts from registration persons effecting transactions in "exempted securities," which for purposes of Section 15 include United States government

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37/ Ridenour also acted as a "dealer," as defined in Section 3(a)(5) of the Act, in that he was engaged in the business of buying and selling securities for his own account.

The Act does not require that the business be the broker's or dealer's primary business. See L. Loss, Fundamentals of Securities Regulation 604 (2d ed. 1988). Certainly, activity that netted Ridenour in excess of $450,000 in three years constituted a substantial business of Ridenour's.

A dealer's activity must be "part of a regular business," a test which "serves to distinguish the securities dealer from the ordinary trader -- the active investor who buys and sells with frequency but does not attempt to attract a clientele." Rice, The Expanding Requirement for Registration as "Broker-Dealer" Under the Securities Exchange Act of 1934, 50 Notre Dame Law. 201, 210 (1974) (emphasis in original). Among the practices that define a dealer are conscious efforts to obtain and keep a regular clientele; substantial transactions directly with investors; maintenance of a regular place of business where he holds himself out as engaged in buying and selling securities; and a fairly regular turnover in secondary transactions. See 2 L. Loss, Securities Regulation 1296-97 (2d ed. 1961); see also SEC v. National Executive Planners, Ltd., 503 F. Supp. 1066, 1073 (M.D.N.C. 1980). Ridenour -- who regularly engaged in transactions directly with the customers that he solicited and dealt with out of his office at Dean Witter -- clearly satisfied these criteria.

U.S. Securities and
Exchange Commission

STATEMENT

Statement on Further Definition of "As a Part of a Regular Business" in the Definition of Dealer

Mark T. Uyeda (/about/sec-commissioners/mark-t-uyeda)

Feb. 6, 2024

Thank you, Chair Gensler. Thank you to the staff for your presentation.

Today's action is problematic. The Commission's effort to classify nearly any person who buys and sells securities as a "dealer" under the Securities Exchange Act of 1934 (the Exchange Act) extends beyond its statutory authority. The lack of any limiting principle creates the potential for arbitrary and capricious government action. Further, today's action may reduce liquidity in the Treasury markets, make them more volatile, reduce the number of liquidity providers, and increase debt costs to taxpayers.

The Exchange Act limits who is a "dealer" by requiring that the trading from one's own account be "as a part of a regular business."[1] The final rules fail at their attempt to clarify what "part of a regular business" means.[2] Instead, they proclaim that "no presumption shall arise that a person is not

a dealer within the meaning of [the Exchange Act] solely because that person does not satisfy [the standards set forth in the rules]."[3] In other words, complying with the rules provides no assurance on dealer status, whether in the Treasury market or beyond.[4]

Today's action codifies the Commission's view that the "dealer" definition is practically limitless. The public should be concerned about the immense scope of this claimed jurisdiction. The rule of law means that the government should define ex ante which activities are lawful and which are not. Without such definition, governmental authority can be arbitrary and even tyrannical. Government can favor some entities, while disfavoring others.

This rulemaking targets proprietary trading funds (PTFs), private funds, and others who make money by buying low and selling high in the Treasury market, while creating additional regulatory confusion for other markets, including crypto asset securities. Indeed, following Form PF, the adoption of private fund adviser rules, securities lending disclosure, and short position and short activity reporting, this action feels like another salvo in the Commission's war on private funds.

The Commission claims that advancements in electronic trading across securities markets resulted in PTFs and others providing more liquidity to the Treasury markets,[5] a traditional dealer activity.[6] While that may be true, it does not legally transform traders into dealers. Broadly speaking, any market participant can be a liquidity provider, and it makes no sense to use liquidity provision as the basis for legally distinguishing between dealers and traders.[7]

The role of PTFs and private funds has grown partly because outstanding public debt has massively increased. In January 2024, total outstanding public debt was $34.1 trillion, with $27 trillion held by the public.[8] Four years ago, those amounts were $23.2 trillion and $17.1 trillion, respectively. Yet primary dealer balance sheets have stayed flat and are constrained by the supplemental leverage ratio. If the banks and dealers cannot provide additional liquidity, where will it come from? Nearly omitted from the Commission's analysis is that PTFs and private funds provide positive

externalities to the Treasury markets through increased liquidity, more competition, and tighter spreads.

The Commission suggests the benefits of imposing dealer regulations on PTFs and others include: (1) these entities will be less likely to discontinue trading in turbulent markets;[9] (2) regulators would have more information about their activities;[10] and (3) the playing field would be leveled.[11]

Overlooked is the fact that dealer regulations are designed to protect customers, not to address whether PTFs and others might stop trading during market turmoil. For example, the net capital rule[12] protects customers during a wind-down but is costly and inappropriate for firms that lack customers.[13] Unsurprisingly, the Commission cannot convincingly demonstrate any gains in investor protection as a result.[14]

Ironically, today's action promotes the very outcome that it seeks to avoid. Increasing costs on non-dealer liquidity provision will generally result in less liquidity and/or higher transaction costs.

As justification, the Commission provides two examples: the March 2020 Covid lockdown and the 1982 failure of Drysdale Government Securities.[15] It is telling that the most specific example is from forty years ago. As for March 2020, the unprecedented global shutdown resulted in a loss of liquidity for all asset classes. The PTFs decline in liquidity provision in March 2020 appears anomalous. By contrast, in the March 2023 market stress, the PTFs increased their activity in the Treasury market and provided a greater share of liquidity.[16] Treasury Under Secretary for Domestic Finance Nellie Liang noted that this "higher share is more consistent with past behavior, such as during the October 15, 2014 event."[17] Yet the Adopting Release fails to credit PTFs with providing increased liquidity during times of Treasury market stress, including in 2014 and 2023.

There are already tools that constrain and monitor risk taking by PTFs. When PTFs trade through a bank or broker-dealer, Federal Reserve Regulations T, U, and X limit the principal traders' risk by imposing margin requirements. If they trade through a broker-dealer, FINRA Rule 4210 may apply specific margin requirements. If they trade directly, the Market

Access Rule requires a sponsoring broker-dealer to establish, document, and maintain a system of controls and supervision designed to limit the risks of the principal traders' activities.[18]

The argument about leveling the playing field entails a fundamental economic fallacy. When a business engages in an economic activity, it weighs the incremental benefits against incremental costs. Even if current registered dealers have fixed regulatory costs associated with other activities, they can remain competitive in the Treasury markets with PTFs and private funds, because their marginal regulatory costs are not tightly linked to that activity per se. However, increasing the regulatory costs for PTFs and private funds will lead them to supply less liquidity to the Treasury market and some firms may exit. Suggesting that there is an intrinsic public benefit tied to increasing the costs of the lesser regulated liquidity providers is misguided.

The argument that the Commission needs more information on PTF transactions is similarly weak. The SEC already has access to substantial data. Most PTF trades occur on interdealer broker platforms.[19] "[B]roker-dealers and ATSs report transactions in U.S. government securities to TRACE" and "TRACE data include the identities of unregistered entities."[20] For non-Treasury transactions, the Consolidated Audit Trail "generally includes all principal traders' orders in NMS securities, OTC equities, and listed options because they are reported by other registered parties."[21] Finally, "[p]rincipal traders with high volumes or with large portfolios may also have to report to the Commission on Form 13F or Form 13H."[22]

The final rules exclude investment companies registered under the Investment Company Act, but not private funds or collective investment trusts.[23] The Commission largely relies on the same rationale described in the proposing release for not excluding private funds, including the comprehensive regulatory framework and extensive oversight of registered investment companies.[24] Yet, the Commission has not considered the aggregate effects of the various rules proposed and/or adopted for private funds since the proposing release.[25] The lack of such analysis makes the final rules arbitrary and capricious.

Today's action follows other Commission actions increasing the number of persons required to register with FINRA.[26] By sweeping more persons into FINRA, it starts to become a de facto federal securities regulator. As such, consideration ought to be given on whether FINRA is now a state actor.[27]

Under the Commission's approach, any person can be a "dealer" if they buy and sell securities as part of a regular business. The final rules modification from "routine" to "regular" provides no further clarity to market participants. The ambiguity is highlighted by recent litigation over the dealer definition, when the Commission argued that the "Exchange Act does not define what it means to be 'engaged in the business' of buying and selling securities, but [this entity] is a business: it has offices, employees, keeps accounting records, and carries on for a profit. And its business model is to buy and sell securities."[28]

Historically, dealers had customers. The Exchange Act's definitions of "broker" and "dealer" generally reference how customer securities transactions are effectuated. "Brokers," acting as agents, trade "for the account of" the customer.[29] "Dealers" take the opposite side of a customer's trades in their "own account."[30] The Commission selectively cherry-picks one 1930s treatise to support its view that a dealer can have no customers,[31] while ignoring a contemporaneous treatise stating "a dealer sells to and buys from a client whereas a broker buys and sells for the account of the client."[32]

Until recently, the Commission has enforced dealer registration in a manner consistent with the idea that "broker" and "dealer" relate to customer orders. That view has apparently changed through regulation by enforcement. [33] As a result, persons are now subject to Commission enforcement, even though they have been operating under the same business model for a long time with the understanding that they were not dealers.

The Commission has filed a number of cases on dealer registration,[34] including a recent settlement with Aryeh Goldstein.[35] Mr. Goldstein loaned money to publicly-traded companies through convertible debt agreements.[36] Goldstein could convert unpaid debt and interest into

discounted stock after waiting six to twelve months, as required under Rule 144.[37] Staff guidance on the Commission's website since 2008 suggested that individuals who buy and sell securities for themselves are not considered dealers and lists a number of factors for consideration.[38] Mr. Goldstein and his firm did not appear to hold themselves out as dealers, did not have customers, nor did they advertise themselves as such.[39] The Commission's rulemaking could have addressed this regulatory ambiguity, but did not.

Given the negative consequences of the final rules, combined with the continued ambiguity on who is a dealer, I am unable to support. Many of the anticipated costs are fixed and small firms will be most disadvantaged. A number of the Commission's findings supporting the final rules are speculative and lack sufficient data or evidence in the administrative record.[40]

While the Commission recognizes that "a decrease in the activities of liquidity-providing entities and their investors would harm market liquidity" and that the harms to the Treasury markets may be more pronounced than others,[41] it theorizes that if that were to occur and bid-ask spreads widen, other registered dealers might increase their own trading to offset the gap. Wishful thinking is not a strategy when it comes to the most important market in the world.

I thank the staff in the Divisions of Trading and Markets and Economic and Risk Analysis as well as the Office of General Counsel for their efforts.

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[1] Section 3(a)(5) of the Exchange Act.

[2] Further Definition of 'As a Part of a Regular Business' in the Definition of Dealer and Government Securities Dealer in Connection with Certain Liquidity Providers ("Adopting Release"), Release No. 34-99477, (Feb 6,

2024), available at: https://www.sec.gov/files/rules/final/2024/34-99477.pdf (https://www.sec.gov/files/rules/final/2024/34-99477.pdf).

[3] Paragraph (d) of the final rules, Adopting Release at 245.

[4] Furthermore, that provision's use of a triple negative represents poor regulatory text drafting. Cf. 17 C.F.R. 230.421(d) ("no multiple negatives" is allowed in the Commission's plain English rules for prospectuses).

[5] Adopting Release at 3-4.

[6] As discussed in the economic analysis section of the Proposing Release, non-dealer firms, such as PTFs, do not constitute a large part of the overall market. Specifically, the non-dealer firms constitute only 19% of the overall Treasury market. On the other hand, PTFs do constitute a substantial proportion of the interdealer markets, "accounting for 61 percent of the volume on automated interdealer broker platforms and 48 percent of the interdealer broker volume overall." See Proposing Release: Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer (Proposing Release), Release No. 34-94524, File No. S7-12-22, at 23080, available at https://www.federalregister.gov/documents/2022/04/18/2022-06960/further-definition-of-as-a-part-of-a-regular-business-in-the-definition-of-dealer-and-government (https://www.federalregister.gov/documents/2022/04/18/2022-06960/further-definition-of-as-a-part-of-a-regular-business-in-the-definition-of-dealer-and-government)

[7] One might argue that if a person is offering to execute orders near each side of what might be determined to be the current market price, then one is a dealer because one is selling immediacy of execution and making money from the bid-ask spread. But all market participants make money by buying low and selling high, and by entering the market in their efforts to do so, they increase liquidity. For instance, if a trader has an algorithm that can reasonably predict the equilibrium market value at any point in time, then it would buy when the price is below that point and sell when the price is above that point, as long as the spread covered the transaction cost. In its efforts to buy low and sell high, the trader may be on both sides of the market, and others might perceive the trader as selling immediacy of

execution — but the trader is engaging in the market transactions solely based on its perception of value. The efficiency of connectivity and electronic markets has rendered the resulting spreads from this type of trading activity tighter, but that does not magically transform that activity into dealer activity. Indirectly, the Adopting Release's Economic Analysis seems to recognize this when, in an effort to determine what entities would be covered by this new definition of dealer, it stated that "the calculation of intraday spreads does not distinguish between trades that capture the bid-ask spread and trades that profit from intraday price movements." Perhaps if you can't empirically distinguish between those two activities, then they are not actually different. And perhaps that is why the Adopting Release immediately added that "[a]lthough we rely on a practical definition of dealing for the purpose of this analysis, we stress that the determination of whether an entity is engaged in regular dealing activity depends on the facts and circumstances." Adopting Release at 116-117.

[8] See FiscalData, Debt to the Penny, at Treasury.gov, available at https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny (https://fiscaldata.treasury.gov/datasets/debt-to-the-penny/debt-to-the-penny)

[9] For example, see Adopting Release at 93 stating that "[t]he financial responsibility and operational integrity of these significant liquidity providers, in turn, will support the resilience of securities markets"

[10] See, e.g., id. at 143-145. In particular, the Adopting Release states: "The information would enable regulators to better analyze markets — including reconstructing markets and detecting abusive trading behaviors — respond to market events and inform investors."

[11] See, e.g., id. at 136, where it states: "The regulatory consistency under the final rules is expected to benefit currently registered dealers by ensuring that all of their competitors, including currently unregistered market participants, are subject to common regulatory requirements."

[12] 17 CFR §240.15c3-1.

[13] For example, one comment letter observes: "By way of example, the SEC's Net Capital Rule is designed to ensure that a broker-dealer holds, at

all times, more than one dollar of highly liquid assets for each dollar of liabilities (i.e., money owed to customers and counterparties), excluding liabilities that are subordinated to all other creditors by contractual agreement. If a broker-dealer fails, it should be in a position to meet all unsubordinated obligations to its customers and counterparties and generate resources sufficient to wind down its operations in an orderly manner. Certainly, an assurance that a broker-dealer can meet its customer obligations (and cannot use customer funds to satisfy its own liabilities) is vital to the protection of customers and to the orderly functioning of the retail marketplace. Requiring a trading firm to maintain net capital when it has no customers to protect is simply nonsensical – yet the Proposal would presumably require just that. Imposing capital requirements that are intended to benefit customers, not traders without customers, does not help investors or the market, and serves no purpose other than as an unnecessary barrier to entry and impediment to liquidity." See Comment Letter of Joanna Mallers, Secretary, FIA Principal Traders Group, (May 27, 2022), at 9, available at https://www.sec.gov/comments/s7-12-22/s71222-20129717-296007.pdf (https://www.sec.gov/comments/s7-12-22/s71222-20129717-296007.pdf)

[14] For example, PTFs and other market participants are already subject to Section 17(a) of the Securities Act of 1933 and section 10(b) of the Exchange Act. No attempt is made by the Commission to quantify the additional benefits and corresponding costs resulting from registration as a dealer. Without examining such effects, the Commission does not have a rational basis for extending the dealer regime to PTFs and private funds.

[15] Adopting Release at 129-131.

[16] Remarks by Under Secretary for Domestic Finance Nellie Liang at the 2023 Treasury Market Conference (Jan. 30, 2024) (underlining added), available at https://home.treasury.gov/news/press-releases/jy1917 (https://home.treasury.gov/news/press-releases/jy1917)

[17] Id., underlining added.

[18] Adopting Release at 107-08. Such risks can include financial, regulatory, operational, or legal risks.

[19] The Adopting Release states "A Federal Reserve staff analysis concluded that PTFs were particularly active in the interdealer segment of the U.S. Treasury market in 2019, accounting for 61% of the volume on automated interdealer broker platforms and 48% of the interdealer broker volume overall." Adopting Release at 105.

[20] Adopting Release at 110. For an ATS, TRACE reporting when the trades occur on an ATS covered by FINRA Rule 6730.07, which "generally" includes "the ATSs with higher volume." Id.

[21] Adopting Release at 108.

[22] Adopting Release at 110.

[23] Collective investment trusts are often used as investment options in defined contribution plans (e.g., 401(k) plans).

[24] Adopting Release at 194-97.

[25] See, e.g., Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, Investment Advisers Act Release No. 6383 (Aug. 23, 2023), 88 FR 63206 (Sept. 14, 2023); Form PF; Event Reporting for Large Hedge Fund Advisers and Private Equity Fund Advisers; Requirements for Large Private Equity Fund Adviser Reporting, Investment Advisers Act Release No. 6297 (May 3, 2023), 88 FR 38146 (June 12, 2023); Amendments to Form PF to Require Current Reporting for Large Hedge Fund Advisers and Amend Reporting Requirements for Large Private Equity Fund Advisers, Advisers Act Release No. 6297 (May 3, 2023) [88 FR 38146 (June 12, 2023)], available at https://www.govinfo.gov/content/pkg/FR-2023-06-12/pdf/2023-09775.pdf (https://www.govinfo.gov/content/pkg/FR-2023-06-12/pdf/2023-09775.pdf). While the Adopting Release did provide some very modest analysis of the "overlap between the compliance period for the final amendments", it did not conduct a thorough economic analysis of the impact on potential costs and benefits of the current rule in combination with these newly adopted rules, even though that is the world upon which these new rules will be imposed, and even though this was also not covered in the economic analysis provided in the Proposing Release. See Adopting Release at 97-100, and 168-170.

[26] See Exemption for Certain Exchange Members, 88 FR 61850 (Sept. 7, 2023).

[27] See Alpine Securities Corp. v. FINRA, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023) (Walker, J., concurring).

[28] See Plaintiff Securities and Exchange Commission's Memorandum of Law in Opposition to Defendants' Motion to Dismiss, SEC v, LG Capital Funding, LLC, U.S. District Court, (EDNY), Civil Action No. 22-cv-3353-WFK-JRC (filed Oct. 27, 2022) at 9-10. The Commission has made similar arguments in other court filings related to violations of Section 15(a).

[29] 15 U.S.C. § 78c(a)(4).

[30] 15 U.S.C. § 78c(a)(5).

[31] See Adopting Release at 23, n. 57.

[32] Hodges, Charles, Wall Street Treatise (1930). See also C.H. Meyer, Law of Stock Brokers and Stock Exchanges § 43-a. at 34 (1933), (What "distinguishe[s]" the "dealer … from a broker" is that the dealer "sells to his customers … securities which he had purchased for his own account elsewhere," or "buys from his customer securities for his own account with a view to disposing them elsewhere.")

[33] If an activity is viewed as concerning by the Commission, particularly where a long-standing approach has influenced market practices, the appropriate course of action is to pursue rulemaking or guidance subject to public comment and accompanied by an economic analysis rather than through enforcement. Cf. CFTC v. EOX Holdings, LLC, No. 22-20622, Jan. 8, 2024 (5th Cir.) (holding that defendants lacked fair notice of the CFTC's unprecedented interpretation of a 39-year old rule).

[34] See SEC v. Actus Fund Management, LLC, No. 1:23-cv-111233 (D. Mass.); SEC v. Almagarby, No. 21-13755 (11th Cir.); SEC v. Keener, No. 22-14237 (11th Cir.), SEC v. LG Capital Funding, LLC, No. 1:22-cv-03353 (E.D.N.Y), SEC v. Carebourne Capital L.P., No. 21-cv-02114 (D. Minn.), SEC v. Morningview Financial, LLC, 1:22-cv-08142 (S.D.N.Y), SEC v. Fife, No. 1:20-cv-05227 (N.D. Ill.), SEC v. Fierro, No. 3:20-cv-02104 (D.N.J.), SEC v. GPL

Ventures LLC, No. 1:21-cv-06814 (S.D.N.Y.), SEC v. River North Equity LLC, No. 1:19-cv-01711 (N.D. Ill.), and SEC v. Long, No. 1:23-cv-14260 (N.D. Ill).

[35] SEC v. Aryeh Goldstein, Adar Bays, LLC, and Adar Alef, LLC, Litigation Release No. 25930 (Jan. 23, 2024), available at https://www.sec.gov/litigation/litreleases/lr-25930 (https://www.sec.gov/litigation/litreleases/lr-25930).

[36] Complaint ¶ 1.

[37] Id.

[38] Commission Guide to Broker Dealer Registration (April 2008), available at https://www.sec.gov/about/reports-publications/investor-publications/guide-broker-dealer-registration (https://www.sec.gov/about/reports-publications/investor-publications/guide-broker-dealer-registration).

[39] The Complaint says that they "grew their business by word-of-mouth" and makes no mention of websites and/or advertising. Complaint ¶ 14. The entities involved, Adar Bays, LLC and Adar Alef, LLC were owned and controlled by Goldstein, the sole managing member. Complaint ¶ 10-11. Goldstein and his entities "traded in their own account on their own behalf." Complaint ¶ 15. Shockingly, Goldstein and his entities were forced to "surrender for cancellation its remaining stock and its remaining conversion rights under convertible notes issued since 2014", which goes beyond any disgorgement principle and could be viewed as a method of punishment in addition to any penalty imposed. See SEC v. Aryeh Goldstein, Adar Bays, LLC, and Adar Alef, LLC, Litigation Release No. 25930 (Jan. 23, 2024), available at https://www.sec.gov/litigation/litreleases/lr-25930 (https://www.sec.gov/litigation/litreleases/lr-25930).

[40] Specifically, and in sum, I have concerns with the Adopting Releases conclusions that the final rules will promote, support or increase:

- orderly markets and investor protection by addressing negative externalities that may arise when a liquidity provider experiences financial failure,
- financial responsibility and operational integrity of liquidity providers in securities markets by subjecting them to the net capital rule and to

other Commission and SRO rules and oversight,

- market stability and resiliency, and
- liquidity and efficiency during times of market stress.

See, e.g., Adopting Release at 96.

[41] Adopting Release at 189.

Last Reviewed or Updated: Feb. 6, 2024

STATEMENT

Statement Regarding GHS Investments, LLC

Mark T. Uyeda (/about/sec-commissioners/mark-t-uyeda)

Aug. 19, 2024

From 2017 through 2022, GHS Investments, LLC (GHS) acquired convertible, variable rate notes from penny stock securities issuers, converted the notes into stock at a substantial discount from the prevailing market price, and sold the resulting shares into the public market to obtain profits. The Commission has issued an order that finds that such activities made GHS a dealer[1] under Securities Exchange Act of 1934 (Exchange Act) and GHS's failure to register as a dealer violated Section 15(a)(1) of that Act.[2] I dissent from this order because it appears that the Commission is attempting to achieve policy objectives through enforcement, instead of rulemaking, while also arbitrarily deciding which activities necessitate enforcement action.

Regulation by Enforcement

Since at least the 1990s, companies have issued convertible, variable rate notes to finance their operations.[3] When investors, like GHS, convert the notes into the company's common stock and resell the stock, there can a "death spiral" of the price of the stock.[4] However, companies generally issue these notes understanding this risk because they have no other sources of financing.[5]

Although the Commission has not publicly expressed it, its enforcement actions suggest policy concerns with investors' actions relating to convertible, variable rate notes and such actions' impact on the share prices of companies that issue them. However, the appropriate course of action to address these concerns is through rulemaking, not enforcement.

The Commission began a rulemaking process in 2020 when it proposed changes to Rule 144 under the Securities Act to eliminate tacking of holding periods[6] for certain types of convertible, variable rate notes, including those at issue in this case. Without tacking, investors, like GHS, may be required to hold the converted shares for at least six months before selling them.[7] If that were the case, investors may be discouraged from purchasing notes at the outset because they would be subject to investment risk while holding the underlying common stock after conversion. Thus, if tacking were prohibited, the Commission may achieve its unspoken policy objective regarding convertible, variable rate notes. However, the Commission has yet to take final action on the proposal.[8]

Since 2017, the Commission has brought a series of enforcement actions against investors engaged in activities similar to GHS with respect to convertible, variable rate notes. These cases introduced a novel interpretation that such activities meant that investors were "dealers" and needed to register under the Exchange Act. While the Commission has been successful in some of these actions,[9] the facts of this case demonstrate why regulation by enforcement is extremely problematic.

Prior to 2017,[10] investors in convertible, variable rate notes had no reason to believe that their activity could trigger dealer registration obligations. One might claim that market participants should have been on notice about the Commission's previously undisclosed interpretation of "dealer" when it filed the first complaint in 2017.

However, it is unreasonable to expect market participants to be continuously scanning court dockets in pending litigation across the country for new legal theories from the Commission, and on which a court has never ruled.[11]

District courts began issuing opinions analyzing the Commission's interpretation of "dealer" in late 2019 and in 2020.[12] However, a court of appeal would not rule on the issue until 2024.[13] The Supreme Court has recognized "[t]he fundamental principle that laws regulating persons or entities must give fair notice of what conduct is required or proscribed."[14] The Commission's action against GHS did not satisfy this principle. As the Commission acknowledges in its order, GHS ceased purchases of new convertible, variable rate notes in 2020, and converted and sold only small amounts of stock from existing inventory after 2020.[15] In other words, GHS stopped the conduct in question around the time that the first judicial opinions stating that such conduct triggered dealer registration requirements was issued. In light of this, holding GHS to a standard not articulated until after its conduct occurred is fundamentally unfair.

The Commission should not be implementing policy objectives for convertible, variable rate notes through enforcement of novel theories under the "dealer" definition. Instead, the Commission should achieve its objectives through the rulemaking process, such as its proposal to change Rule 144's tacking requirements.

Arbitrary Enforcement

Under the Commission's broad definition of "dealer," nearly any activity that involves buying and selling securities outside of the trader exception could require registration under the Exchange Act. Yet the action against GHS is solely focused on its transactions involving convertible, variable rate notes.

In addition to notes, GHS also acquired shares of common stock at a discounted price pursuant to equity lines of credit and then sought to resell them at prevailing market prices pursuant to registration statements under the Securities Act.[16]

However, the Commission's order makes no mention of the common stock obtained through these equity lines of credit. Instead, the Commission appears to make an arbitrary decision that transactions involving convertible, variable rate notes should be subject to different – and harsher – regulatory treatment.

Why does the acquisition and resale of stock from convertible, variable-rate notes require GHS to register as a dealer while the acquisition and resale of discounted stock from equity lines of credit raise no such registration requirements? Is it because issuances of such notes, which are often made as last-ditch financing by near-bankrupt companies, implicate the Commission's unspoken policy concerns but issuances of common stock may not? Unfortunately, the order is silent on this question.

Singling out of notes transactions as requiring dealer registration appears to be an arbitrary application of the "dealer" definition. This type of arbitrary implementation was a concern to the Supreme Court when it overturned the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*.[17] As Justice Gorsuch explained in his concurring opinion, "because the reasonable bureaucrat may change his mind year-to-year and election-to-election, the people can never know with certainty what new 'interpretations' might be used against them."[18] Actions like the one the Commission takes today invite heightened judicial scrutiny of the Commission's interpretation of the term "dealer."

The Commission's actions also further raise questions as to whether its implementation of the "dealer" definition under the Exchange Act should be analyzed under the Supreme Court's "void for vagueness" doctrine, which "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way."[19] Under the Commission's current interpretation of the "dealer" definition, parties cannot know what is required of them, and the Commission's lack of precision enables enforcement actions to be undertaken in an arbitrary and discriminatory manner.

Conclusion

In enforcing the federal securities laws, the Commission has an obligation to express its views prospectively, *ex ante*, to provide fair notice to persons of the conduct that will run afoul of the law. The Commission has failed to do so in this action against GHS.

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[1] Section 3(a)(5) of the Exchange Act defines the term "dealer" to mean "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A). The definition excludes "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," which is commonly referred to as the "trader exception." *See* 15 U.S.C. § 78c(a)(5)(B).

Earlier this year the Commission adopted a definition of the term "as a part of a regular business" as used within the Exchange Act's definition of "dealer." *See* Further Definition of "As a Part of a Regular Business" in the Definition of Dealer and Government Securities Dealer in Connection with Certain Liquidity Providers, Release No. 34-99477 (Feb. 6, 2024) [89 FR 14938 (Feb. 29, 2024)] ("Dealer Definition Release"), available at https://www.govinfo.gov/content/pkg/FR-2024-02-29/pdf/2024-02837.pdf (https://www.govinfo.gov/content/pkg/FR-2024-02-29/pdf/2024-02837.pdf). For my views on this rulemaking, see Statement on Further Definition of "As a Part of a Regular Business" in the Definition of Dealer, Mark T. Uyeda (Feb. 6, 2024), available at https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-dealer-trader-020624 (https://www.sec.gov/newsroom/speeches-statements/uyeda-statement-dealer-trader-020624).

[2] *See* In the Matter of GHS Investments, LLC, Mark S. Grober, Sarfraz S. Hajee, and Matthew L. Schissler, Release No. 34-100769 (Aug. 19, 2024) (the "OIP"), available at https://www.sec.gov/files/litigation/admin/2024/34-100769.pdf (/files/litigation/admin/2024/34-100769.pdf).

[3] *See* Rule 144 Holding Period and Form 144 Filings, Release No. 33-10911 (Dec. 22, 2020) [86 Fed. Reg. 5063, 5072 (Jan. 19, 2021)] (the "Rule 144 Release"), available at https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2020-28790.pdf (https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2020-28790.pdf).

[4] *Id.*

[5] *Id.*

[6] Tacking refers to combining the holding period of the underlying common stock with the holding period of the convertible notes, to satisfy Rule 144's holding period requirement. Tacking is generally permitted under Rule 144 when notes are convertible for the underlying common stock because the holder of the notes is subject to investment risk in the underlying common stock during the pre-conversion period. However, when the conversion rate is at a substantial discount to the market price of the common stock, it is questionable whether this investment risk exists during the pre-conversion period. Typically, when investors such as GHS rely on Rule 144 to sell converted common stock, they satisfy the rule's holding period requirement solely through their holding period of the notes, and accordingly, they can sell the underlying common stock immediately upon conversion. *See*, generally, the Rule 144 Release *supra* note 3.

[7] In lieu of holding the converted shares for the period required by Rule 144, an investor may resell the converted shares immediately upon conversion pursuant to a resale registration statement filed by the issuer.

[8] *See* Agency Rule List – Spring 2024, Securities and Exchange Commission, available at https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode&showStage=active&agencyCd=3235 (https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode&showStage=active&agencyCd=3235).

[9] *See*, e.g., *SEC v. Almagarby,* 479 F. Supp. 3d 1266, 1269, 1271-73 (S.D. Fla. 2020), *affirmed by SEC v. Almagarby*, 92 F.4th 1306 (11th Cir. 2024), and *SEC v. Keener*, 580 F. Supp. 3d 1272, 1282 (S.D. Fla. 2022), *affirmed by SEC v. Keener*, 2024 WL 2745055 (11th Cir. May 29, 2024).

[10] The Commission's first complaint alleging failure to register as a dealer in the context of convertible, variable rate notes was in *SEC v. Ibrahim Almagarby, et al.*, No. 0:17-cv-62255-MGC (S.D. FL filed Nov. 17, 2017), available at https://www.sec.gov/files/litigation/complaints/2017/comp23992.pdf (https://www.sec.gov/files/litigation/complaints/2017/comp23992.pdf).

[11] The same can be said for market participants affected by some of the Commission's recent enforcement actions related to crypto asset securities.

[12] *See*, e.g., *SEC v. River N. Equity LLC*, 415 F. Supp. 3d 853 (N.D. Ill. 2019) and *SEC v. Almagarby,* 479 F. Supp. 3d 1266 (S.D. Fla. 2020). The district court in *Almagarby* denied the defendant's motion to dismiss in 2018. However, it did not issue an opinion and published only an order.

[13] *See SEC v. Almagarby*, 92 F.4th 1306 (11th Cir. 2024).

[14] *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012), available at https://docs.fcc.gov/public/attachments/DOC-314768A1.pdf (https://docs.fcc.gov/public/attachments/DOC-314768A1.pdf).

[15] The OIP at paragraph 15.

[16] *See, e.g.,* Form S-1 of Guided Therapeutics, Inc. (filed June 5, 2018), available at https://www.sec.gov/Archives/edgar/data/924515/000165495418006646/gthp_s1.htm (https://www.sec.gov/Archives/edgar/data/924515/000165495418006646/gthp_s1.htm); Form S-1 of Rocky Mountain High Brands, Inc. (filed May 15, 2019), available at https://www.sec.gov/Archives/edgar/data/1670869/000166357719000213/mainbody.htm (https://www.sec.gov/Archives/edgar/data/1670869/000166357719000213/mainbody.htm); Form S-1 of Singlepoint, Inc. (filed June 12, 2020), available at https://www.sec.gov/Archives/edgar/data/1443611/000147793220003346/sing_s1.htm (https://www.sec.gov/Archives/edgar/data/1443611/000147793220003346/sing_s1.htm).

[17] *See Loper Bright Enterprises v. Raimondo,* 603 U.S. ___ (2024), available at https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf (https://www.supremecourt.gov/opinions/23pdf/22-451_7m58.pdf).

[18] *Id.* at 19.

[19] *See* FCC v. Fox Television Stations, Inc., *supra* note 14, at 12.

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U.S. Securities and
Exchange Commission

SPEECH

Remarks to the Council of Institutional Investors – Dangers of the Unbounded Administrative State

Mark T. Uyeda (/about/sec-commissioners/mark-t-uyeda)

Washington D.C. | March 5, 2024

Thank you for the invitation to address the Council of Institutional Investors, whose members are responsible for combined assets under management of nearly $5 trillion.[1] They include pension plans obligated to act prudently when investing the savings of millions of workers and their families to provide retirement benefits. Council members include state and local government pension plans, which are important to secure the retirement promise made to individuals who have provided a lifetime of public service. It is a promise that I am quite familiar with. As a former California state securities regulator, I am a member of the California Public Employees' Retirement System (CalPERS). I am also the son of a retired community college instructor, whose retirement has been made possible by the California State Teachers Retirement System (CalSTRS).

When one compares the investment holdings of CalPERS or CalSTRS to the holdings of the Federal Thrift Savings Plan (TSP) or a target date fund in a 401(k) plan, one will notice a significant difference: defined benefit plans often have an allocation to private funds while the others do not. There may be reasons for investing in private funds, such the potential for higher risk-adjusted returns, increased diversification, and the ability to better match anticipated cash outflows from the plan. However, for the average worker who invests through a 401(k) plan or an individual retirement account, it is nearly impossible to obtain exposures to a diversified portfolio comparable to CalPERS and CalSTRS even if he or she does not expect to retire for 30 years or more. As returns in the public markets become more closely correlated, regulators should be thinking about whether investors might be better served with more opportunities to diversify – such as exposures similar to those held by pension funds.

Private Fund Adviser Rules

Recently, the Commission has finalized several rules impacting private funds and their advisers, which will impact pension plans and other institutional investors.[2] One significant rulemaking was an integrated package of reforms for private fund advisers (the "Private Funds Rules"), that included quarterly fund statements, mandatory fund audits, procedures for adviser-led secondaries, restrictions on certain activities, and prohibitions on certain preferential treatment.[3] The Council supported the rules' provisions on fee and expense disclosure as well as performance disclosure.[4] More recently, the Council joined an amicus brief in support of the final rules, expressing the view that they would address harms resulting from the imbalance of power between advisers and institutional investors and the information asymmetry around the conflicts that can result.[5]

While I understand that the Council might be pleased with the results of the rulemaking, some caution about the Commission's statutory authority to promulgate such rules may be in order. The Commission relies on an expansive view of Section 211(h)(2) of the Investment Advisers Act of 1940 ("Advisers Act"). This provision was added by paragraph (g) of Section 913

of the Dodd-Frank Act under the heading of "authority to establish a fiduciary duty for brokers and dealers."

Section 913(g) contained parallel provisions amending both the Securities Exchange Act of 1934 ("Exchange Act") and the Advisers Act to authorize the Commission to impose a fiduciary standard of care for brokers, dealers, and investment advisers. Section 913(g) also included parallel provisions, codified in Section 15(l) of the Exchange Act and Section 211(h) of the Advisers Act, directing the Commission to "examine and, where appropriate, promulgate rules prohibiting or restricting certain sales practices, conflicts of interest, and compensation schemes for brokers, dealers, and investment advisers that the Commission deems contrary to the public interest and the protection of investors."[6]

By ignoring the context provided by Section 913, the Commission's broad reading represents a significant jurisdictional extension. Section 913 does not mention private funds, but focuses on brokers, dealers, and investment advisers. It does not make sense that Congress would use Section 913, which was part of Title IX of the Dodd-Frank Act, to regulate private fund advisers when Congress specifically addressed them in Title IV of the Dodd-Frank Act. Should we believe that Congress omitted any authorization to regulate private funds in this manner in Title IV, but included an obscure authorization in Section 913(g)?

Over-reaching assertions of government jurisdiction is a problem for all market participants. When contemplating the administrative state, persons should be concerned if there is no practical limiting principle on the scope of an agency's authority and the dangers associated with that method of governance.

Section 211(h) has three important components: (1) sales practices, conflicts of interest and compensation schemes; (2) investors; and (3) brokers, dealers, and investment advisers.

The first component is "sales practices, conflicts of interest, and compensation schemes." These areas can be broadly construed. In the capital markets where every participant has its own self-interest, conflicts of interest are everywhere. Nearly any form of communication can be

deemed a sales practice and any payment can be part of a compensation scheme. The Investment Company Act of 1940 – which regulates registered investment companies (RICs) – already contains provisions that address sales practices,[7] conflicts of interest[8] and compensation schemes.[9] Does Section 211(h) allow the Commission to superimpose the provisions of the Investment Company Act onto the Advisers Act for non-RICs? Read broadly, Section 211(h) could permit the Commission to prohibit or restrict any type of advisory activity that might fall into these categories. For example, could Section 211(h) be used to prohibit or restrict the ESG activities of a fund, because it involves a sales practice, conflict of interest, and/or compensation scheme? Could Section 211(h) be used for government mandated price caps on funds?

The second component is investors. The Commission argues that Section 211(h) makes no distinction between retail investors and institutional investors. What are the implications of this assertion? If it means that entities such as private funds, which are statutorily excluded from regulation under Sections 3(c)(1) and 3(c)(7) of the Investment Company Act,[10] can be indirectly regulated through the Advisers Act, then why wouldn't the same argument apply to other excluded funds? After all, the Private Funds Rules require providing investors with fund-level – not adviser-level – disclosures such as quarterly statements about private funds adviser compensation, fund fees and expenses, and performance,[11] and audited financial statements.[12] For instance, could the Commission use Section 211(h) to regulate church plans[13] excluded by Section 3(c)(14) of the Investment Company Act? What about collective investment trusts that are excluded by Section 3(c)(11) of the Investment Company Act? What about private pension plans that are also excluded by Section 3(c)(11)?

The third component is brokers, dealers, and investment advisers, though I will focus only on investment advisers. Section 211(h) does not differentiate among Commission-registered investment advisers, state-registered investment advisers, and investment advisers exempt from registration. The National Securities Market Improvement Act of 1996 ("NSMIA") provides that the states cannot impose substantive regulations on Commission-registered investment advisers,[14] but is silent on the Commission's ability to impose regulations on state-registered investment

advisers. Does Section 211(h) give the Commission the authority to regulate state-registered investment advisers? Section 203(b) provides a list of "investment advisers" who need not register. This list includes advisers to insurance companies,[15] advisers to charitable organizations,[16] commodity trading advisers registered with the Commodity Futures Trading Commission (CFTC) whose business does not otherwise consist primarily of acting as an investment adviser,[17] and advisers to small business investment companies and rural business investment companies.[18] Can the Commission now regulate these advisers under Section 211(h)?

Thus, the purported reach of Section 211(h) under the Commission's approach appears to go beyond what Congress intended given the context of Section 913. For the Commission's jurisdictional claim to be valid, Congress must have intended Section 211(h) to be a blank check that subsumes the other federal securities laws, which I find implausible.

Definition of Dealer

The Commission's broad assertion of jurisdiction is not limited to private funds. The Commission's recent rule on dealers has many market participants asking the question – are they dealers? The heart of the rulemaking was whether liquidity providers, like proprietary trading firms without customers, were dealers because they provided a function similar to market making. The Commission answered affirmatively. Pension plans might take comfort that under the rule, they are unlikely to be dealers because they are not regularly posting bids and asks at or near the market price. But the Commission also made it clear that just because a person does not fall within the rule's definition as a dealer, that person still could be a dealer under the statutory definition.[19]

The Exchange Act defines a dealer to mean any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise.[20] There is an exception for any person who conducts such activities "not as part of a regular business."[21] But isn't it part of the regular business of a pension plan, a mutual fund, an exchange-traded fund, a collective investment trust, and a charitable endowment, to buy and sell securities? Indeed, the final dealer rule recognizes that investment companies registered under the Investment

Company Act might fall within its scope and thus provided a specific exclusion for them. However, while excluding registered investment companies, the final rule did not exclude private funds, investment advisers, collective investment trusts, and pension plans.

What is the limiting principle on who is a statutory dealer? For the statutory definition, liquidity provision or market making are irrelevant. In fact, the Commission has launched enforcement cases against numerous entities for being statutory dealers, even though they had no customers and bought and held securities for relatively lengthy periods of time before selling.[22] While it is unclear how these court cases will turn out, and one court of appeal recently ruled in favor of the Commission's view,[23] what is clear is that the guidance released by Commission staff in 2008,[24] which lists a number of factors to consider when determining whether a person is a dealer, did not and would not have put these types of entities on notice of their requirement to register as dealers.

Historically, one limiting principle has been that dealers have customers. Since the adoption of the Exchange Act, the terms "broker" and "dealer" have generally referred to the method by which a securities business effectuates customer securities transactions. However, that no longer appears to be a requirement in the eyes of the Commission. The new dealer rule fails to provide a definitive test to determine dealer status. With no limiting principle, how does an institutional investor know that they are not a dealer? After all, institutional investors are in the regular business of buying and selling securities. At the very least, institutional investors may need to have policies and procedures to make regular determinations as to their status as a dealer.

Cryptocurrencies and the Definition of a Security

There is one more area where there appears to be no limiting principle – what constitutes a security under the investment contract test in Howey, which has arisen for cryptocurrencies and digital assets. Under Howey, an investment contract exists when there is an investment of money in a common enterprise with the expectation of profits based on the managerial efforts of others.[25] Council members are likely not invested in crypto or digital assets, so why should they be concerned about how the Commission

defines a “security”? However, the Commission’s approach to this analysis for cryptocurrencies and digital assets has been that any item sold whose value is based on the efforts of others is a security. In September 2023, the Commission found that the purchase of a digital image via a non-fungible token (NFT), the proceeds from which was used to finance the creation of an animated series was an investment contract, even though only those users who had purchased the digital image could gain access to watch the content.[26] This broad reading of Howey would appear to scope in many common transactions in the non-digital world, including pre-purchase commitments, collectibles, art, and land.

For example, based on the Commission’s broad interpretation – could real estate be considered a security? Many real estate holdings of pension plans are not raw land. They often are projects with development rights, zoning rights, and permits, among other things. Also, let’s not forget that the original Howey case involved orange groves. Under the broad definition of an “investment contract” being applied to the crypto space, could those interests in real estate be deemed as securities? If so, does your real estate broker also need to be registered with FINRA? Does your real estate appraiser have to be registered as an investment adviser? What about commodities holdings? Should they be treated as securities?

Conclusion

In conclusion, market participants need to know when their conduct implicates the securities laws and when it does not. The Commission’s broad jurisdictional claims in Section 211(h), the definition of “dealer,” and the definition of “security” without any practical limiting principle should be concerning for all. The Commission was designed by Congress to have a degree of independence from the political process. In return, the Commission’s jurisdiction is limited to only those areas specifically authorized by statute.

Our capital markets have historically thrived because, absent a statutory or regulatory restriction, market participants are able to act without government approval in advance or fear of enforcement without proper notice. The rise of the administrative state presents a challenge to this historical norm. When a regulator can, without practical limitation,

promulgate, interpret, and enforce rules and guidance, including retroactively, the temptation to be arbitrary in the exercise of administrative power and enforcement can be great.

I look forward to having a continuing dialogue with the Council and its members in the years to come. Hopefully, you won't need to change the name of your organization to the "Council of Institutional Dealers and Investors." Thank you and enjoy the rest of your morning.

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[1] My remarks today represent my views as an individual Commissioner and not necessarily the views of the Commission or my fellow Commissioners.

[2] See, e.g., Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews (Release No. IA-6383 (Aug. 23, 2023) [88 FR 63206 (Sep. 14, 2023)], available at https://www.govinfo.gov/content/pkg/FR-2023-09-14/pdf/2023-18660.pdf (https://www.govinfo.gov/content/pkg/FR-2023-09-14/pdf/2023-18660.pdf); Form PF Reporting Requirements for Large Liquidity Fund Advisers; Technical Amendments to Form N-CSR and Form N-1A, Release No. IC-34959 (July 12, 2023) [(88 FR 51404 (Aug. 3, 2023)], available at https://www.govinfo.gov/content/pkg/FR-2023-08-03/pdf/2023-15124.pdf (https://www.govinfo.gov/content/pkg/FR-2023-08-03/pdf/2023-15124.pdf); Form PF; Reporting Requirements for All Filers and Large Hedge Fund Advisers, Advisers Act Release No. 6546 (Feb. 8, 2024), available at https://www.sec.gov/files/rules/final/2024/ia-6546.pdf (https://www.sec.gov/files/rules/final/2024/ia-6546.pdf).

[3] Private Fund Advisers; Documentation of Registered Investment Adviser Compliance Reviews, supra note 1.

[4] Letter from the Council of Institutional Investors dated Apr. 7, 2022, available at https://www.sec.gov/comments/s7-03-22/s70322-20122806-

279150.pdf (https://www.sec.gov/comments/s7-03-22/s70322-20122806-279150.pdf).

[5] See Brief of amicus curiae Institutional Limited Partners Association, Council of Institutional Investors, Chartered Alternative Investment Analyst Association, and 11 Public Pension Funds in Support of Respondent in National Association of Private Fund Managers, et al., v. SEC, Case No. 23-60471 p. 11 (5th Circuit, filed Dec. 22, 2023), available at https://www.cii.org/files/issues_and_advocacy/correspondence/2023/12-22-2023_CII-ILPA-Amicus-Brief-in-Support-of-SEC.pdf (https://www.cii.org/files/issues_and_advocacy/correspondence/2023/12-22-2023_CII-ILPA-Amicus-Brief-in-Support-of-SEC.pdf).

[6] Dodd-Frank § 911(g)(2).

[7] See, e.g., Sec. 17(j), Sec. 30, and Sec. 35.

[8] See, e.g., Sec. 12, Sec. 17.

[9] See, e.g., Sec. 15(c), Sec. 36(b).

[10] See Sec. 3(c)(1), Sec. 3(c)(7).

[11] See 17 CFR § 275.211(h)1-2.

[12] See 17 CFR § 275.206(4)-10. The Private Funds Rules also include restricted activities and preferential treatment provisions that operate on a fund level. Those provisions prohibit certain contractual arrangements unless they are offered to all investors in the fund.

[13] A church plan is plan established and maintained by either a church as defined in Internal Revenue Code Sec. 3121(w)(3)(A) or a church-controlled organization, known as a QCCO, as defined in Sec. 3121(w)(3)(B).

[14] Pub. L. 104-290, Oct. 11, 1996, 110 Stat. 104-290.

[15] Sec. 203(b)(2).

[16] See Sec. 3(c)(10)(D).

[17] Sec. 203(b)(6).

[18] Sec. 203(b)(7), (b)(8).

[19] Further Definition of 'As a Part of a Regular Business' in the Definition of Dealer and Government Securities Dealer in Connection with Certain Liquidity Providers ("Adopting Release"), Release No. 34-99477, at p. 245 (Feb 6, 2024), available at:https://www.sec.gov/files/rules/final/2024/34-99477.pdf (https://www.sec.gov/files/rules/final/2024/34-99477.pdf).

[20] Sec. 3(a)(5) of the Exchange Act.

[21] Id.

[22] See SEC v. Actus Fund Management, LLC., No. 1:23-cv-111233 (D. Mass.); SEC v. Keener, No. 22-14237 (11th Cir.), SEC v. LG Capital Funding, LLC, No. 1:22-cv-03353 (E.D.N.Y), SEC v. Carebourne Capital L.P., No. 21-cv-02114 (D. Minn.), SEC v. Morningview Financial, LLC, 1:22-cv-08142 (S.D.N.Y), SEC v. Fife, No. 1:20-cv-05227 (N.D. Ill.), SEC v. Fierro, No. 3:20-cv-02104 (D.N.J.), SEC v. GPL Ventures LLC, No. 1:21-cv-06814 (S.D.N.Y.), SEC v. River North Equity LLC, No. 1:19-cv-01711 (N.D. Ill.), and SEC v. Long, No. 1:23-cv-14260 (N.D. Ill).

[23] See SEC v Almagarby, No. 21-13755 (11th Cir. 2024).

[24] Commission Guide to Broker Dealer Registration (April 2008), available at https://www.sec.gov/about/reports-publications/investor-publications/guide-broker-dealer-registration (https://www.sec.gov/about/reports-publications/investor-publications/guide-broker-dealer-registration).

[25] SEC v. W.J. Howey Co., 328 U.S. 293 (1946).

[26] Stoner Cats 2 LLC, Securities Act Release No. 11233 (Sept. 13, 2023); available at: https://www.sec.gov/files/litigation/admin/2023/33-11233.pdf (https://www.sec.gov/files/litigation/admin/2023/33-11233.pdf).

Last Reviewed or Updated: March 5, 2024

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	**Case No. 17-62255-Civ-COOKE/HUNT**
v.	:	
IBRAHIM ALMAGARBY and MICROCAP EQUITY GROUP, LLC,	:	
Defendants.	:	

JOINT PROPOSED JURY INSTRUCTIONS AND VERDICT FORM

Plaintiff United States Securities and Exchange Commission ("SEC") and Defendants Ibrahim Almagarby and Microcap Equity Group, LLC ("Defendants"), by their respective counsel, hereby file the parties' joint proposed jury instructions and verdict form, as directed by the Court's scheduling order [Doc. 58], for the trial in this matter which is currently scheduled to commence on April 13, 2020. In accordance with the Court's order, the SEC's objections to proposed instructions by the Defendants are indicated in **bold** and the Defendants' objections to proposed instructions by the SEC are indicated in *italics*. The basis of all objections are stated at the end of the applicable proposed instruction.

Following the proposed jury instructions, the parties have included their jointly proposed verdict form.

<u>SEC's Proposed Charge No. 14</u>

Unregistered Dealer

The first claim the SEC asserts in this case is a claim against each defendant, Mr. Almagarby and Microcap Equity Group, under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act").

The Exchange Act is a federal statute that, among other things, empowers the SEC to regulate the conduct of certain people who participate in the securities industry in order to protect public investors. Section 15(a) of the Exchange Act makes it unlawful for anyone to engage in the business of a broker or a dealer, through the use of the mails or any means or instrumentalities of interstate commerce, without registering with the Commission as a broker or a dealer or a registered representative thereof. The broker-dealer registration requirements are of the utmost importance because they establish necessary standards with respect to training, experience and records, and allow the SEC to exercise discipline over those who are in the securities business.

The SEC alleges that defendants acted as dealers and failed to register as dealers in violation of Section 15(a) of the Exchange Act when they engaged in the business of acquiring aged debt from creditors, then acquiring convertible debt instruments from the debtor companies in satisfaction of that aged debt, converting those debt instruments into shares of common stock of the debtor companies and then selling those shares to the investing public through the stock market.

To succeed on this claim, the Commission must prove the following three elements by a preponderance of the evidence:

First, you must find that defendants acted as dealers.

Second, you must find that, in acting as dealers, defendants used the mails or an instrumentality of interstate commerce.

Third, you must find that defendants failed to register with the Commission as a dealer.

Now I'll provide you with some additional instructions to help you as you consider the elements that the SEC must prove.

With respect to the first element, a "dealer" is any person engaged in the regular business of buying and selling securities for such person's own account, through a broker or otherwise.

A person who buys and sells securities for his or her own account, but not as a part of a regular business, is not a dealer. Persons who buy and sell securities for their own account, but do not do so as part of a regular business, are sometimes referred to as "traders" in order to distinguish them from "dealers." The term "trader," in this context, is just a shorthand way of referring to persons who engage in securities transactions but do not do so as part of a regular business.

A "security" includes stocks and convertible notes. The convertible notes and resulting shares of common stock that defendants acquired from issuers, and the common stock that Defendants subsequently sold, are securities.

A "business" is a commercial enterprise carried on for profit, such as a particular occupation or employment habitually engaged in for livelihood or gain. In deciding whether defendants were engaged in the business of buying and selling securities, you should consider the degree to which defendants' business model was predicated on the purchase and sale of securities.

In deciding whether there was "regularity," you must consider defendants' level of participation in purchasing and selling securities (in this case, stock). For there to be regularity, their level of participation must involve more than a few isolated transactions. You may also consider whether the regular participation occurred at some point in the overall process by which newly issued securities are sold by the company that issued those securities to the investing public.

To prove the first element of its claim, the SEC does not need to prove that defendants were aware that they were acting as dealers. Rather, the SEC only has to prove that the defendants' conduct meets the definition of a dealer as I have explained it to you.

With respect to the second element, the defendants have admitted that they made use of the instrumentalities of interstate commerce and of the mails in buying aged debt, entering into agreements with debtholders and issuers, converting debt to shares, and selling shares into the market.

With respect to the third element, defendants have admitted that they were

not registered with the Commission as dealers.

<u>Sources</u>: Securities Exchange Act of 1934, Sections 3(a)(5) and 15(a)(1); *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 809-810 (11th Cir. 2015); *SEC v. River North Equity, LLC, et al.*, 415 F. Supp.3d 853, 2019 WL 6527971 at *5-8 (N.D. Ill. Dec. 4, 2019); *SEC v. Offill, et.al.*, Case No. 3:07-CV-1643-D, 2012 WL 246061 at *7-9 (N.D. Tex. Jan. 26, 2012); *SEC v. Benger, et al.*, 697 F. Supp.2d 932, 944 (N.D. Ill. Mar. 10, 2010); *Massachusetts Financial Services, Inc. v. SIPC*, 411 F.Supp. 411, 415 (D. Mass. Mar. 26, 1976), *aff'd*, 545 F.2d 754 (1st Cir. 1976); Loss, Seligman & Paredes, *Securities Regulation*, (4th Ed. 2014); Eleventh Circuit Civil Pattern Jury Instructions § 6.3.2.

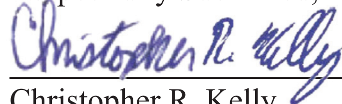
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, **Plaintiff,** **v.** **MORNINGVIEW FINANCIAL, LLC, et al.,** **Defendants.**	**1:22-cv-08142-VM**

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Dated: May 19, 2023

Respectfully Submitted,



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In this action, the United States Securities and Exchange Commission (the "SEC") alleges in detail that (1) Morningview Financial, LLC ("Morningview Financial") and Miles M. Riccio (collectively, "Defendants") were in the business of buying and selling securities for their own account, and (2) Defendants were not registered as dealers with the SEC as required by the plain language of Section 15(a)(1) of the Securities Exchange Act of 1934 ("Exchange Act"). *See* 15 U.S.C. § 78o(a)(1). Defendants even concede they regularly bought and sold securities for their own account, and therefore meet the Exchange Act's broad definition of "dealer." *See* 15 U.S.C. § 78c(a)(5)(A). Nevertheless, Defendants ask this Court to dismiss the Complaint on the grounds that they qualify for what is known as the "trader" exception, which exempts from registration those whose trading is not done as "part of a regular business." 15 U.S.C. § 78c(a)(5)(B). In so doing, Defendants contend that the SEC failed to allege numerous additional factors that, they claim, are required in order for the SEC to adequately plead its unregistered dealer claim. Defendants' argument has no merit.

First, the SEC's Complaint alleges sufficient facts to show Defendants operated as dealers under the plain language of the statute. The historical understanding and usage of "dealer," and the SEC's and its staff's statements, also both support the SEC's claim. And so, not surprisingly, every court that faced the same motion-to-dismiss argument Defendants advance here rejected it. In addition, Defendants' reliance on stipulated, settled orders is misplaced, and so they have not met their burden to establish the trader exception applies.

Second, there simply is no merit to Defendants' due process argument given that Congress's long-standing definition of "dealer" is clear and unambiguous on its face.

Finally, Miles Riccio's control-person argument rests entirely on Defendants' flawed unregistered dealer argument, and thus it also fails.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

CURT KRAMER,
POWER UP LENDING GROUP, LTD.,
GENEVA ROTH REMARK HOLDINGS, INC.,
and 1800 DIAGONAL LENDING, LLC,

Defendants.

Civil Action No.
24-cv-03498 (ER)

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Suzanne J. Romajas
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Counsel for Plaintiff

Dated: September 27, 2024

interpretation of the statutory dealer definition, 15 U.S.C. § 78c(a)(5). Numerous courts, including the Southern District of New York in *SEC v. Morningview Fin. LLC*, No. 22 Civ. 8142, 2023 WL 7326125 (S.D.N.Y. Nov. 7, 2023), have addressed this same interpretive issue, considered identical or near-identical arguments to those advanced by Defendants here, and have developed standards for distinguishing between a dealer and a trader.

Morningview is one of the more recent cases, and the most recent in this district. The Court "synthesized" its analysis of the statutory definition, the large body of caselaw from other jurisdictions, and historical and other evidence, and held that, "to sufficiently allege that a person or entity acted as a *prima facie* 'dealer' under the Exchange Act, a litigant must plead facts establishing that the person or entity, (1) bought and sold securities, (2) as principal rather than as agent for another, (3) as part of a profit-seeking enterprise, and (4) on more than a few isolated occasions." *Id. at* *11-13 (S.D.N.Y. Nov. 7, 2023) (citing cases from other jurisdictions).[3]

B. The Complaint Satisfies Every Element Of The Pleading Standard

The SEC's Complaint satisfies every element of the standard set forth in *Morningview* and therefore plausibly establishes that each Defendant was a "dealer" within the meaning of the Exchange Act definition, 15 U.S.C. § 78c(a)(5).

Defendants Bought Securities on a Daily Basis. Defendants executed SPAs with issuers on a daily basis and purchased convertible notes and preferred shares. Dkt. 1 ¶¶ 27-38, 46. The

[3] *Morningview*'s standard is consistent with courts outside this district, all of which have focused on (i) "the ***regularity*** of Defendants' participation in securities transactions and (ii) "the ***level of participation***, whether measured by volume of trades or profit realized," to determine whether a Complaint plausibly alleges that the defendant acted as a securities dealer. *See, e.g., SEC v. Fife*, No. 20-cv-5527, 2021 WL 5998525, at *6 (N.D. Ill. Dec. 20, 2021) (citing *SEC v. River North Equity, LLC*, 415 F. Supp. 3d 853, 858, 859 (N.D. Ill. 2019); *SEC v. Keener*, No. 1:20-cv-21254, 2020 WL 4736205, at *4-5 (S.D. Fla. Aug. 14, 2020); *SEC v. Fierro*, No. 20-02104, 2020 WL 7481773, at *3 (D.N.J. Dec. 18, 2020)).