

Via E-Mail

September 22, 2017

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission
100 F Street NE.
Washington, DC 20549

Re: Request for No-Action Relief Relating to MiFID II

Dear Mr. Chairman:

I am writing in response to information we have recently received indicating the staff of the Securities and Exchange Commission's (SEC or Commission) is contemplating providing no-action relief to broker-dealers from certain provisions of the federal securities laws in anticipation of the implementation of the Council of the European Union's (EU) Markets in Financial Instruments Directive (MiFID II), which takes effect on January 3, 2018. We believe that any no-action relief granted should require consistent treatment of clients by broker-dealers. More specifically, in our view, if a broker dealer receives direct payments for research services from customers subject to MiFID II, the broker-dealer *must* accept direct payments for research services from *all* customers, including U.S. fund managers. We believe that the narrower no-action relief some broker-dealers are advocating will disadvantage U.S. institutional investors.

The Council of Institutional Investors (CII) is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, and other employee benefit plans, foundations and endowments with combined assets under management exceeding \$3 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than \$20 trillion in assets under management.¹

MiFID II is an EU directive that will require investment managers subject to its requirements to separate payments for research from payments for execution services. As a result of MiFID II, investment managers subject to its unbundling requirements will no longer be permitted to pay for research and brokerage services in a bundled commission payment. That result is consistent with long-standing CII membership approved policy which states:

¹ For more information about the Council of Institutional Investors ("CII"), including its members, please visit the CII's website at <http://www.cii.org/members>.

Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission Recapture

The most important voice in discussions of soft dollars, commission levels and directed brokerage belongs to us, as institutional investors. Commissions are an asset of the plan, and as plan sponsors and trustees it is our right and responsibility to decide how they are managed. . . . We . . . have the broader duty to communicate the interests and desires of the institutional investor community to regulators, to the public and to the industry regarding trading practices and commissions.

Like any other expense of the plan, trading costs need to be managed to minimize the cost and ensure that maximum value is received. But current brokerage industry practices of bundled pricing for services make it difficult to break out the exact costs of services (for trade execution, research or other things), may be antithetical to the fiduciary obligation of obtaining best execution, and hold too much potential for conflicts of interest and abuses.

We support and urge full unbundling of pricing for investment management, brokerage and research services, so that institutional investors can purchase and budget for these services as they do any other expense of the plan. . . .²

Consistent with our policy, we believe that MiFID II will foster better price-discovery and more efficient allocation of resources related to research and trading, benefiting investors and asset owners. In addition, the unbundling of research costs and trading will facilitate independent research, thus improving market efficiency. This is all broadly positive for European-domiciled investors, as the overall cost of research as well as trade execution should decline, post-MiFID II.

Thus, we oppose no-action relief that we understand some broker-dealers are requesting. It is our understanding that such selective relief would provide assurance that staff will not recommend that the SEC take enforcement action under the Investment Advisers Act of 1940 against a broker-dealer registered with the SEC that provides research services that constitute investment advice under 202(a)(11) of the Advisers Act to an investment manager that is required under MiFID II to pay for the research services from its own money or from a research payment account funded by the investment manager's clients and/or its own money. We are concerned that the limited nature of the request, if granted, would facilitate broker-dealers continuing the practice of bundling research with execution in transactions in which the customer is not subject to MiFID II.

² CII, Policies on Other Issues, **Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission Recapture** (Mar. 31, 1998), http://www.cii.org/policies_other_issues#principles_trading_commission_softdollar.

As explained by Amy C. McGarrity, Chief Investment Officer, of CII member Colorado Public Employees' Retirement Association:

Requiring the continued bundling of research and commissions for U.S. investors creates a competitive disadvantage relative to our European peers. We envision and believe a scenario will exist whereby an investment manager trades with a broker and is required to use hard dollars for their European client, yet is "required" (based on current interpretation) to use soft dollars for a U.S. client. The manager is making the same trade on behalf of both clients, and utilizing the same research. However, due to the transparency associated with the hard dollars, the U.S. investors could ultimately end up subsidizing research for European clients, as U.S. investor payment into the "research pool" is opaque and less objective. This clearly puts U.S. investors at an unnecessary disadvantage.³

If no-action relief under our approach--requiring consistent treatment of clients by broker-dealers--is unfeasible at this time, we strongly recommend that *any* no-action relief granted be temporary in nature and be promptly followed by Commission action that provides for a public due process, including the solicitation of views by investors. As indicated by our policy, we believe that pricing for brokerage and research services is critically important to our members and the millions of workers and their families that are the beneficiaries of our member funds. Significant policy changes by the SEC that impact those issues deserves a public discussion, feedback and careful consideration of the views of all market participants, not just broker-dealers.

Thank you for consideration of our views. If we can answer any questions or provide additional information on this important matter, please do not hesitate to contact me at 202.822.0800 or jeff@cii.org.

Sincerely,



Jeffrey P. Mahoney
General Counsel
Council of Institutional Investors

CC: The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner

³ Letter from Amy C. McGarrity, CFA, Chief Investment Officer, Colorado Public Employees' Retirement Association, to the Hon. W. Jay Clayton, Chairman, et al., Securities and Exchange Commission 2 (Sept. 22, 2017) (on file with CII).

Douglas J. Scheidt, Associate Director and Chief Counsel, Division of Investment Management
Heather Seidel, Acting Director, Division of Trading and Markets