U.S. Securities and Exchange Commission

Investment Advisers Act of 1940 - Section 202(a)(11)
Securities Industry and Financial Markets Association

October 26, 2017

RESPONSE OF THE CHIEF COUNSEL'S OFFICE
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated October 17, 2017 requests our assurance that we would not recommend that the Securities and Exchange Commission ("SEC") take enforcement action under the Investment Advisers Act of 1940 ("Advisers Act") against a broker-dealer that provides research services that constitute investment advice under section 202(a)(11) of the Advisers Act to an investment manager that is required under Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, as implemented by the European Union ("EU") member states ("MiFID II"),[1] either directly or by contractual obligation (a "Manager"),[2] to pay for the research services from its own money, from a separate research payment account ("RPA") funded with its clients' money, or a combination of the two (the "Research Payment").[3]

You represent that the need for no-action assurances is urgent due to the January 2018 implementation of MiFID II. You are concerned that broker-dealers will not be able to provide research services to Managers, as their receipt of Research Payments may subject the broker-dealers to regulation under the Advisers Act.[4] You believe that this potential outcome will negatively impact these broker-dealers given the global nature of the U.S. capital markets and the reliance by non-U.S. and global investment managers on research services provided by broker-dealers.[5]

Based on your facts and representations, and for the Temporary Period (as defined below), we would not recommend enforcement action to the SEC if a broker-dealer provides research services that constitute investment advice under section 202(a)(11) of the Advisers Act to a Manager that is required to pay for the research services by using Research Payments (a "Broker-Dealer"). Our assurances are temporary and will expire thirty (30) months from MiFID II's implementation date (the "Temporary Period").[6] During the Temporary Period, we will not consider a Broker-Dealer to be an investment adviser. We may or may not renew these assurances as appropriate. This letter represents only the Division's position on enforcement action and does not purport to express any legal conclusion on the questions presented. Because our position is based upon all of your facts and representations, any different facts or representations may require a different conclusion.

Elizabeth G. Miller
Senior Counsel

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[1] *See* Directive 2014/65, of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Commission Directive 2002/92 and Council Directive 2011/61, O.J. (L 173) 57, 349 (available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2014:173:TOC) and equivalent national rules of member states.

[2] A Manager may retain a non-EU domiciled investment manager who is contractually required to comply with MiFID II or equivalent protections (*e.g.*, setting research budgets, accounting for research inputs, and having systems and controls to ensure that the receipt of research does not give rise to certain conflicts of interest).

[3] These assurances are intended to address concerns that have arisen in light of the adoption of MiFID II while preserving choice in maintaining the SEC's long-standing approach to arrangements under section 28(e) of the Securities Exchange Act of 1934.

[4] Section 202(a)(11)(C) of the Advisers Act generally excludes from the investment adviser definition any broker or dealer who performs investment advisory services (*i.e.*, who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities) and whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor.

[5] You state that broker-dealers that provide research services to Managers can expect to receive Research Payments for such services. The receipt of such Research Payments might subject a broker-dealer to the Advisers Act if deemed special compensation. As further described in your letter, you are concerned that subjecting broker-dealers' research services to the Advisers Act would thereby disrupt existing business models that are already subject to an extensive regulatory framework overseen by the SEC and the Financial Industry Regulatory Authority.

[6] The Temporary Period is intended to provide the staff with sufficient time to better understand the evolution of business practices after the implementation of MiFID II. Staff notes that EU regulators have recently issued guidance on key aspects of MiFID II and the Temporary Period will allow the industry time to review, comprehend, and implement the

guidance, and evaluate impacts on their business models. Accordingly, during this Temporary Period, the staff will monitor and assess the impact of MiFID II's requirements on the research marketplace and affected participants in order to ascertain whether more tailored or different action is necessary.

Incoming Letter

The Incoming Letter is in Acrobat format.

http://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm

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