

Comments on File No. S7-22-07: SEC Interpretations of 202(a)(11)(c) of the Investment Advisor's Act of 1940.

I agree entirely with the interpretation that a special contract or separate fee for investment advisory services should be prima facie evidence that advisory services are not merely incidental to the brokerage services. "Incidental" in my view of the act, should apply to services that ANY client would want his broker to be able to apply, given certain contingencies, but which neither party ex ante expects to prove necessary. Once there is a separate fee however, it is clear that the client explicitly expects to be advised. Who will pay extra for something he doesn't want to use? Potentially, one could consider the extra fee as a sort of insurance, where the client, not expecting to need advice, but wanting to have the option if he later decides he does, pays extra in advance for that option, but once we have explicit contracting for this option, it seems hard to call such advisory services "incidental" to the broker's business. The slight chance of a special arrangement arising that conflicts with this interpretation is well outweighed in this instance by the clarity of having a brightline rule.

I generally agree with the second proposed rule, that any account over which a broker-dealer exercises "investment discretion" is subject to the Advisor's Act. If my broker giving me advice which I then follow did subject the account to the act, while my broker carrying out the same advise on my behalf did not, much of the Act's force could easily be evaded merely through the transfer of discretion to brokers. I am somewhat worried, however, by the some of the exceptions for investment discretion on a "temporary or limited basis." Footnote 13 defines the SEC's view of what counts as "temporary or limited discretion," and a few of the items seem overbroad.

Most specifically, I worry about two items in the footnote:

- (ii) "on an isolated or infrequent basis, to purchase or sell a security or type of security when a customer is unavailable." and
- (vi) "to purchase a bond with a specified credit rating and maturity"

I have no reason to complain about an order from a client who is going to be out of the country to "purchase 100 shares of XYZ for me next month the day before the ex divided date" or "exercise my XYZ calls on their expiration date if they are in the money." Here, the client is choosing timing, security, and volume, and the actual trigger pulling by the broker clearly does not amount to serious discretion. But as one weakens these conditions, the discretion looks less temporary and limited. "Type of security" is very broad language. Does this mean I can say, "while I'm out of the country, use the cash in my account to buy me some stocks that look good to you"? This seems equivalent to the broker giving advice to the client but getting around the rule by actually acting on it itself. This language should be tightened to clarify, preferably removing the vague "type of security clause" and perhaps inserting an explicit requirement that to count as "temporary and limited" the client must set certain limiting conditions on volume and timing of a transaction as well.

A similar problem arises with orders to purchase a bond of a "specified type or maturity." Securities of the same credit rating and maturity are not interchangeable, as many holders of highly ranked mortgage-backed securities have learned. Even within the category of bonds, with

parameters on maturity and credit rating set by the customer, there is still a lot of variance. Two 5 year bonds can be equally rated but have very different payment structures: zero-coupon or coupon, discount or premium, etc. Choosing among these implies, in my view, quite a bit of discretion. Likewise, with the whole universe of corporate bonds available, considerable discretion is exercised just by selecting which firm's bonds you are buying. Perhaps I am being overly cautious, but a brokerage could potentially offer advisory options on the sly by explicitly making a practice accepting maturity and rating guidelines from customers and claiming to add value through the specific bonds chosen. Hence, I feel that section (vi) of footnote 13 should be removed or narrowed.