

SEC Wants More Securities Traders Under Its Dealer Big Top: Would Require Exchange Act Registration by More Regular Traders

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Recent SEC actions relating to the definition of “dealer” under the Securities Exchange Act of 1934 may enable the SEC to start cracking the whip over more persons who actively trade securities for their own account “as part of a regular business.” This potentially could include insurance companies, among others. Specifically, despite long-standing SEC staff interpretive positions addressing the distinction between “traders” and “dealers,” the SEC under Chair Gary Gensler has (a) brought several federal court actions alleging unregistered dealer status against persons involved in active trading activity and (b) proposed rules that would define what it means to be dealing “as part of a regular business” in a way that would require more individuals and entities claiming trader status to register under the Exchange Act as dealers. **Statutory Definition.** The Exchange Act defines “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.” The statutory 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.” The SEC’s Guide to Broker-Dealer Registration states that, under this definition, “[i]ndividuals who buy and sell securities for themselves generally are considered traders and not dealers.” Similarly, in a series of SEC staff no-action letters, dating from 197 to 2001, the SEC staff agreed, subject to conditions, not to recommend enforcement against traders if traders did not register as dealers. The letters set forth a variety of factors to consider in a facts and circumstances analysis of whether a trader or investor is required to register as a dealer. **SEC Enforcement Actions** Notwithstanding SEC staff guidance on the dealer/trader distinction, since 2019 the SEC has filed actions in New Jersey (*SEC v. Fierro*), Florida (*SEC v. Keener*; *SEC v. Almagarby*), and Minnesota (*SEC v. Carebourn Capital*). In each action, the SEC alleged that defendants were unregistered dealers involved in dealing in securities “as part of a regular business.” In each case, the SEC prevailed on

summary judgment against the unregistered dealers. **SEC Proposed Rulemaking** Following the commencement of the enforcement actions, the SEC in March 2022 proposed new Rules 3a5-4 and 3a44-2 under the Exchange Act to define the phrase “as a part of a regular business” as used in the statutory definitions of “dealer” and “government securities dealer.” The proposing release identifies advancements in technology, changes in the U.S. Treasury market, and unregistered market participants who provide liquidity as some of the reasons why the new rules are needed. The proposed rules would not apply to persons who have or control less than \$50 million in total assets or to registered investment companies but would apply to other persons or entities, including private funds and registered investment advisers. If adopted, the proposed rules would provide that buying and selling securities for a person’s own account is “a part of a regular business” if such person: [E]ngages in a routine pattern of buying and selling securities that has the effect of providing liquidity to other market participants by:

- Routinely making roughly comparable purchases and sales of the same or substantially similar securities in a day; or
- Routinely expressing trading interests that are at or near the best available prices on both sides of the market and that are communicated and represented in a way that makes them accessible to other market participants; or
- Earning revenue primarily from capturing bid-ask spreads, by buying at the bid and selling at the offer, or from capturing any incentives offered by trading venues to liquidity-supplying trading interests.

Although the SEC has not yet taken final action on the proposed rules, its continuing recent enforcement activity in this area may cause some persons who have been considering themselves mere “traders” to reevaluate whether they should now purchase a ticket to get inside the SEC’s dealer tent or should take other action to reduce the possibility of the SEC telling them that such a ticket is required.

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