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Memorandum

SEC Rulemakings and Interpretations Addressing Investment Adviser and Broker-Dealer Standards of Conduct and Disclosure Obligations

June 20, 2019

The Securities and Exchange Commission ("SEC") recently adopted a package of rulemakings and interpretations that address the standards of conduct and disclosure obligations applicable to investment advisers and broker-dealers. Specifically, the SEC: (i) published an interpretation of the standard of conduct for investment advisers (the "Adviser Fiduciary Interpretation"); (ii) adopted Form CRS, a customer relationship summary form that registered investment advisers and broker-dealers must provide to retail investors; (iii) adopted Regulation Best Interest, which establishes a standard of conduct for broker-dealers and their associated persons; and (iv) published an interpretation of the "solely incidental" prong of the broker-dealer exclusion from the "investment adviser" definition under the Investment Advisers Act of 1940 (the "Advisers Act") (collectively, the "SEC Releases").[1]

We summarize below our key takeaways from the SEC Releases for fund managers, focusing primarily on the Adviser Fiduciary Interpretation. Following our key takeaways is a more in-depth summary of the SEC Releases, again focusing primarily on the Adviser Fiduciary Interpretation.

Key Takeaways

In line with SEC Chairman Jay Clayton's ongoing focus on retail investors, the primary goal of the SEC Releases is to enhance the protections afforded to retail investors. As such, the SEC Releases will have a more significant impact on advisory and brokerage relationships with retail investors than on advisory and

[1] Commission Interpretation Regarding Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248 (June 5, 2019); Form CRS Relationship Summary; Amendments to Form ADV, Investment Advisers Act, Exchange Act Release Nos. 34-86032; IA-5247 (June 5, 2019); Regulation Best Interest: The Broker-Dealer Standard of Conduct, Exchange Act Release No. 34-86031 (June 5, 2019); Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, Investment Advisers Act Release No. IA-5249 (June 5, 2019).

brokerage relationships with institutional investors. For investment management firms that only advise private investment funds and other institutional clients, the SEC Releases should have a limited effect on their businesses.

An Investment Adviser's Fiduciary Duty: Not surprisingly, the SEC characterizes an investment adviser's fiduciary duty as comprising both a duty of care and a duty of loyalty. The SEC has historically focused on an adviser's duty of loyalty, which can be satisfied through disclosure. Perhaps one of the more notable aspects of the Adviser Fiduciary Interpretation is its discussion of a duty of care concept that may not be adequately addressed solely through disclosure—advice must be in the "best interest" of the advisory client. What is less clear is what this may mean in practical terms, and whether the SEC has the authority to bring enforcement actions for alleged violations of Section 206 of the Advisers Act—an anti-fraud provision—that are not grounded in disclosure violations.

Duty of Loyalty and Sufficiency of Conflict Disclosures: The Adviser Fiduciary Interpretation reaffirms that an adviser may satisfy its duty of loyalty by fully and fairly disclosing a conflict of interest and obtaining the client's informed consent, which can be implicit in certain circumstances. Although the SEC expresses concerns that the disclosure of more complex and extensive conflicts may not be sufficiently understandable to enable clients to provide informed consent, the SEC emphasizes that institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications.

Investment Allocation: In the Adviser Fiduciary Interpretation, the SEC confirms that an investment adviser need not have *pro rata* allocation policies, or any particular method of allocation. Significantly, the Adviser Fiduciary Interpretation also confirms that an adviser and a client may agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to that client. This confirmation preserves important co-investment and other practices within the private fund industry.

Retail Clients vs. Institutional Clients: While the SEC has previously recognized that a client's level of sophistication is a relevant factor to consider in determining whether the Advisers Act's anti-fraud provisions have been violated,[2] the Adviser Fiduciary Interpretation marks the first time the SEC has explicitly articulated that the nature of an adviser's fiduciary duty to a client varies significantly depending on whether the client is retail or institutional.

Use of the Word "May" and Level of Specificity in Disclosures: The Adviser Fiduciary Interpretation provides guidance on the appropriate level of specificity for disclosures of material facts and conflicts of interest and when the word "may" could be used in describing actual and potential conflicts. This SEC

[2] *See, e.g.*, Heitman Capital Mgmt., LLC, SEC No-Action Letter, 2007 WL 789073 (Feb. 12, 2007) (focusing on a client's level of sophistication, among other factors, in discussing the circumstances under which a hedge clause in an investment advisory agreement would violate the Advisers Act's anti-fraud provisions).

guidance is more detailed than any prior SEC or staff guidance on these topics. For example, the SEC states that an adviser's disclosure that it "may" have a particular conflict, without more, would be inadequate when the conflict actually exists. Accordingly, managers of funds should assess whether any enhancements should be made to their disclosure documents in light of the guidance.

Hedge Clauses: The Adviser Fiduciary Interpretation provides new guidance regarding the permissibility of "hedge clauses" in advisory agreements, which purport to limit an adviser's liability under the agreement. Although the SEC, in providing this new guidance, formally withdrew the *Heitman* no-action letter,[3] the view expressed by the SEC in the interpretation with respect to hedge clauses in advisory agreements with institutional clients largely mirrors the view previously expressed in *Heitman*; that is, whether a hedge clause in an agreement with an institutional client violates the Advisers Act's anti-fraud provisions will be determined based on the particular facts and circumstances.

Form CRS: Fund managers will not be required to prepare a Form CRS relationship summary, so long as they do not provide advisory services to a separately managed account client who is a natural person, or a legal representative thereof, receiving services primarily for personal, family, or household purposes.

Additional Investment Adviser Regulations: The proposed adviser fiduciary interpretation requested comment on whether investment advisers (and their personnel, as applicable) should be subject to licensing and continuing education requirements, client account statement delivery requirements, and financial responsibility requirements. Notably, the SEC did not formally propose these requirements as part of the SEC Releases.

Interpretation of the Fiduciary Standard for Investment Advisers

The SEC published the Adviser Fiduciary Interpretation with the goal of reaffirming, and in some cases clarifying, certain aspects of the fiduciary duty that investment advisers owe to their clients under the Advisers Act.[4] The Adviser Fiduciary Interpretation describes the Advisers Act fiduciary duty as being comprised of a duty of care and a duty of loyalty. Under this fiduciary duty, an investment adviser must, at all times, serve the best interest of its client and cannot place its own interests ahead of those of its client.

The Adviser Fiduciary Interpretation will be effective immediately upon being published in the Federal Register.

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[3] *Id.*

[4] The U.S. Supreme Court has interpreted Section 206 of the Advisers Act as establishing a federal fiduciary standard to govern the conduct of investment advisers. *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963); *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979). Investment advisers also have antifraud liability under Section 206.

Scope of Advisory Relationship

According to the Adviser Fiduciary Interpretation, a fiduciary duty follows the contours of an adviser's relationship with its client, and the adviser and client may shape this relationship by agreement, provided there is full and fair disclosure and informed consent. The SEC indicates that the specific obligations that derive from an adviser's fiduciary duty depend on what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client will vary significantly from the obligations of an adviser to a fund where the contract and organizational documents define, with substantial specificity, the scope of an adviser's services and the limitations on its authority.

The Adviser Fiduciary Interpretation clarifies that an adviser's Advisers Act fiduciary duty may not be waived and provides some examples of contractual provisions that purport to waive the adviser's fiduciary duty: (i) a statement that an adviser will not act as a fiduciary; (ii) a blanket waiver of all conflicts of interest; and (iii) a waiver of any specific obligations under the Advisers Act. Such contractual provisions are, in the SEC's view, inconsistent with the Advisers Act, regardless of the client's sophistication.

Duty of Care: Providing Advice That Is in a Client's Best Interest

The Adviser Fiduciary Interpretation indicates that the duty of care includes a duty to provide investment advice that is in a client's best interest, including a duty to provide advice that is suitable for the client. This duty applies to all investment advice provided to clients, including engaging a sub-adviser. To fulfill this duty, an adviser must have a reasonable understanding of its client's objectives (e.g., for institutional clients, an understanding of their investment mandates).

Reasonable Inquiry Into a Client's Objectives

The interpretation explains that an adviser's process for developing a reasonable understanding of a client's objectives should vary based on whether the client is retail or institutional. In the retail client context, an adviser should make a reasonable inquiry into its client's financial situation, level of sophistication, investment experience, and financial goals. In addition, the adviser should update the retail client's investment profile in order to maintain a reasonable understanding of the client's objectives, and the advice should be adjusted to reflect changes in circumstances.

By contrast, in the institutional client context, the nature and extent of an adviser's reasonable inquiry into its client's objectives generally are shaped by the specific investment mandates from the client (e.g., a private fund client's investment guidelines and objectives). For instance, an adviser engaged to advise on an institutional client's bond portfolio needs to develop a reasonable understanding of the client's objective within that bond portfolio, but not the client's objectives within its entire investment portfolio. For advisers

acting on specific investment mandates for institutional clients, particularly funds, the obligation to update the client's objectives would not be applicable, except as may be set forth in the advisory agreement.

Reasonable Belief That Advice Is in a Client's Best Interest

According to the Adviser Fiduciary Interpretation, an investment adviser must have a reasonable belief that the advice it provides is in its client's best interest based on the client's objectives. To form such a reasonable belief regarding an investment recommendation, the adviser should consider whether its client can and is willing to tolerate the risks associated with the investment and whether the potential benefits of the investment may justify these risks.

For example, it may be in the best interest of a financially sophisticated client, such as a fund that has an appropriate risk tolerance, to invest in directionally speculative derivatives, securities on margin, complex instruments, or other products that may have limited liquidity. These types of investments, however, may not be in the best interest of a retail client with a conservative investment objective. Furthermore, an adviser must conduct a reasonable investigation into the investment sufficient not to base its advice on materially inaccurate or incomplete information.

The Adviser Fiduciary Interpretation clarifies that advisers, in determining whether a security or investment strategy is in a client's best interest, should generally consider the cost associated with investment advice and an investment product's or strategy's investment objectives, characteristics, liquidity, risks, potential benefits, volatility, likely performance of a variety of market and economic conditions, time horizon, and cost of exit. An adviser would not satisfy its fiduciary duty to provide advice that is in its client's best interest by simply advising the client to invest in the lowest cost (to the client) or least remunerative (to the investment adviser) investment product or strategy without further analyzing other factors in the context of the portfolio that the adviser manages for the client and the client's objective. Rather, a higher-cost investment may be recommended where the adviser reasonably concludes that other factors about the investment outweigh the associated costs, in light of the client's objectives. For instance, it might be consistent with an adviser's fiduciary duty to advise a client with a high risk tolerance and significant investment experience to invest in a private equity fund with higher fees and significantly less liquidity than funds that invest in publicly-traded companies where such an investment is in the client's best interest because it provides exposure to an asset class that was appropriate in the context of the client's overall portfolio.

Duty of Care: Seeking Best Execution

The Adviser Fiduciary Interpretation reaffirms that an investment adviser's duty of care includes a duty to seek best execution of a client's transactions where the adviser is responsible for selecting broker-dealers to execute client trades. To meet this obligation, an adviser must seek to execute transactions for clients in such a manner that the client's total cost or proceeds in each transaction are the most favorable under the

particular circumstances occurring at the time of transaction. In seeking best execution, an adviser should consider the full range and quality of a broker's services in placing brokerage. Factors to consider include the value of research provided, execution capability, commission rate, financial responsibility, and responsiveness to the adviser. The determinative factor is not the lowest possible commission cost, but whether the transaction represents the best qualitative execution. Lastly, advisers should periodically and systematically evaluate the execution it is obtaining for its clients.[5]

Duty of Care: Providing Advice and Monitoring Over the Course of the Relationship

Under the Adviser Fiduciary Interpretation, an investment adviser's duty of care encompasses the duty to provide advice and monitoring at a frequency that is in a client's best interest, taking into account the scope of the relationship. As an example, where an adviser has an ongoing relationship with a client that pays a periodic asset-based fee, the duty to provide advice and monitoring will be relatively extensive, consistent with the nature of the relationship.[6] Conversely, absent any agreed-upon limitation or expansion, the scope of the duty to monitor will be indicated by the duration and nature of the advisory arrangement.

Duty of Loyalty: Full and Fair Disclosure

The Adviser Fiduciary Interpretation reaffirms that, under the duty of loyalty, an adviser may not subordinate its client's interest to its own.[7] Put differently, an adviser must not place its own interest above its client's interests.

To meet its duty of loyalty, an adviser must make full and fair disclosure to clients of all material facts relating to the advisory relationship. In addition, an adviser must eliminate or at least expose through full and fair disclosure all conflicts of interest which might incline an investment adviser, either consciously or unconsciously, to render advice which is not disinterested. The SEC believes that while full and fair disclosure of all material facts relating to the advisory relationship or of conflicts of interest, coupled with a client's informed consent, prevent the presence of those material facts or conflicts from violating the

[5] The Adviser Fiduciary Interpretation notes that an adviser's use of an affiliated broker to execute client trades involves a conflict of interest that must be fully and fairly disclosed, and the client must provide informed consent to the conflict.

[6] The Adviser Fiduciary Interpretation clarifies, however, that an adviser and client may scope the frequency of the adviser's monitoring (e.g., agreement to monitor quarterly), provided there is full and fair disclosure and informed consent.

[7] The duty of loyalty, like the duty of care, extends to all advice provided to an existing client, including engaging a sub-adviser. Notably, the proposed interpretation stated that the duty of loyalty requires an adviser to "put its client's interest first." However, the SEC revised this description of the duty of loyalty to be more consistent with how the SEC has previously described the duty.

adviser's fiduciary duty, such disclosure and consent do not themselves satisfy the adviser's duty to act in the client's best interest.[8]

For disclosure to be full and fair in the SEC's view, it should be sufficiently specific so that a client can understand the material fact or conflict of interest and make an informed decision whether to provide consent. Disclosing that the adviser has other clients without describing how conflicts between clients will be managed is inadequate. Disclosing that the adviser has conflicts without further description would likewise be inadequate. Along similar lines, simply disclosing that an adviser "may" have a particular conflict is not adequate when the conflict actually exists. For instance, the SEC would regard the use of "may" as inappropriate when the conflict exists with respect to some types of clients or transactions and no further disclosure is provided to specify the types of clients or transactions with respect to which the conflict exists. Additionally, "may" should not be used if it simply precedes a list of all possible conflicts regardless of likelihood and obfuscates actual conflicts to the point that a client cannot provide informed consent. That said, "may" could be appropriately used to disclose a potential conflict that does not currently exist but might reasonably present itself in the future.

The adequacy of disclosure depends upon, among other things, the nature of the client, the scope of the services, and the relevant material fact or conflict. Whether a client is retail or institutional is important in this context. Because institutional clients generally have a greater capacity and more resources than retail clients to analyze and understand complex conflicts and their ramifications, disclosure made to an institutional client (including the level of detail and explanation of terminology) can differ significantly from disclosure made to a retail client. However, even disclosure to institutional clients must be clear and detailed enough for the client to make an informed decision to consent to the conflict.

Duty of Loyalty: Allocation of Investment Opportunities

When allocating investment opportunities among eligible clients, an adviser may face conflicts of interest either between its own interests and those of a client or among different clients. Under the Adviser Fiduciary Interpretation, an adviser that allocates investment opportunities among eligible clients must eliminate or at least expose through full and fair disclosure the conflicts associated with its allocation policies such that a client can provide informed consent.

In allocating investment opportunities, an adviser may consider the nature and objectives of the client and the scope of the relationship. An adviser and a client may agree that certain investment opportunities or categories of investment opportunities will not be allocated or offered to that client. The Advisers Act fiduciary duty does not prescribe any particular method of allocation, but the adviser's allocation practices

[8] The SEC clarifies elsewhere that while an adviser may satisfy its duty of loyalty by making full and fair disclosure of conflicts and obtaining the client's informed consent, an adviser is prohibited from overreaching or taking unfair advantage of a client's trust. In the SEC's view, an adviser's obligation to act in a client's best interest is an overarching principle that encompasses both the duty of care and the duty of loyalty.

must not prevent it from providing advice that is in the best interest of its clients.[9] The interpretation makes clear that an investment adviser need not have *pro rata* allocation policies.

Duty of Loyalty: Informed Consent

The Adviser Fiduciary Interpretation reaffirms that disclosure of a conflict of interest must be full and fair such that a client can provide informed consent. Advisers need not make an affirmative determination that a particular client understood the disclosure and that the client's consent was informed. Rather, disclosure should be designed to enable a client to understand and provide informed consent to the conflict. Such informed consent can be either explicit or, in certain circumstances, implicit.

In the SEC's view, an adviser may not infer or accept client consent where the adviser was aware, or reasonably should have been aware, that the client did not understand the nature and import of the conflict. For certain types of conflicts, it may be difficult to provide disclosure to clients that adequately conveys the material facts or the nature, magnitude, and potential effect of the conflict sufficient for a client to consent to or reject it.[10] Particularly for retail clients, providing disclosure regarding complex or extensive conflicts that is sufficiently specific and understandable may be difficult. Where a conflict cannot be fully and fairly disclosed to a client such that the client can provide informed consent, the adviser should either eliminate the conflict or adequately mitigate (i.e., modify practices to reduce) the conflict such that full and fair disclosure and informed consent are possible.

Hedge Clauses

The Adviser Fiduciary Interpretation also discusses the *Heitman* no-action letter[11] in which the SEC staff took the view that whether a hedge clause (i.e., a clause in an advisory agreement that purports to limit an adviser's liability) violates the anti-fraud provisions of the Advisers Act depends on all of the surrounding facts and circumstances.

Purportedly expressing a new view on hedge clauses, the SEC indicates that it is withdrawing the *Heitman* letter. The SEC clarifies that while the permissibility of a hedge clause is a facts and circumstances analysis,

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[9] Notably, the proposed interpretation stated that "in allocating investment opportunities among eligible clients, an adviser must treat all clients fairly." Some commenters interpreted this sentence to mean that it would be impermissible for an adviser to allocate a particular investment to one eligible client instead of a second eligible client, even when the second client had received full and fair disclosure and provided informed consent to such an investment being allocated to the first client. The SEC determined to remove this sentence in the final interpretation. The Adviser Fiduciary Interpretation notes elsewhere that an adviser cannot favor its own interests over those of a client, whether by favoring its own accounts or by favoring certain client accounts that pay higher fee rates to the adviser over other client accounts.

[10] In a footnote accompanying this specific point, the Adviser Fiduciary Interpretation reiterates that institutional clients generally have a greater capacity and more resources than retail investors to analyze and understand complex conflicts and their ramifications.

[11] *See supra* note 2.

there are few, if any, circumstances in which a hedge clause in an agreement with a *retail client* would be consistent with Advisers Act anti-fraud provisions, where the clause purports to relieve the adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser under federal or state law. The SEC further clarifies that whether a hedge clause in an agreement with an *institutional client* violates the anti-fraud provisions is to be determined based on the particular facts and circumstances.

Form CRS Relationship Summary

The SEC adopted a rulemaking to require registered investment advisers and registered broker-dealers to provide a brief relationship summary to "retail investors." This relationship summary, referred to as Form CRS, is intended to inform "retail investors" about: (i) the types of client and customer relationships and services offered by the firm; (ii) the fees, costs, conflicts of interest, and required standard of conduct associated with these relationships and services; (iii) whether the firm and its financial professionals currently have reportable legal or disciplinary history; and (iv) how to obtain additional information about the firm. Form CRS is subject to SEC filing and recordkeeping requirements.

An investment adviser, or a supervised person acting on its behalf, must deliver to each "retail investor" its current Form CRS before or at the time it enters into an investment advisory contract with that "retail investor." In addition, the adviser's current Form CRS must be delivered to each "retail investor" who is an existing client upon the occurrence of certain triggering events (e.g., where the adviser opens a new account for its "retail investor" client). Moreover, amendments made to Form CRS must be communicated to each "retail investor" who is an existing client of an adviser within 60 days after the amendments are required to be made.

For purposes of Form CRS delivery obligations applicable to investment advisers, the term "retail investor" is defined as "a natural person, or the legal representative of such natural person, who seeks to receive or receives services primarily for personal, family or household purposes." The SEC clarifies in the Form CRS adopting release that this definition would include trusts and other similar legal entities that represent natural persons. Advisers that are not required to deliver a Form CRS to any clients need not prepare or file a Form CRS with the SEC. Accordingly, advisers that do not provide advisory services to any "retail investors" will have no obligation to prepare Form CRS.

Firms that are registered, or investment advisers who have an application for registration pending, with the SEC prior to June 30, 2020 will have a period of time beginning on May 1, 2020 until June 30, 2020 to file their initial relationship summaries with the SEC. On and after June 30, 2020, newly registered broker-dealers will be required to file their relationship summary with the SEC by the date on which their

registration with the SEC becomes effective. The SEC will not accept any initial application for registration as an investment adviser that does not include a relationship summary that satisfies the requirements of Form CRS.

Regulation Best Interest

The SEC also adopted Regulation Best Interest, which seeks to enhance the existing standard of conduct for broker-dealers and establishes a "best interest" obligation for broker-dealers and their associated persons with respect to "retail customers"[12] when making recommendations of any securities transaction or investment strategy involving securities. Notably, the term "best interest" is not defined; rather, what is in a retail customer's "best interest" turns on an objective assessment of the relevant facts and circumstances. While Regulation Best Interest goes beyond the existing suitability standard applicable to broker-dealers, it does not go so far as to create a uniform fiduciary duty for broker-dealers and investment advisers.

Under Regulation Best Interest, broker-dealers must, among other things: (1) act in the best interest of their retail customer at the time a recommendation is made, without placing its interest ahead of its retail customer's interests; and (2) address conflicts of interest by establishing, maintaining, and enforcing policies and procedures reasonably designed to identify and fully and fairly disclose material facts about conflicts of interest, and in instances where the SEC determined that disclosure is insufficient to reasonably address the conflict, to mitigate or, in certain instances, eliminate the conflict.

The compliance date for Regulation Best Interest is June 30, 2020.

Interpretation of Advisers Act's "Solely Incidental" Exclusion for Broker-Dealers

Lastly, the SEC published an interpretation of Section 202(a)(11)(C) of the Advisers Act, which excludes from the definition of "investment adviser" any broker or dealer that provides advisory services when such services are "solely incidental" to the conduct of the broker or dealer's business and when such incidental advisory services are provided for no special compensation. The interpretation is intended to confirm and clarify the SEC's previous interpretations of the term "solely incidental" for purposes of this exclusion from the "investment adviser" definition.[13]

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[12] "Retail customer" is defined as "a natural person, or the legal representative of such natural person, who: (A) Receives a recommendation of any securities transaction or investment strategy involving securities from a broker, dealer, or a natural person who is an associated person of a broker or dealer; and (B) Uses the recommendation primarily for personal, family, or household purposes."

[13] The interpretation does not provide guidance on the "special compensation" prong of the broker-dealer exclusion, and instead references prior SEC interpretations of this prong. *See* Commission Interpretation Regarding the Solely Incidental Prong of the Broker-Dealer Exclusion from the Definition of Investment Adviser, 17 C.F.R. Part 276 (2019) at n.17 (citing Interpretive Rule Under the Advisers Act Affecting Broker-Dealers, 72 Fed. Reg. 55,126 (Sept. 24, 2007); Certain Broker-Dealers Deemed Not to Be Investment Advisers, 70 Fed. Reg. 20,424 (Apr. 12, 2005)). Similarly, in the

According to the interpretation, a broker-dealer's provision of advice as to the value and characteristics of securities or as to the advisability of transacting in securities is consistent with the solely incidental prong of the exclusion if the advice is provided in connection with, and is reasonably related to, the broker-dealer's primary business of effecting securities transactions. Whether advisory services provided by a broker-dealer satisfy the solely incidental prong is assessed based on the facts and circumstances surrounding the broker-dealer's business, the specific services offered, and the relationship between the broker-dealer and the customer. A broker-dealer's exercise of unlimited discretion over a customer account would not be solely incidental to a broker-dealer's business. However, where discretion is limited in time, scope, or other manner and lacks the comprehensive and continuous character of investment discretion that would suggest that the relationship is primarily advisory, such discretion would be considered "solely incidental" to a broker-dealer's business.

The SEC interpretation will be effective immediately upon being published in the Federal Register.

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context of soft dollars, the interpretation makes clear that it does not alter the SEC's 2006 interpretation of Section 28(e) of the Securities Exchange Act of 1934, "which, in the context of a client commission arrangement that otherwise satisfies [S]ection 28(e), permits a broker-dealer to be paid out of a pool of commissions for its research even if that broker-dealer did not effect a securities transaction." *See id.* at n.49; Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, 71 Fed. Reg. 41,978 (July 18, 2006).

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