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FINANCIAL MARKETS AND FUNDS ADVISORY

SEC Significantly Broadens "Dealer" Definition

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Two new rules that significantly expand who may be required to register as a "dealer" or a "government securities dealer" were adopted by the Securities and Exchange Commission (SEC) on February 6, 2024.[1] As a result of this significant expansion, many market participants previously considered "traders" will be considered "dealers" under the new rules and required to register with the SEC as broker-dealers.

More specifically, the Securities Exchange Act of 1934, as amended (Exchange Act) defines the term "dealer" as "any person engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise."[2] But the Exchange Act also excludes from that definition a person traditionally known as a trader, namely any "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*."[3] The Exchange Act also provides parallel language applicable to government securities dealers.[4] The new rules expand when one is acting "as a part of a regular business", thereby limiting when one is acting as an excluded "trader" and therefore acting as a "dealer" requiring registration.

Historically, these Exchange Act definitions and related exclusions, along with many decades of interpretive guidance from the SEC and the courts, have been known as the "dealer-trader distinction."[5] As indicated, any person, which may include entities, trading for its own account and not as part of a regular business was a "trader", and any person trading as part of its business (including by offering securities on both sides of the bid-ask spread to earn profit) was a "dealer."[6] The new rules significantly blur this distinction.

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1 Securities Exchange Act Release No. 34-99477 (Feb. 6, 2024), https://www.sec.gov/files/rules/final/2024/34-99477.pdf (Adopting Release). The proposing release is available at Securities Exchange Act Release No. 34-94524 (Mar. 22, 2022), https://www.sec.gov/files/rules/proposed/2022/34-94524.pdf. A summary of the proposing release is available at *SEC Deals New Proposal to Expand Reach of Dealer Registration Requirements*, KATTEN (Apr. 5, 2022), https://katten.com/sec-deals-new-proposal-to-expand-reach-of-dealer-registration-requirements.

2 Section 3(a)(5)(A) of the Exchange Act.

3 Section 3(a)(5)(B) of the Exchange Act (emphasis added).

4 Section 3(a)(44) of the Exchange Act.

5 In the past, the SEC and the courts have identified some activities that are typical for dealers, but are not usually engaged in by ordinary traders, including but not limited to the following:

> (1) purchasing or selling securities as principal from or to customers; (2) carrying a dealer inventory in securities (or any portion of an affiliated broker-dealer's inventory); (3) quoting a market in or publishing quotes for securities (other than quotes on one side of the market on a quotations system generally available to non-broker-dealers, such as a retail screen broker for government securities) in connection with the purchase or sale of securities permitted under Rule 15a-1; (4) holding itself out as a dealer or market-maker or as being otherwise willing to buy or sell one or more securities on a continuous basis; (5) engaging in trading in securities for the benefit of others (including any affiliate), rather than solely for the purpose of the OTC derivatives dealer's investment, liquidity, or other permissible trading objective; (6) providing incidental investment advice with respect to securities; (7) participating in a selling group or underwriting with respect to securities; or (8) engaging in purchases or sales of securities from or to an affiliated broker-dealer except at prevailing market prices.

Definition of Terms in and Specific Exemptions for Banks, Savings Associations, and Savings Banks Under Sections 3(a)(4) and 3(a)(5) of the Securities Exchange Act of 1934, Exchange Act Release No. 47,364, 68 Fed. Reg. 8686 (Feb. 24, 2003) (quoting OTC Derivatives Dealers, Exchange Act Release No. 40,594, 63 Fed. Reg. 59362 (Nov. 3, 1998)).

6 15 U.S.C. § 78c(a)(9) ("The term 'person' means a natural person, company, government, or political subdivision, agency, or instrumentality of a government.").

If a person qualifies as a dealer, the person must register with the SEC as a broker-dealer, become a member of the Financial Industry Regulatory Authority (FINRA)[7] and comply with federal securities laws and regulatory obligations applicable to broker-dealers pursuant to Section 15(a) of the Exchange Act.

Adopted Rule - Expansion of the "Dealer" Definition is Broad

As described in greater detail below, the SEC adopted two qualitative standards in the new rules to determine (on a non-exclusive basis) whether a person is buying or selling securities as part of a regular business, resulting in that person not being a trader and having to register as a broker-dealer. While the SEC emphasizes it only seeks to require persons and entities engaging in *de facto* market making to register as dealers, the standards are broad.[8]

Trading Interest Factor

Under the Trading Interest Factor, a person will be considered a dealer if that person engages in a regular pattern of buying and selling securities that has the effect of providing liquidity to other market participants by "[r]egularly expressing trading interest that is at or near the best available prices on both sides of the market for the same security and that is communicated and represented in a way that makes it accessible to other market participants."[9] Below are brief descriptions of a few of the key terms and concepts used in this Trading Interest Factor:

- **Regularly.** Whether a person's activity is "regular" will depend on the liquidity and depth of the relevant market for the security.[10] "Regularly" will capture persons that engage in the activity described in this factor on a frequent enough basis (both within a trading day and over time) that they do so as part of a regular business.[11] The SEC further clarified that a "market participant does not need to be continuously expressing trading interest to be engaging in a 'regular' business."[12]
- **Simultaneousness and both sides of the market.** The SEC expressly declined to add the word "simultaneously" to this provision. As a result, one can express trading interest "on both sides of the market" without expressing that interest at the same time.[13] This can be particularly important for firms that acquire and subsequently liquidate that position, which can look like "expressing trading interest," albeit at different times on each "side of the market."
- **Communicated and represented.** The SEC emphasizes that "the expressing trading interest factor does not hinge on any particular method of communication and representation," just "that a person expresses trading interests to more than one market participant."[14]

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[7] The SEC recently amended Rule 15b9-1 to require virtually every broker-dealer to become a FINRA member. More information on the SEC's amendments to Rule 15b9-1 is available at FINRA Gains Greater Jurisdiction and Members: Amendments to SEC Rule 15b9-1 Will Require Most Proprietary Trading Broker-Dealers to Join FINRA, KATTEN (Sept. 6, 2023), https://katten.com/finra-gains-greater-jurisdiction-and-members-amendments-to-sec-rule-15b9-1-will-require-most-proprietary-trading-broker-dealers-to-join-finra.

[8] The SEC notes that "the modifications we have made to more appropriately tailor the scope of the final rules will address various concerns raised by commenters and appropriately require only entities engaging in de facto market making activity to register as dealers." Adopting Release at 18. (Emphasis added).

[9] Adopting Release at 20.

[10] Adopting Release at 36. "'[R]egular' in the most liquid markets would mean more frequent periods of expressing trading interest on both sides of the market both intraday and across days given the efficiency in which securities can be bought and sold and the market's ability to absorb orders without significantly impacting the price of the security. In contrast, if the market for a security is less liquid, and it is difficult to execute orders in that security or large orders can dramatically affect the price of the security, the term 'regular' would account for the possibility of more interruptions or wider spreads for the best available prices." Adopting Release at 37.

[11] Adopting Release at 38.

[12] Adopting Release at 36.

[13] Adopting Release at 46. The SEC added that "market participants also can be acting as dealers by regularly providing liquidity even where the expressions of trading interest on both sides of the market for the same security are not simultaneous, particularly because the markets for different securities have varying structures, trading volume, and liquidity." *Id.* at 46-47.

[14] Adopting Release at 49.

Primary Revenue Factor

Under the Primary Revenue Factor, a person will also be considered a dealer if that person engages in a regular pattern of buying and selling securities that has the effect of providing liquidity to other market participants by "[e]arning revenue primarily from capturing bid-ask spreads, by buying at the bid and selling at the offer, or from capturing any incentives offered by trading venues to liquidity-supplying trading interest."[15] Below are brief descriptions of a few of the key terms and concepts used in this Primary Revenue Factor:

- **Primarily.** The SEC explained that "if a person derives the majority of its revenue from either of the sources described … it would likely be in a regular business of buying and selling securities or government securities for its own account"[16] and therefore will be deemed a "dealer."
  - Generally, if a person earns more revenue from the appreciation of its securities portfolio, it will not be found to have met this factor.[17] It may be difficult, however, to separate out when the revenue results from the appreciation of a security's value or the result of the difference in value represented by the bid-ask spread. This analysis will depend on the market for the subject security and the SEC acknowledges that "the markets for different securities have varying structures, trading volume, and liquidity." As such, a person or firm will need to evaluate the frequency of trading and depth and liquidity of a market to consider whether their non-simultaneous trading in that particular market may be "sufficiently close in time to h*ave the effect of* providing liquidity in the same security to other market participants."[18]
- **Earning revenue.** The SEC clarified that trading strategies do not need to be profitable to bring a person within the definition of "dealer" under the new rules.[19]
- **Trading venues.** In the primary revenue factor, the SEC refers to "trading venue" to allow the application of this factor to apply to new and evolving trading venues.[20]

Exclusions

The new rules provide exclusions for registered investment companies, central banks, sovereign entities, international financial institutions, and persons with less than $50 million total assets. Notably, the new rules *do not* carve out private funds. As such, any private fund that engages in one or more of the activities described above may be required to register as a broker-dealer.

No Presumption

Further, the new rules provide that there shall be no presumption that a person is not a "dealer" solely because that person does not engage in any of the activities described above.[21] The SEC describes this provision as making clear that the prior case law and previous examples of dealer activity continue to apply, but one wonders whether an aggressive examination team or other regulator may use this provision to further expand the conduct giving rise to dealer registration.

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[15] Adopting Release at 21.

[16] Adopting Release at 52.

[17] The SEC explains that "it is unlikely that a person who regularly earns more revenue from an appreciation in the value of its inventory of securities than from capturing bid-ask spreads or incentive payment for liquidity provision, would be considered to earn revenue "primarily" from capturing bid-ask spreads or trading incentives." Adopting Release at 57-58.

[18] Adopting Release at 47 (emphasis added).

[19] Adopting Release at 52.

[20] "The term 'trading venues' is intended to accommodate the variety of venues in which market participants today engage in liquidity-providing dealer activity. In addition, the use of this term is intended to capture venues as they evolve, wherever that activity occurs, whether on a national securities exchange, an ATS, any other broker- or dealer-operated platform executing trading interest internally by trading as principal or crossing orders as agent, or any other platform performing a similar function." Adopting Release at 56-57.

[21] Adopting Release at 92-93.

Compliance Date

The compliance date for the new rules will be one year and 60 days after publication in the *Federal Register*. As a result, any market participant that meets the definition of "dealer" under the new rules must register with the SEC as a broker-dealer prior to the compliance date. Of course, any market participant that meets the definition of "dealer," as previously defined under the longstanding dealer-trader distinction, must register with the SEC as a broker-dealer immediately.

Passive and Active Trading Strategies

The SEC estimated that 43 participants may have to register as dealers because their activity provides liquidity to other market participants.[22] This count includes proprietary trading firms, hedge funds, and other market participants, including persons that employ high-frequency trading strategies, which could bring them within the definition of a dealer.

In the Adopting Release, the SEC clarified that employing a passive trading strategy may cause a market participant to have to register as a dealer. In particular, "market participants that, for example, employ passive market making strategies involving the submission of non-marketable resting orders (bids and offers) that provide liquidity to the marketplace at specified prices," would be captured by the Trading Interest Factor.[23]

Certain types of active trading strategies may also require a person to register as a dealer under the Trading Interest Factor. As noted above, the SEC indicated that simultaneousness is not required for trading activity to be considered "dealer" activity.[24] However, the SEC declined to provide further clarity on the potential inclusion of active trading strategies under the "dealer" definition in the Adopting Release. Instead, the Adopting Release provides that market participants need to assess the totality of their trading activity to see if their employed trading strategies have the effect of providing liquidity in the single security for others in the market.[25] Thus, a firm actively trading by buying on the bid and subsequently selling on the offer (or vice versa) could be deemed a dealer, depending on, among other things, whether the trades have the effect of providing liquidity to market participants. Part of assessing whether trades "have the effect of providing liquidity" will include, among other things, an analysis of the timing of the trades, particularly as compared to the usual depth, liquidity and trading frequency in market for the subject security or asset class. In her dissent, Commissioner Hester Peirce took issue with the unclear nature of the rule here, noting that "simply executing any of a number of common trading, investing, and risk management strategies could turn a market participant into a dealer if doing so happens to provide significant liquidity to the market."[26]

Consequences of Being a Dealer

If a person is found to be a dealer under the new rules and no exemption or exclusion applies, then that person must register with the SEC as a broker-dealer, become a FINRA member[27] and comply with federal securities laws and regulatory obligations. Below is a brief overview of some of the requirements that will apply to market participants seeking to register as broker-dealers. Some of these consequences are clear and obvious. Others may be less obvious and more significant, particularly for affected private funds.

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[22] "[T]he TRACE analysis identifies as potential significant liquidity providers a total of 31 firms that are not currently registered as dealers; including 22 entities classified as [proprietary trading firms (PTFs)], 4 entities classified as hedge funds, and another 5 entities. Further, the Form PF analysis identifies 12 hedge funds that are the most likely to meet the final rules' factors due to their reported HFT activities." Adopting Release at 223.

[23] Adopting Release at 37.

[24] "While simultaneously expressing trading interest on both sides of the market in the same security is indicative of dealer activity, market participants also can be acting as dealers by regularly providing liquidity even where the expressions of trading interest on both sides of the market for the same security are not simultaneous, particularly because the markets for different securities have varying structures, trading volume, and liquidity." Adopting Release at 47.

[25] The SEC stated, "participants will need to assess the totality of their trading activity to determine if they are expressing trading interests on both sides of the market for the same security sufficiently close in time to have the effect of providing liquidity in the same security to other market participants." Adopting Release at 47.

[26] *See Dealer, No Dealer?: Statement on 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*, Comm'r Hester M. Peirce (Feb. 6, 2024).

[27] *See* supra note 7.

FINRA Registration

Dealers must seek to become FINRA members by filing a New Member Application (NMA). Typically, the membership application process takes several months as several minimum requirements must be met.[28] FINRA has adopted an accelerated approval process for membership in other contexts,[29] but it is unclear whether FINRA will be able to adopt a similar expedited process for market participants required to register as a result of the adoption of the new rules. Any market participant who may fall under the new dealer definition should discuss with outside counsel the process for applying for FINRA membership.

Qualified Personnel and Supervision

In addition, unless an exception applies, a FINRA member broker-dealer must have in place (among other requirements) a minimum of two general securities principals, a financial and operations principal, a principal financial officer, a principal operations officer, and a chief compliance officer.[30] Each of these individuals must take and pass the requisite examinations as set forth in FINRA rules.[31]

Net Capital

The net capital requirements in SEC Rule 15c3-1 apply to all registered broker-dealers.[32] The rule requires broker-dealers to carry a minimum amount of capital to meet ongoing financial obligations. Importantly, a qualifying dealer may elect to operate under SEC Rule 15c3-1(a)(6) to obtain more favorable capital treatment for transactions relating to *bona fide* market making activity.[33]

Regulation SHO

SEC-registered broker-dealers must comply with Regulation SHO, including the requirement to "locate" securities for delivery before engaging in a short sale.[34] Regulation SHO provides an exemption from this locate requirement to broker-dealers engaged in *bona fide* market making activity.[35] Although it would seem that dealer registration predicated *de facto* market making activity would be sufficient to meet the requirement for bona fide market making activity, the Adopting Release suggests otherwise, indicating that "[t]he bona fide market making exception under Regulation SHO applies to a specific subset of dealer activity."[36] This is a curious result, however, particularly as *bona fide* market making, like the adopted rule, focuses on making a two-sided market and expressing trading interest on the bid and offer side of the market.[37]

Market Access Rule

A broker-dealer that provides "market access" — access to an exchange or alternative trading system — must comply with the detailed requirements of Rule 15c3-5 under the Exchange Act, known as the Market Access Rule. This is a particularly complicated rule that requires a broker-dealer to adopt and maintain financial risk management controls to prevent the entry of erroneous orders and orders that exceed pre-set credit and capital thresholds and regulatory risk management controls designed to ensure compliance with regulatory requirements. While firms may have existing risk parameters and controls, the Market Access Rule is far more comprehensive. Among other things, it requires detailed documentation, an annual testing and verification process, and an annual CEO certification that the controls and procedures comply with the rule.[38]

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[28] *See Standards for Admission*, FINRA (last accessed Feb. 15, 2024) https://www.finra.org/rules-guidance/guidance/finra-standards-admission#standard_1.

[29] *See, e.g., FINRA Adopts a Short-Form Membership Application Process for Certain Firms That Must Become FINRA Members due to Amended SEA Rule 15b9-1*, FINRA (Nov. 9, 2023), https://www.finra.org/rules-guidance/notices/23-19.

[30] *See* FINRA Rules 1210 and 1220.

[31] *See Id.*

[32] *See generally* SEC Rule 15c3-1.

[33] *See* SEC Rule 15c3-1(a)(6); 17 CFR § 240.15c3-1(a)(6).

[34] *See generally* 17 CFR § 242.200.

[35] *See Regulation* SHO – Bona Fide Market Making Exemptions, FINRA (last visited Feb. 15, 2024). https://www.finra.org/rules-guidance/guidance/reports/2024-finra-annual-regulatory-oversight-report/regulation-sho.

[36] Adopting Release at 49.

[37] *See* Release No. 34-50103, 69 Fed. Reg. 48008 at 48015 (Aug 6, 2004).

[38] *Id.*

Other Consequences

Once a firm is registered as a broker-dealer, all the requirements (and limitations) applicable to broker-dealers and their employees apply, many of which may be surprising for private funds or other newly registered dealers not accustomed to operating in the regulated broker-dealer environment. Below is a small list of the practical consequences of being a broker-dealer.

- **Firm Required to Implement Supervisory System and Subject to Regulatory Examinations.** A registered broker-dealer must supervise its business, implement a supervisory system, and adopt written supervisory procedures. FINRA, the SEC, and other regulators can examine the firm periodically to determine whether its supervisory system and procedures are sufficient and whether the firm is in compliance with other regulatory requirements. This is a significant requirement that requires a comprehensive compliance infrastructure and is far more extensive than the provisions of the Investment Advisers Act of 1940, as amended, that apply to the investment manager of a private fund.
- **Employees as Registered Representatives.** Employees conducting the registered business of a broker-dealer generally are "registered representatives" of the broker-dealer and themselves must be registered as such, taking the appropriate qualification examinations. Those registered representatives, in turn, are then subject to regulatory requirements, such as the requirement to file Form U4 (when joining a broker-dealer) or Form U5 (when leaving a broker-dealer) and making applicable disclosures under those forms, such as for disciplinary action, lawsuits, personal financial activities such as bankruptcies or accommodations with creditors. Registered representatives must also disclose "outside business activities" and get permission from their firm to engage in "private securities transactions."
- **Application of FINRA "New Issue Rule."** FINRA Rule 5130 lists categories of "restricted persons" who cannot purchase initial public offerings (IPOs) or other new issues of securities. A broker-dealer, its associated persons, and certain entities and persons in the broker-dealer's ownership chain are "restricted persons" under the rule and, therefore, cannot purchase IPOs. Thus, a fund deemed to be a dealer cannot purchase IPOs, which may affect the investment strategy and opportunities of the fund.
- **Effect of the Net Capital Rule.** The net capital rule can limit a broker-dealer's ability to distribute capital to its owners. For example, the rule generally provides that capital must remain within the broker-dealer for one year to be counted as good regulatory capital. This could affect a fund registered as a broker-dealer from distributing capital to master funds or limited partners. More importantly, the net capital rule limits the leverage a broker-dealer can use in its trading activity far more significantly than a fund may currently leverage its trading.

Proprietary Trading Firms

The SEC specifically noted that proprietary trading firms account for nearly half the daily volume in the interdealer US Treasury market and are not registered as dealers.[39] The SEC's view is that many unregistered proprietary trading firms have become *de facto* market makers, including in the US Treasury market,[40] and should register as broker-dealers even though the proprietary trading firms do not have any customers.[41]

The SEC explained proprietary trading firms that are dealers will have to comply with numerous rules and regulations and be subject to examination by the SEC, in addition to requirements related to FINRA membership discussed above.[42] Proprietary trading firms registered as broker-dealers also will face larger constraints on risk-

[39] Adopting Release at 9-10.

[40] Adopting Release at 105.

[41] Adopting Release at 23.

[42] "These responsibilities include compliance with regulations regarding capitalization, operational controls, book-keeping, and record-keeping. These PTFs also do not submit annual reports or financial statements to the Commission and are not subject to examination, thus limiting regulators' insight into their internal risk-management or recordkeeping practices." Adopting Release at 107

taking.[43] Among other things, proprietary trading firms registered as dealers will have to comply with the Market Access Rule,[44] and have additional reporting obligations to the Consolidated Audit Trail and the Trade Reporting and Compliance Engine.[45] In addition, as noted above, proprietary trading firms registered as dealers may be able to benefit from more favorable capital treatment under SEC Rule 15c3-1(a)(6) with respect to its *bona fide* market making activities so long as it meets the conditions in paragraph (a)(6).

Private Funds

In the Adopting Release, the SEC specifically noted that private funds that seek to take advantage of pricing differentials in bid-ask spreads will be required to register as dealers if their activity has the effect of providing liquidity to other market participants.[46] Additionally, if private funds are employing high-frequency trading strategies, they should carefully consider whether their trading activity constitutes providing liquidity to other market participants and, therefore, will require registration as a dealer.[47]

Any private fund required to register with the SEC as a broker-dealer will have to carefully examine their investors' withdrawal rights and how those rights would affect compliance with the net capital rule, as discussed above.[48] A private fund may wish to consider separating its activities that constitute dealing into a separate entity.

In addition, any private fund registering as a broker-dealer would need to adapt its structure to adequately address various other supervisory, financial disclosure and tax considerations associated with broker-dealer registration, including but not limited to treatment as a "dealer" in securities for US federal tax purposes, as well as the considerations mentioned in the "Other Consequences" subsection above.

Crypto Asset Securities and Automated Market Makers

In the Adopting Release, the SEC specified that the new rules apply to all securities, including crypto asset securities.[49] As such, any trading activity involving crypto asset securities that falls within the expanded "dealer" definition may result in a person having to register as a dealer.[50] The SEC explained that "[t]he dealer framework is a functional analysis based on the securities trading activities undertaken by a person, not the type of security being traded."[51]

Any person using a smart contract, automated market maker or other all-to-all or peer-to-peer execution arrangements may have to register as a dealer if their activity qualifies under the new rules and they do not meet any of the above exceptions.[52]

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[43] *Id.*

[44] "The Market Access Rule requires the broker-dealer offering its market access to establish, document, and maintain a system of controls and supervision designed to limit the risk—e.g., financial, regulatory, operational, or legal—of the PTFs' activities related to that market access." Adopting Release at 108.

[45] Adopting Release at 108-09.

[46] "With respect to portfolio management and trading strategies that for varying reasons may seek to take advantage of pricing differentials in bid-ask spreads, as stated above, persons who engage in a pattern of trading for their own account having the effect of providing liquidity to other market participants should be subject to the dealer regulatory regime, even if they are also registered investment advisers or private funds." Adopting Release at 58-59.

[47] "We understand that algorithmic HFT is a primary feature of the PTFs and private funds who are most likely to meet the final rules' qualitative factors, since such trading can involve regularly expressing trading interests on both sides of the market (the expressing trading interest factor) or earning revenue from bid-ask spreads or incentives offered for liquidity-providing trades (the primary revenue factor). The application of these rules to affected parties engaged in such algorithmic trading activity will accordingly promote the stability and resilience of U.S. securities markets." Adopting Release at 139.

[49] Adopting Release at 22.

[50] "Rules 3a5-4 and 3a44-2, as adopted, apply to any person transacting in securities or government securities, irrespective of where, or the technology through which, the security or government security trades." Adopting Release at 211.

[51] Adopting Release at 79.

[52] "There is nothing about the technology used, including distributed ledger technology based protocols using smart contracts, that would preclude crypto asset securities activities from falling within the scope of dealer activity." Adopting Release at 80. "Persons, including persons using so-called "automated market makers," that are engaged in buying and selling securities for their own account must consider whether they are dealers under the final rules, and thus subject to dealer registration requirements." Adopting Release at 44.

Final Thoughts

Clients should analyze their trading strategies to determine whether their trading activity meets either of the qualitative factors that would require registration as a dealer under the SEC rules.

Katten will continue to monitor the space for potential litigation against the new rules and provide clients with guidance on whether their activity could result in having to register as a dealer.

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