

Comment Letter on SEC Proposal to Exclude Certain Broker-Dealers from the Advisers Act, February 2005

February 7, 2005

Mr. Jonathan G. Katz
Secretary
U.S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

Re: Certain Broker-Dealers Deemed Not to Be Investment Advisers; File No. S7-25-99

Dear Mr. Katz:

The Investment Company Institute¹ supports the Securities and Exchange Commission's proposed rule to exclude broker-dealers in certain circumstances from the Investment Advisers Act of 1940.² We also support the Commission's proposed publication of an interpretive statement to provide further guidance relating to this exclusion.

The Commission first proposed a rule to define when broker-dealers are excluded from regulation under the Advisers Act in 1999.³ At the time, the Institute supported the proposal but recommended that the Commission study some of the broader issues it raised.⁴ These issues included whether a broker-dealer's exercise of investment discretion should trigger regulation under the Advisers Act and what advisory services of the broker-dealer are "solely incidental" to its brokerage services for purposes of relying on the exclusion. We are pleased that the Commission has undertaken a deliberative study of these issues. We believe the Commission's resulting proposal is well-reasoned and provides greater clarity regarding when clients of a broker-dealer are entitled to the protections of the Advisers Act. The proposal will also ensure that investors who pay special compensation to a broker-dealer are alerted to the distinctions between the broker-dealer's advisory services and its brokerage services.

We agree with the Commission's approach to treat all accounts over which a broker-dealer exercises investment discretion as advisory accounts regardless of the broker-dealer's form of compensation. We believe this bright-line test is an appropriate means by which to distinguish brokerage accounts from advisory accounts. A broker-dealer's ability to effect a trade without first consulting the client constitutes the rendering of investment advice for which the client should be entitled to the protections of the Advisers Act.

With respect to the proposed disclosure that would be required of a broker-dealer relying on the exclusion, the Institute strongly supports both the placement and content of such disclosure. We believe it will have the intended effect of alerting a broker-dealer's clients to the fact that the regulatory protections accorded to a brokerage account are distinct from those accorded to an advisory account. Moreover, it will ensure that clients who are interested in learning more information about this distinction will have the name of a contact at the firm to consult for such information. As such, this disclosure should help investors make informed decisions regarding whether to retain a broker-dealer or an investment adviser to assist them in fulfilling their investment goals.

We support the Commission's proposal to publish an interpretive statement relating to what types of advisory services of a broker-dealer are "solely incidental" to its brokerage services for purposes of the exclusion in the Adviser's Act. We agree with the Commission's approach to provide this guidance by identifying those practices that are not "solely incidental." We additionally agree with the Commission that financial planning and certain wrap fee program services should not be deemed solely incidental practices for purposes of the exclusion.

The Institute appreciates the opportunity to support the Commission's proposed rule and interpretive statement. If you have any questions about these comments or would like additional information, please contact the undersigned by phone at 202-326-5825.

Sincerely,

Tamara K. Salmon
Senior Associate Counsel

ENDNOTES

¹ The Investment Company Institute is the national association of the American investment company industry. More information about the Institute is included at the end of this letter.

² See SEC Release Nos. 34-50980 and IA 2340, Certain Broker-Dealers Deemed Not To Be Investment Advisers (Jan. 6, 2005), which is available on the Commission's website at: <http://www.sec.gov/rules/proposed/34-50980.pdf>.

³ See SEC Release Nos. 34-42099 and IA-1845, Certain Broker-Dealers Deemed Not to Be Investment Advisers (Nov. 4, 1999).

⁴ See [Letter from Tamara K. Reed](#), Associate Counsel, Investment Company Institute, to Mr. Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated January 14, 2000. When the Commission repropoed the rule in August 2004, the Institute filed a comment letter reiterating our support for the rule as well as our recommendation that the Commission study the broader issues it raised. See [Letter from Tamara K. Salmon](#), Senior Associate Counsel, Investment Company Institute, to Mr. Jonathan G. Katz, Secretary, Securities and Exchange Commission, dated September 22, 2004, commenting on SEC Release Nos. 34-50213 and IA-2278, Certain Broker-Dealers Deemed Not to Be Investment Advisers (Aug. 18, 2004).

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