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December 1, 2005

Jonathan G. Katz,
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, D.C. 20549-9303

Re: Proposed Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934 (Release No. 34-52635, File No. S7-09-05)

Dear Mr. Katz,

The Securities Industry Association ("SIA")[1] is taking this opportunity to express its appreciation to the Commission for all the time and effort it expended in carefully considering how best to update its guidance with respect to the scope of research and brokerage services that should fall within the Section 28(e) safe harbor, as well as with respect to certain related issues.

Most importantly we appreciate that the Commission, and the NASD Mutual Fund Task Force, whose report is referenced in the Proposing Release,[2] have both recognized that, while client commission arrangements may pose potential conflicts of interest if not properly supervised and documented, they also provide significant benefits to money managers and their clients which enhance the investment decision-making process and facilitate best execution. We also appreciate the Commission's clear affirmation that the Section 28(e) safe harbor applies equally to third-party and proprietary research.

[1] The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated $236.7 billion in domestic revenue and an estimated $340 billion in global revenues. (More information about SIA is available at: www.sia.com.)

[2] *See* Securities Exchange Act Release No. 52635 (October 19, 2005), 70 FR 61700 ("Proposing Release") at 61704.

A. GENERAL OVERVIEW

SIA is pleased that the Proposing Release clarifies that the lawful and appropriate assistance standard set forth in the 1986 Release[3] applies to brokerage as well as research services, and further, that for research products and services to be eligible under the safe harbor, they must reflect the expression of reasoning and knowledge. We believe that this is an appropriate standard as expressed in a flexible way by the Commission to encompass original research or a synthesis, analysis or compilation of the research of others. Additionally, we are pleased that the Commission recognizes the validity and importance of the mixed-use test and that it has offered some "bright line" guidance with respect to the safe harbor eligibility of a variety of products and services. We note, in particular, that the Commission reiterates the view set forth in the 1986 Release, that market data services generally fall within the safe harbor. In large measure, we believe the guidelines set forth in the Proposing Release are consistent with the recommendations of the NASD Mutual Fund Task Force report, which SIA supports, as well as SIA's own recommendations to the Commission staff.

We also take note of two important concepts stated explicitly in the Proposing Release that we believe can make a positive contribution to determining the scope of services that may be obtained through utilization of client commissions. However, further clarification as to how these concepts interact with and impact the bright line guidance offered elsewhere in the release may be needed. The first of these concepts is that the categories of research services expressly listed in Section 28(e)(3)(A) and (B), also "subsume" other topics related to securities and the financial markets.[4] The second concept reflects the Commission's view that the inclusion of a research service within the safe harbor may be dependent on how the research is "utilized." The Proposing Release cites the example of account performance analytics which may or may not be eligible research depending on whether they are used to support the money manager's investment decision-making responsibilities, as opposed to for marketing purposes.[5] Thus, depending on how the analytics are utilized, they may fall either within or outside of the scope of the safe harbor, or be subject to a mixed-use allocation.

These concepts reflect the Commission's understanding that, given the sophisticated and integrated nature of many research and brokerage services, their safe harbor eligibility may be largely dependent on the particular context in which they are offered and how they are utilized. As such, we believe that the Commission intends, or should intend, that these concepts serve as "qualifiers" on any bright line guidance it provides elsewhere in the Proposing Release. While this approach may be more difficult to apply than a strict bright line test, it better reflects the marketplace realities regarding the kinds of services available today to assist the investment decision-making and

[3] *See* Securities Exchange Act Release No. 23170 (April 23, 1986), 51 FR 16004 ("1986 Release").

[4] *See* Proposing Release at 61706-7.

[5] *See* Proposing Release at 61707.

transaction execution processes. As the Commission states, focus should be placed on a money manager properly documenting that all such services are being utilized in a manner consistent with these purposes, and that, where required, proper mixed-use allocations are being made. In particular, such documentation will enhance the ability of clients, including mutual funds (and their directors), and chief compliance officers to conduct meaningful reviews of client commission arrangements in which fund managers participate on behalf of fund investors.

SIA has reviewed numerous law firm memoranda and media reports on the Proposing Release, and we are concerned that there appears to be somewhat divergent views regarding the application of the concepts discussed above to bright line tests regarding particular services. Therefore we respectfully suggest that this subject needs to be further clarified in the final interpretive guidance. We believe that such clarification should reflect that while, in the first instance, certain products and services may be presumed to be outside of the safe harbor, such presumption is rebuttable depending on the context in which the product or service is employed and how it is utilized. Proper and credible documentation created and maintained by a money manager would also be a critical factor in determining whether a presumption has been rebutted.

In the remaining portions of this letter we will offer our views as to how the proposed interpretative guidance should apply to certain products and services, the temporal standard relating to brokerage services, commission-sharing arrangements, and cross-border harmonization.

B. SAFE HARBOR ELIGIBILITY OF CERTAIN PRODUCTS AND SERVICES

While SIA agrees with the Proposing Release's categorization for safe harbor eligibility purposes of most of the described services, there are a number of such services where we either believe more clarification is needed, the services should be subject to mixed-use allocation, or they should not be automatically excluded from safe harbor eligibility. We discuss these below:

1. Order Management Systems – While the proposed interpretive guidance suggests that order management systems are discrete systems with common characteristics, numerous SIA members, and others, advise us that such systems are so integrated and interrelated with order execution systems and market data and other research services, that there is no bright line between the various components of these systems. In other words, these systems do not function independently of one another and therefore should be eligible for the safe harbor to the extent they are "subsumed" by eligible services. Alternatively, these integrated services should at least be subject to a mixed-use allocation, though such an allocation would pose practical measurement difficulties.

2. Trade Analytics – We note the Commission's statement that the temporal standard for brokerage, as proposed by the Commission, would exclude post-trade

analytics as a brokerage service.[6] SIA requests that the Commission reconsider this statement, as trade analytics are an inherent part of the execution process for many managers and cannot be separated from their receipt of brokerage services. For example, certain post trade analytics – such as analyses provided by a broker-dealer confirming that its execution met or exceeded a volume average weighted price for a security – should be treated as a brokerage service, since this is in essence the "report card" showing that the broker-dealer executed the transaction in accordance with its undertaking to the money manager. SIA therefore requests that the Commission, as a matter of public policy in appropriate circumstances, allow trade analytics to be eligible for the safe harbor as brokerage services, even though they may not fall within the proposed temporal standard, discussed below.[7]

3. Custody – SIA is concerned that the Commission's proposed temporal standard for brokerage could be read to exclude custody, despite the explicit mention of custody in the statutory language.[8] Custody may be a significant factor in a money manager's decision where to execute a transaction. In particular, the ability of a broker-dealer to maintain custody of client funds and securities may be a relevant factor in where to execute transactions that have delayed settlement, such that the executing broker-dealer may hold an account's funds or securities for an extended period of time prior to settlement. The decision of where to hold client assets long-term is also important as the insolvency of the broker-dealer could cause significant losses to client accounts.[9]

4. Legal Advice – SIA believes that legal advice is one example of a category that should be subject to a "utilization" test rather than being automatically excluded from the safe harbor under a bright line test. While most legal advice provided to a money manager would be ineligible as research under the "utilization" test, in some instances a money manager may use legal advice to enhance its investment decision-making, particularly where legal considerations may impact the value of

[6] This is consistent with the Financial Services Authority ("FSA") final rules adopted July, 2005. FSA Policy Statement 05/9.

[7] Even if the Commission clarifies, as we request below, that trade analytics may qualify as research services, this would not obviate the desirability of similarly clarifying that trade analytics may qualify as brokerage services in the contexts we describe. In practice, some money managers may legitimately elect not to use, or to limit the use, of client commissions for research while continuing to use trade analytics as part of the brokerage services they obtain from executing broker-dealers. A position that places trade analytics solely in the category of research services would ignore the manner in which they are used as an integral part of the execution process.

[8] Section 28(e)(3)(C) of the Exchange Act states that a person provides brokerage to the extent he "…effects securities transactions and performs functions incidental thereto (such as clearance, settlement and custody)…".

[9] We note also that financial responsibility is a factor the money manager may take into account in its best execution determination. *See* 1986 Release.

portfolio securities held in client accounts or considered for investment. For example, a money manager may seek advice of counsel to advise it on the likely outcome of material litigation involving a subject company or on antitrust considerations in a pending merger or acquisition. Such legal advice provides lawful and appropriate assistance to the money manager in its investment decisions and should be safe harbor eligible provided they are properly documented. SIA notes that there may be other examples where an item may be presumed at first to be outside the safe harbor, but based on the item's use, may be considered research, and requests that the Commission clarify that in such instances, a money manager may treat such items as research under Section 28(e).

5. Mass-Marketed Publications – We note that the proposed guidance does not appear to restrict the use of client commissions to obtain subscriptions to mass-marketed publications. The final rules adopted by the United Kingdom ("U.K.") Financial Services Authority ("FSA") on the other hand would seem to prohibit the use of such commissions to obtain any publications. We believe that the best approach lies somewhere between these extremes, and that part of the current difficulty with the concept lies in the use of the terms "mass-marketed" and "publicly available" publications as if the terms were interchangeable. While we would agree and have recommended that subscriptions to "mass-marketed" publications should not be safe harbor eligible, there are many limited purpose publications that, although "publicly available" to anyone who wishes to subscribe, are focused on subjects largely of interest only to professional money managers, rather than the general public. These industry specific periodicals, trade journals, technical publications and the like, can be critical to a money manager's decision-making process, often providing in-depth analysis of technical, economic and scientific information that directly affects the value of investments. Therefore, we suggest that the Commission provide interpretive guidance which appropriately distinguishes between true mass-marketed publications and those that are more narrowly focused.

C. TEMPORAL STANDARD

SIA members have expressed considerable concern about the Commission's employment of a temporal standard for determining whether a brokerage service is eligible for the safe harbor, and we request that the Commission reconsider its adoption and application of such a standard. Moreover, since this is a new concept, the ramifications of which are not as yet fully known, we would hope that the Commission would be prepared to modify the standard, if adopted, should unintended consequences surface.

SIA is concerned that an approach to defining "brokerage" that is based on the start and end times for transactions fails to take into account the ongoing relationship between broker-dealers and their customers. This often takes the form of the constant flow of trading ideas and market color that may or may not culminate in executions. The

temporal approach proposed by the Commission ignores this ongoing dialogue, despite its clear connection to brokerage services.

If the Commission were to adopt a temporal standard for brokerage, SIA believes that it should start – not with the actual communication of an order as the Commission has proposed – but with (and subsume) communications by a money manager in contemplation of a possible order. This would make clear that communications such as those regarding indications of interest, willingness to commit capital or provide volume weighted average price executions, which occur naturally within brokerage relationships, fit squarely within the concept of brokerage services. [10]

SIA also notes that the temporal standard as proposed appears inconsistent with the FSA's rules on use of client brokerage. Under the FSA's rules, "execution" begins "at the point at which the *investment manager* makes an investment or trading decision…" (emphasis in original),[11] which is earlier in time than the proposed Commission standard for brokerage. This could result in the inconsistent treatment by U.S. and U.K. law of items such as pre-trade analytics, which are considered execution under FSA rules but as research under the proposed interpretation. SIA believes that, to the extent the Commission can reconcile its treatment of pre-trade analytics with the FSA's rules it may help to avoid regulatory inconsistencies that could impede the further harmonization of U.S. and foreign markets.[12]

D. COMMISSION SHARING ARRANGEMENTS

SIA appreciates the Commission's efforts to clarify the application of the safe harbor to commission sharing arrangements. We fully agree with the Commission that Congress' original intent thirty years ago in requiring the broker-dealer providing the brokerage and research services to effect the related transactions was principally to preclude the practice of paying "give-ups,"[13] while permitting soft dollars in the context of "normal and legitimate correspondent arrangements."[14] We therefore support the Commission's efforts to provide a reasonable standard that allows "normal and legitimate

[10] As discussed above, we also believe that for public policy reasons, the Commission should allow certain post trade functions, such as trade analytics, to fall within the safe harbor as brokerage, even if they fall outside the proposed temporal standard.

[11] *See* FSA Policy Statement 05/9.

[12] SIA notes that regulatory inconsistencies may be appropriate in some instances, due to the differences between the U.S. and U.K. markets and regulatory schemes. We believe, however, that pre-trade analytics as described above should not present such an instance.

[13] *See* Proposing Release at 61710. Give-ups were the practice, when commissions were fixed by exchange rules, whereby an executing broker-dealer would share a portion of its commission on a trade to another broker-dealer that may have had no role in the transaction.

[14] *See Pershing & Co.* (June 28, 1976) (stating that Congress did not intend to preclude soft dollars in the context of normal and legitimate correspondent arrangements).

correspondent arrangements" (including those which allow for customer orders to be placed directly with the clearing broker) to fit within the safe harbor, while excluding give-ups.

We believe that the Commission's goal in providing this standard should be to allow the money manager the maximum flexibility to seek best execution of account transactions, while also making use of research that assists in its investment decision-making. In this regard, we ask that the Commission be cautious not to impose conditions on correspondent arrangements that would unnecessarily limit the money manager's choices on where to send orders or from whom to obtain research.

Under its proposal, the Commission would require the introducing broker to satisfy four conditions:

- Be financially responsible to the clearing broker for all customer trades until the clearing broker has received payment (or securities);
- Make or maintain records relating to its customer trades required by Commission and SRO rules, including blotters and memoranda of orders;
- Monitor and respond to customer comments concerning the trading process; and
- Generally monitor the trading process and settlements.

These four conditions are derived from a 1983 Staff no-action letter, [15] cited with approval in the Commission's 1986 Release,[16] which confirmed safe harbor treatment for transactions effected by an introducing broker where the money manager's orders were placed directly with the introducing broker's clearing firm. SIA believes that the Commission should be mindful of the variety of correspondent arrangements that have developed for the benefit of money managers as well as their advisory clients and formally recognize that correspondent arrangements may take various forms and allocate functions and responsibilities (including in the four areas identified above) to the participating brokers in a way those brokers determine appropriate under SRO and SEC rules. In keeping with this, SIA suggests that all four conditions, although taken from past Commission and Staff precedent, do not need to be present to demonstrate that both the introducing broker and the clearing broker played a role in effecting a securities transaction, such that the money manager's receipt of research may fall within the safe harbor.

1. Commission Should Apply a Test For "Effecting Transactions" That Is Consistent Under the Federal Securities Laws

In the Proposing Release, the Commission cites the statutory language of Section 28(e) as the basis of its requirement that an introducing broker providing research must

[15] *See SEI Financial Services* (December 14, 1983).

[16] *See* 1986 Release at 16007.

also effect the related transactions.[17] SIA agrees that the test of whether research provided by an introducing broker may fall within the safe harbor should be whether the introducing broker effected the transaction.

The term "effect" is used in various places under the federal securities laws, and the Commission typically interprets it in its broadest terms.[18] For example, the Commission has typically interpreted Rule 10b-10, which requires a broker-dealer to send a confirmation in connection with each transaction it effects, to apply generally to transactions in which the broker-dealer has played a substantive role, but may not necessarily have met the four conditions for safe harbor treatment proposed in the Proposing Release. SIA believes the Commission should interpret the term "effecting transactions" within Section 28(e) on the same basis. [19] For example, in some

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[17] Section 28(e)(1) of the Exchange Act provides that:

> No person…shall be deemed to have acted unlawfully or to have breached a fiduciary duty…solely by reason of his having caused the account to pay a member of an exchange, broker or dealer an amount of commission for *effecting* a securities transaction in excess of the amount of commission another member of an exchange, broker or dealer would have charged for effecting that transaction, if such person determined in good faith that such amount of commission was reasonable in relation to the value of the brokerage and research services provided by such member, broker, or dealer, viewed in terms of either that particular transaction or his overall responsibilities with respect to the accounts as to which he exercises investment discretion. (Emphasis added) 15 U.S.C. § 78bb(e)(1).

[18] SIA also notes that the legislative history of Section 28(e) states that "[t]he definition of brokerage and research services is intended to comprehend the subject matter in the broadest terms, subject always to good faith standard in Subsection (e)(1)." Proposing Release at fn. 74 (citing Senate Comm. On Banking Housing and Urban Affairs, Securities Acts Amendments of 1975, S. Rep. No. 94-75, at 71 (1975), *reprinted* in 1975 U.S.C.C.A.N. 179, 240). We believe this implies that Congress intended a broad reading of the safe harbor. We recognize that the Commission has stated that "since Section 28(e) involves a statutory exemption for conduct which might otherwise constitute a breach of fiduciary duty by a money manager to his client, the Commission believes that the section should be construed in light of its limited purposes." Report of the Investigation of Investment Information Inc., 19 SEC Docket at 926. As discussed above, however, the express purpose of the "effecting" requirement was to preclude give-ups from falling within the Section 28(e) safe harbor. SIA believes that the Commission may preclude give-ups without imposing each of the four conditions enumerated in the Proposing Release.

[19] In the context of broker-dealer registration, the Commission also has interpreted the term "effect" extremely broadly. Through a long series of no-action letters and Commission guidance, the Commission and its Staff have generally considered a person who participates in securities transactions "at key points in the chain of distribution" to be effecting securities transactions. *See e.g., Progressive Technology Inc.* (October 11, 2000) (*citing Massachusetts Financial Services , Inc. v. Securities Investor Protection Corp.*, 411 F. Supp. 411, 415 (D. Mass), aff'd 545 F.2d 754 (1st Cir. 1976), cert. denied, 431 U.S. 904 (1977); *see also BD Advantage, Inc.* (October 11, 2000), and *BondGlobe, Inc.* (February 6, 2001). *See also Birchtree Financial Services* (September 22, 1998). With respect to soft dollar transactions, the Commission has stated that "where foreign broker-dealers provide research to U.S. investors pursuant to an express or implied understanding that the investor will direct a given amount of commission income to the foreign broker-dealer, the staff would consider the foreign broker-dealer to have induced purchases and sales of securities, irrespective of whether the trades received from the investor related to particular research that

correspondent arrangements, the introducing broker is responsible to the clearing broker for an introduced trade *only* from the time the introducing broker has received the order until it is accepted by the clearing broker for execution, clearance or settlement. Such arrangements take advantage of the operational efficiencies that permit smaller research providers to compete in today's marketplace. Clearly in those arrangements, the introducing broker would be deemed to be effecting the transaction under Rule 10b-10. SIA therefore requests that the Commission clarify that, where an introducing broker accepts an order as part of a normal and legitimate correspondent arrangement, the safe harbor would be available even if the introducing broker does not meet the Commission's four conditions, provided the introducing broker-dealer is obligated to confirm the transaction under Rule 10b-10. SIA is concerned that, if the Commission requires introducing brokers to meet all four conditions in order to qualify for the safe harbor, many introducing brokers will not be able to compete with larger firms, and may close or limit their business, leaving a much less competitive marketplace for research. SIA notes, however, the importance of the Commission providing certainty so that there is a level playing field in the structuring of commission sharing arrangements.

The SIA is also concerned that, if the Commission were to adopt the four conditions enumerated in the Proposing Release, the Commission would be imposing stricter requirements than those adopted by the FSA. In the U.K., many introducing brokers have entered into "Model B" clearing agreements pursuant to which the executing broker is solely responsible for settlement risk after the order is passed from the introducing broker to the executing broker. As discussed above, under this arrangement, the introducing broker would be deemed to effect the transactions under Rule 10b-10. SIA therefore requests that the Commission clarify that in such arrangements money managers are not precluded from relying on Section 28(e). This would help avoid the undesirable result of a money manager serving both U.S. and foreign clients not being able to rely on guidance provided by the FSA for transactions effected in the United Kingdom, thereby impeding cross border brokerage at a time when the two countries are seeking more efficient ways to integrate our financial markets.

2. Broker-Dealers May Reasonably Allocate Each of Four Functions Within Normal and Legitimate Correspondent Arrangements

SIA understands that historically, the Staff has relied on the presence of the four conditions required in the Proposing Release to help distinguish normal and legitimate correspondent arrangements from give-ups, particularly in situations where the money manager bypasses the introducing broker and transmits the order directly to the clearing

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has been provided." *See* Securities Exchange Act Release No. 25801 (June 14, 1988) (proposing Exchange Act Rule 15a-6). Clearly in that situation, the foreign broker-dealer would be seen as participating "at key points in the chain of distribution" of the resulting transactions. SIA is not suggesting that the Commission should consider the provision of research "effecting transactions" for purposes of the safe harbor. Instead, we merely note that the term "effecting" may reasonably be applied by the Commission for purposes of the safe harbor more broadly than stated in the Proposing Release.

broker. We believe, however, that in normal and legitimate correspondent arrangements, the introducing broker and the clearing broker may reasonably allocate each of those conditions, especially where the specific facts and circumstances of the arrangement require these conditions to be worked out between them.

For example, financial responsibility may not be an essential factor in determining whether a correspondent arrangement is "normal and legitimate," including where a money manager bypasses the introducing broker and transmits orders directly to the clearing broker for execution, clearance and settlement. In some arrangements parties to a clearing agreement may instead allocate financial responsibility based on the business needs of the firms, subject to applicable law. The parties to such arrangements also may allocate financial responsibility for a transaction depending on which broker-dealer (the introducing or the clearing firm) accepted the order, particularly to the extent that liability may result due to the actions of that broker-dealer. That allocation of responsibilities may seem a more reasonable allocation of risk, placing the burden on the firm accepting a transaction for execution.

In other arrangements, the clearing broker may accept an order on behalf of the introducing broker. In such an arrangement, the introducing broker might retain its recordkeeping responsibilities under Securities Exchange Act of 1934 ("Exchange Act") Rules 17a-3 and 17a-4, but would delegate the actual recordkeeping function to the clearing broker, which is in a far better position to create and maintain the records. Under the clearing agreement, the clearing broker would be required to make the records available to the introducing broker upon request. SIA requests that, if the Commission adopts an interpretation requiring the introducing broker to make or maintain records in order to qualify for the safe harbor, it clarify that the clearing broker may create and maintain the records on the introducing broker's behalf, understanding that the introducing broker remains responsible for the records, which the clearing broker would make available upon reasonable request.

The Commission also proposed to require introducing firms to generally monitor trading and settlements. Again, SIA requests that the Commission recognize that the clearing broker is often in a better position to monitor trading and settlement, including with respect to transactions for which the introducing broker may be financially responsible. SIA requests that the Commission clarify that although monitoring of trades and settlements is a factor in determining whether a transaction has been effected by an introducing broker, the clearing broker may perform this function, as part of a normal and legitimate correspondent arrangement, to the extent the parties determine that the clearing broker is in a better position to do so.

3. Treatment of Step Outs and Prime Brokerage Transactions

We agree with the Commission's statements confirming that, where each broker-dealer provides substantive functions in effecting trades (*e.g.*, clearance and settlement),

step-out transactions may be eligible for the safe harbor.[20] Related to this, SIA believes that, in a prime brokerage transaction effected pursuant to the terms of the Staff's *Prime Broker Committee* (January 25, 1994) no-action letter or its progeny, both the executing broker and the prime broker should be considered to effect the transaction for purposes of Section 28(e). We request that the Commission make this clear in any formal interpretation it approves.

E. CROSS-BORDER HARMONIZATION

We are pleased that the Commission has recognized that as the world's financial markets become more closely interconnected, harmonization of regulation is a cross-border issue, and has taken the FSA's work into account in developing its own positions.[21] We believe that the Proposing Release makes significant progress toward enhancing such harmonization. In those areas where differences remain, such as mass-marketing publications (we believe SEC standards are too broad, and FSA's too narrow), raw market data and seminar fees, and commission sharing, the respective regulators should continue their dialogue with a view toward narrowing those differences, subject to the need to respect and accommodate differences in market practices and regulatory schemes.

F. IMPLEMENTATION

The Commission's proposal to amend Section 28(e) includes proposals to amend its interpretation of Section 28(e) that would limit the definition of "research services" and for the first time define "brokerage" in addition to proposing the Four Conditions in correspondent arrangement. Implementation of any of these proposals would require significant changes in operations, relationships between broker-dealers and customers, as well as with another broker-dealer, and often new legal documentation. Given the magnitude of the changes proposed by the Commission, SIA requests that if any of the Commission's proposals are adopted in a form similar to that proposed that the Commission provide a significant length of time, that is not less than one year, for the industry to implement the amendments.

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[20] *See* Proposing Release at fn. 125. SIA requests clarification from the Commission that, in a step-out transaction it is the money manager's responsibility to ensure that it receives soft dollar credit solely for agency and "flat" riskless principal transactions that are eligible for the safe harbor. *See* Securities Exchange Act Release No. 45194 (December 27, 2001), 67 FR 6 (clarifying that the safe harbor applies to riskless principal transactions where the fees in connection with the transaction are fully disclosed on the confirmation and the transactions are reported under conditions that provide independent and objective verification of the transaction price subject to SRO oversight). This would be consistent with industry practice in which the stepped-out broker-dealer often does not report its execution capacity to the stepped-in broker-dealer.

[21] See Proposing Release at 61704-5.

G. CONCLUSION

SIA strongly believes that the thoughtful and pragmatic interpretive guidance that the Commission has provided in the Proposing Release will help maintain the integrity of, and public trust and confidence in, client commission arrangements. We are particularly pleased that the Commission recognizes the importance of such arrangements in leveling the playing field with respect to access to high quality research and execution services for small and large money managers alike for the benefit of their customers. Importantly, it also affirms that such benefits are available with respect to both third-party and proprietary research.

We repeat our concern that the temporal standard for brokerage may lead to unintended consequences that we have not yet considered. SIA therefore asks that if the Commission adopts a form of temporal standard for brokerage, that it be prepared and willing to modify such a standard and apply it flexibly, in the event such unintended consequences arise.

Although we recognize that client commission arrangements can pose potential conflicts with respect to a money manager's fiduciary duty to clients, such arrangements can, if appropriately utilized, help maximize the value obtained by clients for such commissions, and thus facilitate the money manager's fulfillment of its fiduciary duties. The Commission appears to recognize this and has chosen to provide thoughtful interpretive guidance rather than taking a proscriptive approach.

With regard to commission-sharing arrangements, we urge the Commission to carefully consider our comments with a view toward avoiding unintended consequences. These arrangements often reflect the reality that in any given transactional context the best research and the best execution are not always found in the same place. Therefore, such arrangements often afford the best opportunity to achieve both, and it would be unfortunate if any requirements or restrictions imposed on such arrangements impede achieving those objectives.

Finally, we would note that regardless of whether the Commission ultimately determines to issue any further requirements or guidance with respect to transparency, the proposed interpretive guidance already makes a substantial contribution to meeting one of the goals of transparency – assuring that only those products and services that enhance the investment-decision process or execution quality will be obtained through client commission arrangements.

Once again, we appreciate the opportunity to comment and should you have any questions regarding this letter please communicate with the undersigned at 202-216-2000, or Michael D. Udoff of SIA staff at 212-618-0509.

Sincerely,

Ira D. Hammerman
Senior Vice President and
General Counsel

cc: The Honorable Christopher Cox, Chairman
The Honorable Cynthia Glassman, Commissioner
The Honorable Paul Atkins, Commissioner
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