November 23, 2005

*Via Electronic Filing*

Mr. Jonathan G. Katz
Secretary
Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-9303

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

Dear Mr. Katz:

The Investment Adviser Association[1] appreciates the opportunity to comment on the Commission's proposed interpretation of client commission practices by investment advisers under the safe harbor of Section 28(e) of the Securities Exchange Act of 1934.[2] We commend the Commission for providing guidance regarding the use of client commissions by a fiduciary to lawfully receive brokerage and research services that assist in the adviser's investment decision-making responsibilities. This is an important issue both for investment advisers and investors.

The IAA has actively supported full and fair disclosure of the use of client commissions for research and brokerage services under the safe harbor of Section 28(e).[3]

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[1] The Investment Adviser Association (formerly the Investment Counsel Association of America) is a not-for-profit association that represents the interests of SEC-registered investment advisory firms. Founded in 1937, the IAA's membership today consists of more than 400 firms that collectively manage in excess of $5 trillion in assets for a wide variety of individual and institutional clients. For more information, please visit our web site: www.investmentadviser.org.

[2] *Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934*, Rel. No. 34-52635; File No. S7-09-05 (Oct. 19, 2005), as published in 70 Fed. Reg. 61700 (Oct. 25, 2005) (Proposal). The Proposal uses the phrase "client commission" practices or arrangements under Section 28(e) to avoid any confusion that may arise over the phrase "soft dollars." Proposal at 3, n. 2. The Proposal is available at http://www.sec.gov/rules/interp/34-52635.pdf.

[3] *See* ICAA Statement Re: Soft Dollars (Mar. 3, 2004) ("ICAA Statement"); Written Statement of Geoffrey I. Edelstein, Managing Director of Westcap Investors, "*Review of Current Investigations and Regulatory Actions Regarding the Mutual Fund Industry: Examining Soft-Dollar Practices*," Before the U.S. Senate Committee on Banking, Housing, and Urban Affairs (Mar. 31, 2004) ("ICAA Testimony"). Both documents are available on our website under "Comments & Statements."

As a fiduciary, an investment adviser has an obligation to seek best execution in connection with client transactions and to disclose potential conflicts of interest to existing and prospective clients. The duty of best execution requires an adviser to seek to execute securities transactions for clients in such a manner that the client's total cost or proceeds is the most favorable under the circumstances.[4] In addition to enhanced disclosure requirements, we have supported the Commission's efforts to clarify the types of products and services that constitute permissible research under current law and have encouraged the preservation of third-party research under the safe harbor.[5] Further, we commented during the U.K. Financial Services Authority's rulemaking regarding the FSA's decision to encourage an industry-led solution on transparency and accountability regarding softing and bundling arrangements.[6]

We are pleased to provide our comments on the Proposal. Specifically, we respectfully request that the Commission:

1. Acknowledge that certain products and services, including order management systems, post-trade analytics, and proxy voting services, may be eligible under the safe harbor of Section 28(e) as brokerage or research services (either in full or under a "mixed-use" analysis);
2. Reconsider its discussion of bundled products in the mixed-use section of the Proposal;
3. Clarify the applicability of the Section 28(e) safe harbor to certain relationships and practices;
4. Confirm that advisers are not responsible for ensuring broker-dealers' compliance with the proposed guidance for commission-sharing arrangements; and
5. Allow firms sufficient time to implement the final interpretation.

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[4] *See Interpretive Release Concerning the Scope of Section 28(e) of the Securities Exchange Act of 1934 and Related Matters*, SEC Rel. No. 34-23170 (Apr. 23, 1986), 51 Fed. Reg. 16004 (Apr. 30, 1986) ("1986 Release") at Section V.

[5] *See* ICAA Statement and ICAA Testimony, *supra*, n. 3.

[6] *See* IAA Letter to UK FSA regarding CP 05/5 on Bundled Brokerage/Soft Commission (May 31, 2005) (commenting on final FSA proposed rules regarding eligible criteria for research and execution services). *See also*, ICAA Letter to UK FSA regarding PS 04/23 on Soft Dollars/Bundled Brokerage (Dec. 16, 2004) (commenting on policy statement regarding which products and services may be paid for with commissions); ICAA Letter to UK FSA regarding CP 176 on Bundled Brokerage and Soft Commission Arrangements (Oct. 9, 2003) (commenting on proposal to mandate that the costs of non-execution services be rebated back to clients) ("2003 ICAA Letter to FSA"). Each letter is available on our website under "Comments & Statements."

## Background

The Commission issued the Proposal for public comment after receiving recommendations from the Task Force on Soft Dollars.[7] We understand the Task Force evaluated soft dollar arrangements to recommend the parameters of eligible "brokerage and research services" under Section 28(e), as well as to consider requiring additional disclosure and recordkeeping requirements of client commission arrangements.[8] In particular, the Proposal seeks to clarify "the scope of 'brokerage and research services' in light of evolving technologies and industry practices."[9] The Proposal is the Commission's first comprehensive, substantive change in its interpretative views on client commission practices since its 1986 Release on the scope of Section 28(e).[10]

## 1. The Commission Should Clarify the Eligibility of Certain Brokerage or Research Services.

The Proposal provides that in determining whether a product or service is eligible "research," the adviser "must conclude that it reflects the expression of reasoning or knowledge and relates to the subject matter identified in Section 28(e)(3)(A) or (B)."[11] "Brokerage services" include activities required to effect securities transactions and functions incidental thereto.[12] The Commission introduced a new temporal standard in the Proposal, which provides that "brokerage begins when the money manager communicates with the broker-dealer for the purpose of transmitting an order for execution and ends when funds or securities are delivered or credited to the advised account or the account holder's agent."[13]

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[7] In 2004, Chairman William H. Donaldson created an agency-wide Task Force on Soft Dollars, which conducted a review of client commission practices. Proposal at 4, n. 7. The IAA and several of its members met with the Task Force, including the Divisions of Market Regulation and Investment Management, during 2004 to discuss advisers' soft dollar practices and how changes in soft dollar regulation would affect advisers and investors.

[8] The Proposal notes the Commission is also considering whether to propose requirements for disclosure and recordkeeping of client commission arrangements. Proposal at 4, n. 7.

[9] Proposal at 2-3.

[10] The Proposal provides a revised interpretation that replaces only Section II ("Definition of Brokerage and Research Services") and Section III ("Third Party Research") of the 1986 Release. Proposal at 20.

[11] Proposal at 28. We understand eligible products and services to include both written and oral communications and access to such communications where the content otherwise satisfies the criteria for research. *See id.* (seminars and conferences are eligible where the content satisfies the 28(e) criteria).

[12] Proposal at 32 (citing Section 28(e)(3)(C)).

[13] Proposal at 34.

The Commission requested comment on whether the guidance is sufficient with respect to the eligibility of "research" and "brokerage" services, functions, and products under Section 28(e).[14] We believe a few areas require additional guidance. Specifically, we request that the Commission reconsider its exclusion of order management systems (OMS) as eligible research or brokerage products or services, or acknowledge they may qualify as mixed-use items under the appropriate standard.[15] Further, we request confirmation that post-trade analytics and proxy voting services may be considered eligible research under the safe harbor, or at least mixed-use items.

a. Order Management Systems Should Be Eligible Under the Safe Harbor.

We respectfully request that the Commission reconsider its conclusion with respect to OMS used by advisers. We believe that the Proposal does not fully consider all the functions of OMS, which are clearly within the scope of lawful brokerage or research services, as defined in the Proposal. At a minimum, we urge the Commission to acknowledge that OMS are mixed-use products.

Activities that are required to effect securities transactions are protected under the statutory safe harbor under Section 28(e)(3)(C). The Proposal states that "trading software operated by a broker-dealer to route orders to market centers" is "brokerage" and that "brokerage services can include connectivity services and trading software where they are used to transmit orders to the broker, because this transmission of orders has traditionally been considered a core part of the brokerage service."[16] Further, it states that "connectivity service" between the adviser and the broker-dealer, including "dedicated lines between the broker-dealer and the money manager's order management system" satisfies the proposed temporal standard of "brokerage services."[17] In addition to activities required to effect securities transactions, Section 28(e)(3)(C) provides that functions "incidental thereto" are eligible for the safe harbor.[18]

Despite these conclusions, the Proposal provides that "order management systems ('OMS') used by money managers to manage their orders . . . are not eligible for the safe harbor as 'brokerage' because they are not sufficiently related to the order execution and

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[14] Proposal at 47.

[15] If the product or service has a mixed use, the adviser would be required to make a reasonable allocation of the cost of the product or service according to its use and keep adequate books and records concerning the allocation to make the required good faith showing. *See* Proposal at 37 (reiterating the Commission's guidance in the 1986 Release regarding the mixed-use standard). Moreover, an adviser should disclose the allocation determination itself, which is a potential conflict of interest. *See* Proposal at 36 (citing the 1986 Release).

[16] Proposal at 35, n. 97.

[17] Proposal at 34-35.

[18] Proposal at 32.

fall outside the temporal standard for 'brokerage' under the safe harbor."[19] We believe the Commission's approach to simply exclude OMS, but not their dedicated lines, is inconsistent and does not reflect the usage of brokerage services by advisers to communicate trades to broker-dealers and to make investment decisions about a client's portfolio.

Many advisers use OMS (supplied by vendors or created in-house) for a variety of functions, including electronic trading, portfolio modeling, FIX connections,[20] and compliance monitoring.[21] Importantly, OMS is a critical component of achieving straight-through-processing from the point of order through execution. OMS are used by advisers to maintain connectivity to broker-dealers and do in fact transmit orders to broker-dealers or an electronic exchange, and are thus sufficiently related to order execution. To the extent OMS provide electronic trading and FIX connections, they appear to fall within the statutory definition and proposed temporal standard of brokerage.

We believe the final interpretation should permit advisers to analyze the product under the statutory standard and under the Commission's 1986 mixed-use standard (reaffirmed in the Proposal). Advisers should be able to determine the extent to which the functions of OMS provide lawful and appropriate assistance in carrying out their responsibilities under Section 28(e). If the OMS are used for any purpose that is ineligible under the statutory definition of brokerage, advisers would be obligated to treat them as mixed-use items and the costs would be allocated between client commissions and the adviser's funds according to their use.

In addition to brokerage products or services, OMS may be considered research products or services. Many advisers use OMS to assist in the investment decision-making process regarding a client's cash balances, including monitoring cash in a real-time basis in order to determine how to invest a client's money. In addition, OMS are used for portfolio modeling and securities and sector allocations, and to analyze portfolio strategies. These functions assist in the investment-decision making process.

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[19] Proposal at 35. Indeed, the Commission may be too limited in its temporal interpretation of the statute. For example, it is unclear why management of orders or discussions with brokers prior to actually sending the trade should not be considered functions incidental to execution.

[20] The Financial Information eXchange ("FIX") Protocol is a technical specification for electronic communication of trade-related messages and allows broker-dealers to understand an adviser's order. *See* http://www.fixprotocol.org/.

[21] For example, some advisers use LongView Trading, which is a "global, multi-asset class order management system developed to support portfolio managers, traders, compliance officers and operations personnel. The comprehensive system provides portfolio modeling, electronic trading, compliance monitoring and FIX connections across all asset classes.…To further facilitate STP, the system offers unparalleled access to global liquidity through supported FIX connections." *See* http://www.fixprotocol.org/vendors/4951.

Accordingly, we request that the Commission remove the blanket exclusion for OMS and permit advisers to apply a mixed-use analysis as they would to other mixed-use items.

b. Post-Trade Analytics Should Be Eligible Under the Safe Harbor.

The Proposal states that "to the extent that money managers use trade analytics both for research and to assist in fulfilling contractual obligations to the client or to assess whether they have complied with their own regulatory or fiduciary obligations such as the duty of best execution or for other internal compliance purposes, the trade analytical software is a mixed-use product, and managers must use their own funds to pay for the allocable portion of the cost of the software that is not within the safe harbor because it is attributable to internal compliance purposes."[22] The Proposal seeks comment on whether the Commission provides appropriate guidance as to the eligibility of "trade analytical software" under Section 28(e).

We strongly believe that post-trade analytics should be considered research and thus agree with the portion of the Proposal that states that post-trade analytical software may be considered "research" to the extent that it assists with the adviser's investment decision-making responsibilities. The software provides information relating to the advisability of investing in securities and analysis concerning the performance of accounts, as provided for in Section 28(e)(3)(B). Specifically, these products provide advisers with important data to determine the effect of commissions and the market impact of a securities transaction on a portfolio's performance. They assist advisers in determining how poor execution by a broker-dealer and the rate of commission costs affect portfolio performance. Thus, these services provide an expression of knowledge about how a transaction in a specific security may affect the client's portfolio performance.[23]

c. Certain Aspects of Proxy Voting Services Should Be Eligible Under the Safe Harbor.

The Proposal does not address whether proxy voting services are an eligible product or service under the safe harbor.[24] We seek confirmation that advisers may continue to treat these services as research or a mixed-use item to the extent that the product or service is utilized to assist the adviser in its investment decision-making responsibilities.

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[22] Proposal at 35, n. 98.

[23] Moreover, the FSA in its final rules permitted post-trade analytics to be an eligible research service if it meets certain criteria. *See* FSA PS 05/5: Bundled brokerage and soft commission arrangements, Feedback on CP 05/5 and final rules (July 2005) at 10-11, at http://www.fsa.gov.uk/pubs/policy/ps05_09.pdf.

[24] *See* Proposal at 48.

Some proxy voting services, as a portion of their services, provide research assessing the impact of proxy proposals on shareholder value for important issues, such as a company's executive compensation and incentives; stock option plans (in which the services recommend the cost of pay plans and compare them to the company's peers); board structure and practices, including shareholder influence on the election of board members; mergers and acquisitions and their effect on board structure, practice and remuneration; requests for capital authorization; contested solicitations; shareholder proposals; and social and environmental responsibilities.[25] Firms that purchase the administrative and research portions of proxy voting services often pay for the administrative functions of the electronic services with their own money under a mixed-use allocation. Firms may have separate business unit functions that use the research and vote proxies. Depending on the issue raised on the ballot, many firms use that research to determine whether to purchase or sell a specific security. Accordingly, we request confirmation that proxy voting products or services that provide research are eligible under the statutory language of Section 28(e) and may also be considered a mixed-use item.

**2. The Commission Should Reconsider its Discussion of Bundled Products in the Mixed-Use Section of the Proposal.**

We request clarification regarding the Commission's guidance regarding mixed-use allocation in a bundled commission rate scenario, which provides:

> Similarly, if the money manager seeks the protection of the safe harbor and receives both Section 28(e) eligible and ineligible products and services for a bundled commission rate, the manager must use his own funds to pay for the allocable portion of the cost of products and services that are not within the safe harbor.[26]

We are concerned about this statement to the extent it implies that advisers should determine the cost and pay for ineligible products and services that a broker-dealer provides in addition to execution for a single commission charge. In the very common situation discussed below where an adviser does not and cannot specifically negotiate what it will receive as part of a bundled rate, the requirement simply does not work.

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[25] *See, e.g.*, Institutional Shareholder Services' website, which describes the proxy voting research services it offers, available at http://www.issproxy.com/institutional/research/index.jsp.

[26] Proposal at 37, n. 108. We note that the Proposal includes this requirement under the subject heading of "Mixed-Use." The general understanding of mixed-use allocation has to do with various uses by the adviser of the same item. This footnote, however, appears to address separating out the cost of a single commission charge among all the products and services provided by a broker-dealer in addition to execution, in order to pay for ineligible items with an adviser's own funds ("unbundling" the commission charge).

It would be very difficult for advisers to determine the actual cost or value of any ineligible products or services provided as part of a bundled commission charge.[27] Broker-dealers often provide many products and services in addition to execution, *i.e.*, access to analysts, commitment of capital, advice regarding executions, access to investments, and capital introductions. There is no separate charge, line item, invoice, or discussion from broker-dealers regarding the costs of eligible or ineligible products that advisers may receive (solicited or unsolicited). As we noted in response to the FSA's initial proposal to mandate that advisers rebate non-execution services back to clients, no regulatory requirement exists for broker-dealers to provide invoices apart from commission charges for various components of the services they provide.[28] Therefore, an adviser cannot negotiate out and pay separately for those ineligible items that may be received as part of bundled commission charges, as the footnote appears to propose.

It has not been previously understood that an adviser must unbundle commissions charged by full-service broker-dealers between the execution cost and the various products and services generated by the broker-dealer that the adviser may or may not use. Moreover, we believe there is much confusion generally about the Commission's intent and expectation with respect to this footnote. Given the potential important and far-reaching effects, we request that the Commission reconsider the inclusion of this footnote in the release. If appropriate, the Commission could instead address this issue in a future disclosure and recordkeeping rule proposal regarding client commissions. This will permit all parties involved -- advisers, brokers, third-party research providers, and investors -- to provide meaningful input about the practical implications of the proposed guidance. If, however, the Commission determines to adopt the proposed guidance as is, we urge it to do so prospectively only and to provide advisers with specific guidance regarding how to achieve such results within the current industry framework.

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[27] The complexity of unbundling is illustrated by the results in the November 11, 2004 NASD Mutual Fund Task Force Report on Soft Dollars and Portfolio Transaction Costs ("NASD Report"). The Task Force was comprised of senior industry executives from broker-dealers and mutual fund management companies, as well as representatives from the academic and legal communities. It considered whether it is possible for an adviser to provide a mutual fund board with a good faith estimate of the total dollar amount of proprietary research obtained with fund brokerage commissions. The Task Force determined it was unable to reach a consensus on the issue. It noted that sharp disagreement exists over the value to fund boards and investors of estimates of the amount of proprietary research (and presumably other non-execution or research items) obtained with fund brokerage. *See* NASD Report at 9, available at http://www.nasd.com/web/groups/rules_regs/documents/rules_regs/nasdw_012356.pdf.

[28] *See* 2003 ICAA Letter to FSA, *supra*, n. 6. In addition to describing eligible criteria for research or execution service in CP 05/5 on Bundled Brokerage/Soft Commission, the FSA withdrew its rebate proposal and announced it expects that the Investment Management Association's Disclosure Code ("IMA Code") (Mar. 2005) will become the standard means of disclosure of client commissions for UK funds. The IMA Code requires firms to disclose their "negotiation process with respect to agreeing on an ex-ante basis for the execution component of the 'At Full Service' rate of commission and to agreeing on services received for the residual." IMA Code at 9.

**3. The Commission Should Confirm the Applicability of Section 28(e) Safe Harbor to Certain Relationships and Practices.**

We seek clarification that advisers may be deemed to satisfy the safe harbor when a broker-dealer provides or makes available unsolicited or incidental products or services as part of a package of brokerage or custodial services that would otherwise satisfy Section 28(e).

We respectfully submit that the eligibility standards for brokerage or research services under the safe harbor should apply only to those products or services that form the basis for which the adviser is paying more than the lowest available commission. The adviser should be deemed to be using client commissions to obtain products and services only when the adviser negotiates for, solicits, or values these services in the brokerage decision-making process and pays more than the lowest available commission for them. In other words, when a broker-dealer provides an adviser with products and services for which the adviser did not negotiate or solicit, the adviser should not be deemed to have paid for those products and services, and therefore, it is not *paying up for* them.

This situation commonly occurs in the context of an adviser's selection of full-service broker-dealers for execution of client trades. For example, the adviser may select a full-service broker-dealer based on its superior execution capabilities and determine that the commissions paid are reasonable in relation to the value of that superior execution capability (including willingness to commit capital for trades, ability to work difficult orders, and the like). The broker-dealer may then send or make available to the adviser unsolicited proprietary research reports for the bundled commission rate, including reports that the adviser may not use in the investment decision-making process. The adviser should not have to pay for unwanted and unsolicited reports in order to stay within the protection of the safe harbor.[29]

It is important to note that most advisers do not have the size or leverage to be able to negotiate bundled commission rates down to reflect their willingness to forego some or all research reports or other products and services. In this industry, most of the assets under management (and therefore commissions to be generated) are highly concentrated in a relatively few firms. SEC data (as of April 2005) reflect that firms with $10 billion or more under management represent 4% of all registered firms, but manage 83% of the assets.[30] Similarly, the vast majority (more than 5,800) of SEC-registered

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[29] If receipt of unsolicited products or services were to cause the adviser to lose the protection of the safe harbor, the Commission would effectively prohibit what in any other industry would be considered a good business practice. In a free market, all businesses seek to find new ways to improve client service in order to promote client goodwill and satisfaction. Often they do it at no charge, so that the customer may try out the new product or service and become familiar with it. If extra unsolicited services are discouraged, innovation may be chilled.

[30] IAA and National Regulatory Services, *Evolution/Revolution: A Profile of the Investment Advisory Profession* (June 2005) at 3. A copy of the report is available on our website.

investment advisers have ten or fewer employees. Accordingly, even though these firms may not want or use all of the products or services provided, they have no ability to negotiate a correspondingly lower commission cost.

Similarly, an adviser should not be deemed to be using client commissions outside the safe harbor to obtain products and services that broker-dealers provide as part of a custodial platform. In addition to custody and execution, these platforms may include technology that provides access to client account data, facilitates trade execution and allocation of client orders, provides research, market data and pricing information, and assists with back-office support, recordkeeping, and client reporting. In addition, as a sound business practice, these custodians/broker-dealers may provide educational and compliance materials to investment advisers to ensure that their business partners understand the relevant regulatory environment. These products and services, which may or may not be eligible, are made available to all advisers using the custodial platform as part of a total relationship, regardless of the amount of commissions generated. Accordingly, receipt or availability of these types of products or services should not cause an adviser to lose the protection of Section 28(e).

Regardless whether the relationship satisfies the framework of Section 28(e), we believe that an adviser should disclose products or services received from a third party that may create a conflict of interest. We understand that many custodian/broker-dealers encourage such disclosure as well.

**4. The Commission Should Confirm that Advisers Are Not Responsible for Ensuring Broker-Dealers' Compliance with the Proposed Guidance for Commission-Sharing Arrangements.**

The Commission seeks comment regarding its guidance on commission-sharing arrangements.[31] We request confirmation that an adviser is not responsible for ensuring an introducing broker-dealer's compliance with the Commission's proposed elements required for a commission-sharing arrangement.

As the Proposal notes, some advisers use commission-sharing arrangements to execute trades with one broker-dealer and obtain research or other services from a different broker-dealer.[32] The Proposal states that a commission-sharing arrangement under which research and brokerage services are provided under the safe harbor must be part of a normal and legitimate correspondent relationship in which each broker-dealer is engaged in securities activities of a more extensive nature than merely the receipt of commissions paid to it by other broker-dealers for research services provided to advisers

[31] Proposal at 48.

[32] Proposal at 43.

(*i.e.*, the "effecting securities transactions" requirement).[33] The Commission provides that this requires that the introducing broker must: (i) be financially responsible to the clearing broker-dealer for all customer trades until the clearing-broker has received payment or securities; (ii) make and/or maintain records relating to its customer trades required by Commission or SRO rules, including blotters and memoranda of orders; (iii) monitor and respond to customer comments concerning the trading process; and (iv) generally monitor trades and settlements.[34]

Advisers are not in a position to determine the nature of the relationship or have knowledge of agreements between an introducing broker-dealer and a clearing broker-dealer. In addition, advisers do not have information regarding the broker-dealer's recordkeeping and monitoring systems. Accordingly, the Commission should confirm that advisers are not legally obligated to ensure that an introducing broker-dealer complies with the specific proposed elements.[35]

**5. The Commission Should Provide Sufficient Time to Comply With the Final Interpretation.**

The Proposal seeks comment on whether the Commission should afford firms time to implement the final interpretation.[36] We strongly encourage the Commission to provide advisers a meaningful opportunity to evaluate how the final interpretation will apply to their current soft dollar arrangements, including both full-service brokerage and third-party research arrangements, as well as policies and procedures that may need to be revised and implemented. In addition, advisers will need to consider their existing soft dollar credits. Further, many third-party research contracts are negotiated for the adviser's fiscal year during which an adviser may be bound by the terms of the agreement. Accordingly, we respectfully request that the Commission adopt a compliance date twelve months from the date the final interpretative release is published

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[33] Proposal at 41-46. The Proposal notes that in "the 1986 Release, the Commission indicated that payment of part of a commission to a broker-dealer who is a 'normal and legitimate correspondent' of the executing or clearing broker-dealer would not necessarily be a 'give-up,' outside the protection of Section 28(e)." Proposal at 42 (citing 1986 Release at III). In addition, a broker-dealer effecting the trade must be legally obligated to a third-party producer of research or brokerage services to pay for the service provided to the adviser. Proposal at 46.

[34] Proposal at 46.

[35] If the Commission decides that advisers have some responsibility in this area, it should confirm that advisers are permitted to rely on a good faith belief after reasonable due diligence that the commission-sharing arrangement satisfies the required elements. This could include, for example, receiving a certification, representation, or other such assurance that the introducing broker-dealer is compliant with the final interpretative guidance issued by the Commission regarding commission-sharing arrangements.

[36] Proposal at 49.

in the Federal Register.[37] However, for existing agreements, we request a compliance date of the later of twelve months or the expiration of the contract. This should ensure sufficient time to evaluate the arrangement in light of the final interpretation and prevent advisers from being out of compliance with the final interpretation if the terms of their current agreements have not yet expired.

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We appreciate the opportunity to provide our views on these important issues and would be pleased to provide any additional information the Commission or its staff may request. Please do not hesitate to contact the undersigned, or Karen L. Barr, General Counsel, to discuss any questions the Commission or its staff may have.

Sincerely,

Monique S. Botkin
Counsel

cc: The Honorable Christopher Cox
The Honorable Cynthia A. Glassman
The Honorable Paul S. Atkins
The Honorable Roel C. Campos
The Honorable Annette L. Nazareth

Mr. Robert L.D. Colby, Acting Director, Division of Market Regulation
Mr. Larry E. Bergmann, Associate Director, Division of Market Regulation
Mr. Meyer Eisenberg, Acting Director, Division of Investment Management
Mr. Robert E. Plaze, Associate Director, Division of Investment Management

[37] To the extent that the Commission does not take our suggestion with respect to footnote 108, we request additional time to address all of its implications.