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March 29, 2005

VIA E-MAIL (rule-comments@sec.gov)

Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Re: Certain Broker-Dealers Deemed Not to be Investment Advisers; Release Nos. 34-50980; IA-2340; File No. S7-25-99

Dear Mr. Katz,

This letter is in furtherance of our February 7, 2005 comment letter on the above-referenced rule proposal. In our letter, we expressed significant concerns about the Commission's proposal to, in essence, treat discretionary brokerage as an investment advisory service for purposes of the Investment Advisers Act of 1940 ("Advisers Act"). In this connection, we provided specific examples of transactions in which a broker-dealer might be viewed as having exercised investment discretion in circumstances that, in our view, would not warrant application of the Advisers Act and would hinder broker-dealers in effecting transactions for customer accounts.

On further reflection and after discussions with many of our broker-dealer clients, we have developed more concrete suggestions in the form of proposed rule text that could follow paragraph (b) of proposed Advisers Act Rule 202(a)(11)-1. Our proposed rule text would exclude from the concept of exercising investment discretion certain activities in which broker-dealers engage that might otherwise be viewed as involving the exercise of investment discretion as broadly defined by Section 3(a)(35) of the Securities Exchange Act of 1934. The proposed rule text is attached for your consideration (the proposed rule text is underlined).

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The listing in the proposed rule text of specific activities is intended to be non-exclusive (to avoid any presumption that a broker-dealer had exercised investment discretion in connection with an activity we had not contemplated) and, we think, should be accompanied by explanations in the Rule's adopting release, such as the illustrations we provided in our February 7th letter. Finally, we would like to underscore our view that, given all the reasons set forth in our February 7th letter, there is no justification to apply the Advisers Act to these types of activities, particularly in view of the proposed disclosures that are incorporated into the Rule as proposed.

Thank you for giving us the opportunity to comment.

Very truly yours,

Steven W. Stone

cc: The Hon. William H. Donaldson, Chairman
The Hon. Paul S. Atkins, Commissioner
The Hon. Cynthia A. Glassman, Commissioner
The Hon. Harvey J. Goldschmid, Commissioner
The Hon. Roel C. Campos, Commissioner
Paul F. Roye, Director, Division of Investment Management
Robert Plaze, Associate Director, Division of Investment Management
Robert L. Tuleya, Senior Counsel, Division of Investment Management
Nancy M. Morris, Attorney-Fellow, Division of Investment Management

Rule 202(a)(11)-1

(b) A broker or dealer that exercises investment discretion, as that term is defined in section 3(a)(35) of the Exchange Act (15 U.S.C. 78c(a)(35)), over customer accounts provides advice that is not solely incidental to the conduct of its business as a broker or dealer within the meaning of section 202(a)(11)(C) of the Advisers Act (15 U.S.C. 80b-2(a)(11)(C)). For purposes of this paragraph (b), a broker or dealer shall not be deemed to exercise investment discretion over a customer account solely by reason of exercising discretion with respect to: (i) purchases or sales of securities limited by instructions or criteria specified or confirmed by the customer in writing; (ii) a customer's account for a limited amount of time (not to exceed 120 calendar days); (iii) the price at which or the time when an order given by a customer for the purchase or sale of a definite amount of a specified security or securities shall be executed; (iv) bulk exchanges at net asset value of money market mutual funds carried out in accordance with the rules, stated policies, practices, or interpretations of a self-regulatory organization of which the broker or dealer is a member; (v) purchases and sales of securities to satisfy margin requirements established by the broker or dealer under the securities laws (as that term is defined in section 3(a)(47) of the Exchange Act (15 U.S.C. 78c(a)(47))) and the rules thereunder, or under the rules of a self-regulatory organization, or similar requirements established by the broker or dealer for its own protection; (vi) purchases and sales of securities by or for an account in which an associated person of the broker or dealer has beneficial ownership, as that term would be interpreted under § 240.16a-1(a)(2) of this chapter in determining whether a person has beneficial ownership of a security for purposes of section 16 of the Exchange Act (15 U.S.C. 78p); or (vii) the selection of an investment adviser to exercise investment discretion over the customer account. No presumption shall arise that a broker or dealer has exercised discretion over a customer account for purposes of this paragraph (b) solely by reason of the broker or dealer exercising discretion in a manner not described in clauses (i) through (vii) above.