Proskauer

SEC Extends MiFID II No-Action Relief, Including Separate Notation

November 12, 2019

On November 4, 2019, the Office of the Chief Counsel of the SEC's Division of Investment Management extended the temporary no-action relief from compliance with the registration and other provisions of the Investment Advisers Act of 1940 (the "Advisers Act") for broker-dealers that receive payments for research in hard dollars or through research payment accounts (RPAs) from investment managers subject to the European directive known as "MiFID II." See our Client Advisory on the relief **here**.

The relief, which was set to expire on July 3, 2020, is **extended until July 3, 2023**.

The press release announcing the extension also referred to separate guidance concerning the exclusion for broker-dealers from the definition of "investment adviser" under the Advisers Act and "the continued ability of broker-dealers to receive payments for research under section 28(e) of the Securities Exchange Act of 1934 through client commission arrangements (CCAs)." Specifically, footnote 8 annotating a statement reiterating that the staff will not consider a broker-dealer relying on the relief to be an investment adviser provides:

> As a separate matter, we understand that, in connection with CCAs, such as those referenced in footnote 4 above [involving money managers bearing the costs of research through reimbursements], the money manager in some cases (a) may not have a trading relationship with a broker-dealer that receives commissions for research from the CCA or (b) to the extent it does have a trading relationship with such a broker-dealer, the trades may not relate to that broker-dealer's research. We understand further that some broker-dealers have questioned whether accepting client commissions to pay for research in these circumstances would affect the availability of the exclusion for broker-dealers from the definition of "investment adviser" under the Advisers Act. In this regard, the staff believes that the Commission was cognizant of these types of CCAs when it issued its 2006 interpretation, and the Commission did not question the availability of the broker-dealer exclusion in the context of these types of CCAs. [Citing the Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Exchange Act, July 18, 2006.] Therefore, the staff believes that the use of these CCAs does not affect whether the broker-dealer exclusion may be available in connection with the receipt of payments for research under section 28(e).

The circumstances in (a) and (b) apparently relate to whether the research is "incidental to brokerage" for purposes of the broker-dealer exclusion. The reimbursement programs identified in footnote 4 may raise concerns about whether the payments received by the broker-dealers are "commissions" (the only form of compensation acceptable under the exclusion) because the costs ultimately are borne by the money managers.[1] These would appear to be the issues the note is meant to address to the extent it affords further relief.[2]

Considerable uncertainty continues to surround the treatment of broker-dealers that "unbundle" research in all manner of arrangements (including CCAs) under the Advisers Act. There are serious implications where the question of compliance with the statute is concerned. The subject clearly is important to both broker-dealers and their investor clients.[3] Chairman Clayton characterized the extension as "an important step in [the SEC's] continued efforts to address changes in the market for research payments driven by MiFID II with an eye toward preserving investor access to research to the maximum extent possible[.]" Whether and to what extent broker-dealers must comply with the Advisers Act in circumstances similar to those presented in the MiFID II relief as they apply more generally to U.S. persons are issues that are fundamental to the operation of the securities laws, and should be dealt with by the Commission directly, explicitly and expediently.

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[1] This is not identified as a factor in footnote 8 except by the reference to footnote 4.

[2] The note does not say whether the broker-dealer exception is perfected in all circumstances—only that the exclusion may be available. In this regard, it should be noted that there may be other issues relevant to the exclusion, including whether the CCA involves a defined charge for the cost of research. *See* SEC Release No. IA-626, 43 Fed. Reg. 19224, 19226 (May 4, 1978). The broker-dealer exclusion is not necessary for the availability of section 28(e) to a money manager or other fiduciary to whom it applies, therefore the omission of any discussion about it in the 2006 release is of limited significance.

Apart from CCAs, the note may offer further assurance with regard to the original relief for eligible broker-dealers acting as third-party research providers in connection with RPAs for money managers subject to MiFID II notwithstanding that their trading relationships with the money managers may be limited.

[3] *See* Letter from Kenneth E. Bentsen, Jr., President & CEO, SIFMA, to Chairman Jay Clayton, SEC (Mar. 21, 2019); Recommendation of the SEC Investor Advisory Committee Structural Changes to the US Capital Markets Re Investment Research in a Post-MiFID II World (July 25, 2019).