

MEMO# 35348

June 13, 2023

ICI Files Comment Letter with SEC on Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange" Under Rule 3b-16

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TO: Equity Markets Advisory Committee
ETF (Exchange-Traded Funds) Committee
Fixed-Income Advisory Committee SUBJECTS: Exchange-Traded Funds (ETFs)
Fixed Income Securities
Investment Advisers
Operations
Trading and Markets RE: ICI Files Comment Letter with SEC on Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange" Under Rule 3b-16

On June 13, 2023, ICI filed a comment letter with the SEC with regards to the supplemental information and reopening of the comment period for its proposal that would, among other things, amend Rule 3b-16 under the Exchange Act, which defines certain terms used in the statutory definition of "exchange."[\[1\]](#) The Reopening Release primarily focused on how proposed amended Rule 3b-16 ("Proposed Rule 3b-16") would apply to crypto asset securities and blockchain trading systems and provided associated supplementary economic analysis. The Reopening Release additionally provided supplemental commentary on Proposed Rule 3b-16's application to order management systems, order execution systems, and order execution management systems (collectively referred to as OEMSs) and ETF portals. Because ICI members utilize both OEMSs and ETF portals, ICI's letter addressed the Commission's questions in the Reopening Release relating to OEMSs and ETF portals.

ICI agreed with the Commission's statements in the Reopening Release suggesting that OEMSs and ETF portals do not generally have the characteristics of an exchange and do not otherwise fall within the regulatory intent of Proposed Rule 3b-16. As stated in our comment letter filed in response to the Original Proposal, we do not believe the SEC

intended OEMSs and ETF portals generally to meet the definition of "exchange," although Proposed Rule 3b-16's broad and ambiguous language created uncertainty regarding whether such systems could be deemed "exchanges."^[2] While we support the Commission further revising Proposed Rule 3b-16 to incorporate the language it requests comment on in the Reopening Release, we additionally continue to believe that the market would benefit from the regulatory certainty provided by the Commission explicitly clarifying that OEMSs that perform specified functions, as described in our letter, and ETF portals are not "exchanges."

Section 1 of our letter recommends that the SEC provide explicit clarification, by adopting clearer language in Proposed Rule 3b-16 and by including clarifying statements and guidance in any adopting release, that OEMSs with certain characteristics are not "exchanges" under any final Rule 3b-16. In Section 1, we first provide background information about how advisers currently use OEMSs. Second, we recommend that the SEC adopt many of the changes to Proposed Rule 3b-16 on which the SEC requests comment in the Reopening Release. Third, we recommend that the Commission provide certainty to market participants by providing a list of non-exclusive examples of functions that would not cause an OEMS to meet the definition of an "exchange" under any final Rule 3b-16, similar to the list the SEC included in the 1998 Regulation ATS Adopting Release.^[3]

Section 2 of our letter similarly recommends that the SEC explicitly clarify that ETF portals are not "exchanges" under any final Rule 3b-16. In Section 2, we first provide background on how ETF portals operate and the functions they help facilitate. Second, we explain why ETF portals are not, and should not be deemed, "exchanges" under any final Rule 3b-16. Finally, for the avoidance of doubt, we request that the Commission explicitly clarify that an ETF portal is not an "exchange."

Kevin Ercoline
Assistant General Counsel

Notes

^[1] Supplemental Information and Reopening of Comment Period for Amendments Regarding the Definition of "Exchange," Exchange Act Release No. 97309 (April 14, 2023), 88 Fed. Reg. 29448 (May 5, 2023), available at <https://www.govinfo.gov/content/pkg/FR-2023-05-05/pdf/2023-08544.pdf> ("Reopening Release"). See also Amendments to Exchange Act Rule 3b-16 Regarding the Definition of "Exchange" and Alternative Trading Systems (ATSs) That Trade U.S. Treasury and Agency Securities, National Market System (NMS) Stocks, and Other Securities, Exchange Act Release No. 94062 (Jan. 26, 2022), 87 Fed. Reg. 15496 (Mar. 18, 2022), available at <https://www.govinfo.gov/content/pkg/FR-2022-03-18/pdf/2022-01975.pdf> ("Original Proposal").

^[2] Letter from Sarah A. Bessin, Associate General Counsel, and Nhan Nguyen, Assistant General Counsel, ICI, to Vanessa A. Countryman, Secretary, SEC, on the Original Proposal at 2-3 (April 18, 2022), available at <https://www.sec.gov/comments/s7-02-22/s70222-20124231-280809.pdf> ("Prior Letter").

^[3] See Regulation of Exchanges and Alternative Trading Systems, Exchange Act Release

No. 40760 (Dec. 8, 1998), 63 Fed. Reg. 70844, 70854-56 (Dec. 22, 1998), available at <https://www.govinfo.gov/content/pkg/FR-1998-12-22/pdf/98-33299.pdf> ("Regulation ATS Adopting Release").

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