Chapter 17

Research and Research Analysts

Russell D. Sacks*

Partner, King & Spalding LLP, New York City

Steven R. Blau

Counsel, King & Spalding LLP, New York City

[Chapter 17 is current as of August 6, 2023.]

* The authors gratefully acknowledge John T. Bostelman, retired partner, Sullivan & Cromwell LLP, who authored the original version of this chapter. The authors thank Kathryne Hunter and Thomas H. Burton, summer associates at King & Spalding LLP, for their contributions to this chapter. The authors also gratefully acknowledge the mentorship of Charles S. Gittleman and the late Lynne Johnson, who guided their careers during the time of the Global Research Settlement and the SRO research rules.

§ 17:1 Introduction

Production and distribution of securities research is a key function of U.S. broker-dealers, with the U.S. Securities and Exchange Commission (SEC) noting that providing research is "one important, long-standing service of the brokerage business."[1] During the era of fixed commission rates, research developed as a key means through which brokerage firms sought to distinguish themselves; although fixed commission rates were abolished in 1975, research continues to be a key broker-dealer offering. Information is the lifeblood of the modern capital markets, and given the tremendous volume and complexity of information and raw data that is available, research analysts play an important role in the relationship between companies and investors, both retail and institutional.[2] Research is a valuable service to a firm's sales-and-trading clients, and generally elevates the profile of a firm in a particular industry or sector.[3]

Research is also a function that has historically received some of the closest regulatory scrutiny and can present some of the thorniest compliance and conflicts considerations. Firms with both research and other functions often undertake many potentially conflicted roles, and the firm's non-research activities have the potential to place pressure on the objectivity and independence of the research function and/or to seek to enlist it in the firm's efforts to secure

---

1. *See* SEC. & EXCH. COMM'N, OFF. OF COMPLIANCE, INSPECTIONS & EXAMINATIONS, INSPECTION REPORT ON THE SOFT DOLLAR PRACTICES OF BROKER-DEALERS, INVESTMENT ADVISERS AND MUTUAL FUNDS (Sept. 22, 1998), https://www.sec.gov/news/studies/softdolr.htm.
2. The 1969 *Wheat Report* (authored by a study group chaired by SEC Commissioner Francis M. Wheat) noted: "[e]ven the casual observer cannot fail to note the increase in the output of market letters, industry surveys, recommended lists and similar publications by the brokerage community. This flow of material to customers and prospective customers not only responds to investors' demands but constitutes a primary medium for the dissemination of information about securities to the investing public."
3. Especially where smaller issuers are concerned, research can be a valuable means to sift, digest, and transmit information in a manner useful to investors. Investors view research into smaller companies as an important component of the information environment, and thus, the liquidity of smaller issuers benefits from the spotlight provided by investment research. As recently as 2022, the SEC and its staff have made statements and issued reports on these benefits. *See* SEC Staff Report on the Issues Affecting the Provision of and Reliance Upon Investment Research into Small Issuers (Feb. 2022), https://www.sec.gov/files/staff-report-investment-research-small-issuers_0.pdf.

investment banking or other business.[4] Similarly, issuers and their management care deeply about the quality of research coverage, and are known to reward investment banks with preferred coverage through underwriting or other mandates; this reality can lead to conflicts that are not easily addressed by regulation of the investment bank producing the research.

A series of actions and investigations by the SEC, Congress, the NASD, NYSE, and state regulators that began in the late 1990s and continued into the early 2000s led to a host of regulations seeking to address potential research analyst conflicts of interest:

- SEC Regulation Analyst Certification ("Regulation AC"), adopted in 2003, requires certain analyst certifications in connection with equity and fixed-income research reports and public appearances;
- The Global Settlement, a 2003–04 settlement agreement among twelve firms and federal and state regulators, the NASD, and the NYSE (the NASD and NYSE Regulations have since merged to become FINRA) that continues to impose certain structural obligations on firms that are party to the settlement, and the requirements of which have been widely adopted across the industry even by firms not party to the settlement;
- FINRA Rule 2241 (formerly NASD Rule 2711 and NYSE Rule 472) governs equity research production and distribution and the relationship between research and investment banking functions; and
- FINRA Rule 2242 governs fixed-income research production and distribution and the relationship between research, investment banking, and principal-trading functions.

Today, perhaps the most significant headwind faced by "sell-side" research is not purely regulatory but rather is a developing shift in the research payment model from soft dollars to hard dollars, a shift that was accelerated by a change in European regulation. The European

---

4. As of December 31, 2019, FINRA's membership included approximately 3,517 broker-dealers, and as of November 2010 approximately 220 firms conducted both investment banking and research activities. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-209, SECURITIES RESEARCH: ADDITIONAL ACTIONS COULD IMPROVE REGULATORY OVERSIGHT OF ANALYSTS CONFLICTS OF INTEREST (Jan. 2012), https://www.gao.gov/assets/590/587613.pdf.

Union's MiFID II Directive[5] came into effect in January 2018 and includes a requirement that asset managers subject to the Directive pay for research either using (i) the manager's own hard dollars, or (ii) a pre-budgeted commission-sharing arrangement, with research costs unbundled from execution costs and disclosed to clients. In practice, this effectively ended the use of soft dollars by EU-resident managers,[6] and accelerated a shift towards hard dollar payments by U.S. asset managers on a voluntary basis, based on a view that doing so may be viewed positively by clients and would be a proactive response to current events. While public reporting has indicated that the European Union and the United Kingdom are re-evaluating the MiFID II unbundling requirements,[7] at the time of this writing the noted requirements remain in force.

Although the soft-dollar model is alive and well in the United States, client preference towards or requirement of hard dollar payments, and the trend towards buy-side in-sourcing of research,[8] puts pressure on the sell-side research function in two ways: firms that accept hard dollars may have to distribute such research as an investment advisory product subject to the U.S. Investment Advisers Act of 1940 (the "Advisers Act"),[9] and it tends to decrease the buy-side

---

5. The Markets in Financial Instruments Directive II.
6. *See, e.g.*, Richard Henderson, *T. Rowe Price Latest Fund Manager to Cover Research Costs Globally*, FIN. TIMES (July 16, 2019), https://www.ft.com/content/c453e0dc-a7d3-11e9-b6ee-3cdf3174eb89.
7. *See, e.g.*, Joe Mayes & Katherine Griffiths, *UK Plans to Reverse MiFID Ban on Free Research for Clients*, BLOOMBERG (July 6, 2023), https://www.bloomberg.com/news/articles/2023-07-06/uk-plans-to-reverse-mifid-ii-ban-on-free-research-for-clients#xj4y7vzkg; SIFMA, TICK TOCK: THE SEC SHOULD EXTEND MIFID II NO-ACTION RELIEF NOW (May 25, 2023), https://www.sifma.org/resources/news/tick-tock-the-sec-should-extend-mifid-ii-no-action-relief-now/.
8. *See, e.g.*, POONEH BAGHAI, ONUR ERZAN & JU-HON KWEK, MCKINSEY & CO, THE NEW GREAT GAME IN NORTH AMERICAN ASSET MANAGEMENT (Nov. 15, 2018), https://www.mckinsey.com/industries/financial-services/our-insights/the-new-great-game-in-north-american-asset-management# ("Unbundling of research costs has catalyzed a re-think by leading asset managers concerning how they get their insights now that broker-provided research and corporate access is no longer 'free.' This is precipitating three major shifts: first, a reshuffling of research relationships, in some cases in favor of smaller, specialized research providers; second, more centralized management of hard-dollar research budgets; and third, a move on the part of the very largest managers to consider bringing additional elements of investment research in-house . . . .").
9. Some prominent firms have begun distributing some research as an investment advisory product, as noted by Dalia Blass, Director of the Division of Investment Management, in March 2019: "At the same

funds available to compensate for research.[10] In March 2019, SEC Chairman Jay Clayton stated: "I am concerned that the broad availability of research may then be reduced as a result of MiFID II."[11] From the time of implementation of MiFID II until July 3, 2023, the SEC staff mitigated this issue through use of an interpretive letter; in 2022, the SEC staff indicated that such relief would not be extended in 2023 and it did in fact expire on July 3, 2023. This emerging issue is described in detail in this chapter.

This chapter is structured as follows: section 17:2 provides an overview of the broker-dealer research function and a discussion of the research payment models. Section 17:3 examines how research may be distributed into the United States from abroad. Section 17:4 covers the Securities Act Offer and Prospectus considerations of research (Rules 137, 138, 139), while section 17:5 covers Regulation M and research reports. Section 17:6 traces the history of U.S. research regulation, beginning with the inquiries and investigations of the late 1990s. Section 17:7 discusses the global research analyst settlement between the SEC, the NASD and NYSE, the New York State Attorney General, state securities regulators, and some of the nation's leading investment firms. Section 17:8 reviews the FINRA Equity Research Rule (Rule 2241) and research analyst registration. Section 17:9 discusses communications between a research analyst and company prior to a securities offering and examines the "Toys 'R' Us" enforcement action. Section 17:10 covers the FINRA Fixed-Income Research Rule (Rule 2242), while section 17:11 covers SEC Regulation AC. The final discussion in section 17:12 considers enforcement and litigation trends regarding research.

---

time, some broker-dealers have explored or taken steps to offer research through a registered advisory business." Dalia Blass, Dir. of the Div. of Inv. Mgmt., U.S. Sec. & Exch. Comm'n, Keynote Address: ICI Mutual Funds and Investment Management Conference (Mar. 18, 2019), https://www.sec.gov/news/speech/speech-blass-031819 [hereinafter Dalia Blass March 2019 ICI Speech].

10. As of 2017, the total global annual budget for sell-side research was estimated to be $16 billion. *See* Robin Wigglesworth, *Final Call for the Research Analyst?*, FIN. TIMES (Feb. 7, 2017), https://www.ft.com/content/85ee225a-ec4e-11e6-930f-061b01e23655. In 2018 and 2019, European fund managers clipped research spending markedly as compared to 2017, and U.S. managers decreased the same somewhat.

11. Jay Clayton, Chairman, U.S. Sec. & Exch. Comm'n, Remarks at Meeting of the Investment Advisory Committee (Mar. 28, 2019), https://www.sec.gov/news/public-statement/clayton-remarks-investor-advisory-committee-032819.

§ 17:2 Overview of the Research Function and Research Payment Models

§ 17:2.1 Overview of the Research Function

Sell-side research analysts serve an important role in the markets, promoting efficiency by compiling publicly available information and offering analysis and insight on companies and industries. Analysts cover a particular industry (a "coverage universe") and publish research reports on the securities of companies or industries that they cover. These research reports are distributed to customers of the firm—typically free of charge—and often include a specific recommendation (for example, buy, sell, hold) and the analyst's expectation of the future price performance of the security (the "price target").

In addition to publishing research reports, analysts will speak with sales-and-trading clients regarding the subject matter of the research reports (all statements in which must be consistent with the analyst's published research), may speak to prospective investors during a primary or secondary offering in which their firm is an underwriter or selling agent, may speak with a firm's investment banking function to provide their views on an industry or on a particular company or transaction, and may give their views to an underwriting commitment committee.[12] Analysts also may make public appearances at industry conferences and in the media, and the research function can also help to arrange corporate access meetings between research clients and covered companies, including but not limited to non-deal road shows.[13] Investors often view analysts as experts on and

---

12. Conversations between a research analyst and the investment banking team are subject to significant policy-and-procedure requirements, and are chaperoned by legal and compliance personnel. For example, the investment banking team must not seek to have the analyst identify a potential investment banking transaction, and may not direct the analyst to meet with a company, among many other restrictions. Further, if the conversation is for purposes of "vetting" a non-public transaction, the analyst must be brought over-the-wall. See discussion of the permissible types of communications between research and investment banking, *infra* section 17:7.3.

13. U.S. investors paid $2 billion in soft dollars for corporate access in 2016, or more than a third of the money spent on stock research and related services, according to consulting firm Greenwich Associates. Serena Ng & Thomas Gryta, *New Wall Street Conflict; Analysts Say 'Buy' to Win Special Access for Their Clients*, WALL ST. J. (Jan. 19, 2017), https://www.wsj.com/articles/new-wall-street-conflict-analysts-say-buy-to-win-special-access-for-their-clients-1484840659.

important sources of information about the securities they cover and rely on their advice, and research reports can move markets.

At the top of the research function is a head of research or group of research management personnel who are "above the wall" and can field inquiries from a firm's investment banking group, or from others outside the research function, that would not be appropriate conversations for a publishing analyst.[14]

§ 17:2.2 Soft Dollar Model

"Soft dollar" arrangements developed as a link between the brokerage industry's supply of research and the money management industry's demand for research. The SEC has defined soft dollars as arrangements under which products or services other than execution of securities transactions are obtained by an adviser from or through a broker-dealer in exchange for the direction by the adviser of client brokerage transactions to the broker-dealer.[15] By definition, then, soft dollar or commission-sharing arrangements always involve three parties: (a) the investor, (b) the broker-dealer executing the transaction and providing the service (which may be research), and (c) the service (research) provider. Sometimes, the latter two parties are the same person.

In a soft dollar arrangement, then, the recipient of the research does not pay for the research directly but rather voluntarily directs a portion of the commissions on executed trades to the firm providing the research, which trades may be executed by firms other than the provider of the research. These commissions may be directed by the so-called "broker vote."[16]

Soft dollar arrangements developed in the fixed-commission era as a means of discounting commission rates. After fixed commission rates were abolished, Congress enacted section 28(e) of the

---

14. The supervision of "above the wall" personnel contains its own pitfalls and must be carefully considered given the inherent information control issues that arise with "above the wall" personnel. *See* 2004 Interpretive Responses, *infra* note 135.

15. U.S. SEC. & EXCH. COMM'N, OFF. OF COMPLIANCE, INSPECTIONS & EXAMINATIONS, INSPECTION REPORT ON THE SOFT DOLLAR PRACTICES OF BROKER-DEALERS, INVESTMENT ADVISERS AND MUTUAL FUNDS (Sept. 22, 1998), https://www.sec.gov/news/studies/softdolr.htm [hereinafter SEC SOFT DOLLAR REPORT], at section II.A.

16. The broker vote is essentially a report card that the "buy-side" gives the "sell-side", where buy-side firm personnel rank sell-side firms based on the utility of the research provided, with firms receiving more votes receiving more of the buy-side firm's soft dollar payments.

U.S. Securities Exchange Act of 1934 (the "Exchange Act"). Section 28(e) provides that a person who exercises investment discretion for an account shall not be deemed to have acted unlawfully or to have breached a fiduciary duty solely by reason of his having caused the account to pay more than the lowest available commission, if such person determines in good faith that the amount of the commission is reasonable in relation to the value of the brokerage and research services provided.[17] This was in response to concerns expressed by money managers and brokers that, under the new system of negotiated commission rates, if managers caused a client account to pay anything but the lowest commission rate available in order to obtain research, they would be held in breach of their fiduciary duty to their clients.[18]

Section 28(e) addresses the regulatory concerns of the investment manager directing the soft dollars. Broker-dealers are likewise permitted to receive soft dollars without triggering investment adviser status, even though soft dollar arrangements would seem to cause the receiving broker-dealer to come within the definition of investment adviser set forth in section 202(a)(11) of the Advisers Act:

> [A]ny person who, for compensation, engages in the business of advising others . . . as to the value of securities or as to the advisability of investing in, purchasing, or selling securities or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities . . . .

The section 202(a)(11) definition provides that persons who (i) as part of a regular business, advise others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities (which securities research certainly does advise on), (ii) for compensation (which soft dollars certainly are), are investment advisers.

However, Advisers Act section 202(a)(11)(C) provides an exception from the definition of investment adviser for any U.S.-registered broker-dealer "whose performance of [investment adviser] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor" [emphasis added]. For a broker-dealer distributing securities research, the key question is generally whether it receives "special compensation" for such research.

---

17. SEC SOFT DOLLAR REPORT, *supra* note 15, section II.A.
18. *Id*. section II.C.

Soft dollar payments, being payments for transaction services, are viewed as commission payments rather than special compensation.[19] The receipt of hard dollar payments for research, however, calls into question the status of a broker-dealer seeking to rely on section 202(a)(11)(C).

§ 17:2.3 MiFID II and the Industry Trend Towards a Hard Dollar Model

The revised EU Markets in Financial Instruments package—known as MiFID II—took effect on January 3, 2018.[20] One of MiFID II's aims is to give investors transparency into the cost of both research and trading commissions, by requiring payments for these elements to be unbundled by EU investment firms.[21]

The research[22] that investment managers typically receive from brokers is, under MiFID II, generally classified as a prohibited "inducement,"[23] unless the investment manager pays for the research

---

19. *See, e.g.*, Commission Guidance Regarding Client Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934, Release No. 34-54165 (July 18, 2006), 71 Fed. Reg. 41,978 (July 24, 2006).
20. The MiFID II package comprises a revised Markets in Financial Instruments Directive II (Directive 2014/65 of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU, O.J. (L 173), the new Markets in Financial Instruments Regulation (Regulation 600/2014 of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Regulation (EU) 648/2012), and supplementary secondary legislation and guidance.
21. The European Union operates a single regulatory regime for most investment business, therefore references to an "an EU investment firm" here would include EU portfolio managers, advisers, investment banks, and brokers.
22. "Research," for purposes of MiFID II, is defined as material or services that "explicitly or implicitly recommend or suggest an investment strategy and provide a substantiated opinion as to the present or future value or price of such instruments or assets" (Article 24 para. 9a MiFID II; Recital 28 of Commission Delegated Directive (EU) 2017/593), but would not include "short term market commentary on the latest economic statistics or company results for example or information on upcoming releases or events, which . . . contains only a brief summary of its own opinion on such information that is not substantiated nor includes any substantive analysis such as where they simply reiterate a view based on an existing recommendation or substantive research material or services" (Recital 29) that are considered to be a minor, non-monetary benefit.
23. MiFID II restricts the payment or receipt of all fees, commission, and non-monetary benefits ("inducements") unless these enhance the quality

either: (i) directly from its own resources; (ii) from a "Research Payment Account" (RPA) funded with an advisory client's money[24] and with the client's prior approval; or (iii) a combination of the two methods.[25] "Soft dollar" commissions are not allowed, unless done through an RPA, and most EU investment managers have elected to pay for research out of the adviser's P&L rather than utilizing an RPA structure.[26]

---

of service provided to a client, and do not impair an EU investment firm's duty to act in the best interests of its client (Article 24 para. 9 MiFID II, Commission Delegated Directive (EU) 2017/593). Research that concerns issuers with a market capitalization of up to EUR 1 billion is not to be considered as an inducement; this exemption was introduced by the MiFID II "Quick Fix" (Directive (EU) 2021/338)—investment firms that provide portfolio management services or independent investment advice. These restrictions on inducements mean that entities subject to MiFID II may only provide or receive research, hospitality, or corporate access which qualifies as "minor non-monetary benefits" (Article 12 para. 2 Commission Delegated Directive (EU) 2017/593). Some uncertainty arises as to which benefits are minor non-monetary benefits and, according to the UK Financial Conduct Authority's (FCA) review of implementation of the rules, some asset managers take a cautious approach to the rules. The FCA confirmed in response that: (i) asset managers need not block all marketing material or free trials from new research providers, as these are acceptable minor benefits if they satisfy the requirements, however, firms should set their own approach; (ii) asset managers may accept "issuer-sponsored" or house-broker research, including that which is particularly important for Small and Medium-Sized Enterprise (SME) issuers, provided that there is no inducement or conflict of interest for the asset manager; and (iii) generally, trade association member events are outside of the inducements framework. FIN. CONDUCT AUTH., IMPLEMENTING MIFID II—MULTI-FIRM REVIEW OF RESEARCH UNBUNDLING REFORMS (Sept. 19, 2019), https://www.fca.org.uk/publications/multi-firm-reviews/implementing-mifid-ii-multi-firm-review-research-unbundling-reforms [hereinafter UK FCA THEMATIC REVIEW OF MIFID II]. The state of this issue in the United Kingdom is somewhat more complex, as the U.K. Financial Conduct Authority relaxed its bundling rules in 2022 through expansion of its list of permitted non-marketing benefits, and in July 2023 signaled that the United Kingdom would remove the requirement to unbundle research costs during 2024. A full discussion of the U.K. contours of this issue is beyond the scope of this chapter.

24. Which may include soft dollar commissions.

25. Article 13, Commission Delegated Directive (EU) 2017/593.

26. The UK FCA has stated in a thematic review that brokers may still contribute to consensus forecasts and that their contribution can be attributed to them by the platform disclosing their identity, and that this will not amount to a material benefit under the inducements rules. The rules would apply if an asset manager then wanted to discuss the

A U.S. broker-dealer without any EU place of business is not generally within the scope of MiFID II, because national regulatory perimeters are generally preserved. However, a U.S. broker-dealer will likely be indirectly impacted through its dealings with entities that are subject to the full MiFID II requirements,[27] since those entities will need to comply with the MiFID II rules relating to commissions and inducements in full (regardless of the location of their customers or counterparties). Put simply: MiFID II has led to EU investment managers generally paying hard dollars for research, including to U.S. broker-dealers.[28]

As a result of MiFID II:

- executing U.S. broker-dealers that are used to receiving a single, bundled commission are often asked by EU investment managers to receive separate, hard dollar payments for research and execution; and
- U.S. delegates that provide sub-advisory or managed account services to EU asset or portfolio managers may be required by contract to comply with MiFID II or equivalent unbundling requirements.[29]

---

research with the broker's analyst or receive the underlying research report. UK FCA THEMATIC REVIEW OF MIFID II, *supra* note 23. The FCA also confirmed that paying for corporate access using an RPA was not compliant with the rules.

27. Including investment banks, brokers, and portfolio managers. AIFMs are subject to the old MiFID inducement regime, which has been copied into Article 24 Commission Delegated Regulation (EU) No. 231/2013; EU laws do not provide for an inducement regime for UCITS managers.

28. *See, e.g.*, Chris Flood, *Blackrock to Foot Bill for External Research under Mifid II*, FIN. TIMES (Sept. 14, 2017), https://www.ft.com/content/fb9e2552-9939-11e7-a652-cde3f882dd7b (citing, in addition to Blackrock, that Vanguard, JPMorgan, and Axa have determined that any research costs incurred for MiFID II-impacted funds and client accounts will be paid for through the manager's own funds). However, some firms have announced that they will seek to pay for research through RPAs and thereby directly pass on research costs to their clients. Robin Wigglesworth, *Fidelity to Set Up 'Research Payment Account' for Clients Affected by Mifid II*, FIN. TIMES (Oct. 30, 2017), https://www.ft.com/content/9a3ef636-e25a-360f-95ae-8e22958f8083. As part of the process of establishing the RPA structure, EU Investment Firms must set a research budget, which must be reviewed on a regular basis, and must provide each client with annual information on the total research costs that have been deducted from the resources of the client.

29. In addition, U.S. investment advisers may be required to purchase research in a MiFID II-compliant manner when they deal with EU brokers.

As noted above, a broker-dealer registered with the SEC that receives hard dollars for research risks investment adviser status and may not be saved by the definitional exception found at section 202(a)(11)(C) of the Advisers Act.

§ 17:2.4 SEC No-Action Relief for Receipt of Hard Dollar Payments from Firms Subject to MiFID II

For U.S.-registered broker-dealers, the regulatory issue resulting from MiFID II and alluded to above is that receipt of hard dollar payments for research potentially triggers investment adviser status under the Advisers Act. Receipt of soft dollar payments is not viewed as "special compensation" for investment advice, and thus broker-dealers receiving such payments are eligible for the Advisers Act section 202(a)(11)(C) exception from the definition of investment adviser. Receipt of hard dollar payments for research, however, calls into question the status of a broker-dealer seeking to rely on section 202(a)(11)(C).

In response to the potential disruption to the broker-dealer research model presented by MiFID II, in October 2017, SEC staff issued a no-action letter providing temporary relief from enforcement action under the Advisers Act to broker-dealers that provide research services that constitute investment advice to an investment manager that is subject, either directly or by contractual obligation, to MiFID II's requirement to either to pay for research services from its own money, from an RPA, or from a combination of the two.[30] The scope of relief provided by the no-action letter is limited however as the letter does not provide relief for broker-dealers that accept hard dollar payments from investment managers that adopt a hard dollar policy on a *voluntary* basis. The no-action letter's relief was set to expire on July 3, 2020, but on November 4, 2019, the SEC staff extended the relief until July 3, 2023.[31]

On July 26, 2022, however, William Birdthistle, SEC Director of the Division of Investment Management, announced in a public speech an end to the no-action letter's relief:

> [The no-action] letter was not intended to be a permanent solution to the issue . . . [W]e understand that firms have developed

30. Securities Industry & Financial Markets Ass'n, SEC No-Action Letter (Oct. 26, 2017), https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm.

31. Securities Industry & Financial Markets Ass'n, SEC No-Action Letter (Nov. 4, 2019), https://www.sec.gov/investment/sifma-110419.

> a variety of solutions to address the impact of MiFID II: Some broker-dealers have dually registered as investment advisers and others utilize a registered adviser affiliate to provide certain research services. In light of these developments in the marketplace for research services, the Division does not intend to extend the temporary position beyond its current expiration date in July 2023. Accordingly, the Division plans for the temporary position to expire on July 3, 2023, and does not expect to issue further assurances with respect to the adviser status of broker-dealers accepting compensation under MiFID II arrangements.[32]

Broker-dealers therefore must consider their posture regarding provision of research to MiFID firms that are required to pay hard dollars in a world without the above-described no-action letter, either implicating investment adviser status through the continuing receipt of hard dollars for research provided to such firms, or ceasing to provide research to such firms in exchange for hard dollars.

Given the broader industry shift towards hard dollar payments, including from investment managers that adopt a hard dollar policy on a voluntary basis (based on a view that doing so may be viewed positively by clients and would be a proactive response to current events) and therefore are not within the SEC staff relief described above, certain broker-dealers have made the determination to distribute certain research reports under an investment adviser registration. Doing so subjects the research to Advisers Act obligations.[33] The SEC staff no-action relief expired and was not renewed in July 2023.

§ 17:2.5 Distribution of Research As an Investment Advisory Product

Given that, for the reasons noted above, some firms have begun to distribute research as an Advisers Act product ("Advisers Act research"), we provide some high-level considerations of the same in the following bullets:

- Overview. Distribution of research under the Advisers Act has important consequences for research distribution structures

---

32. William Birdthistle, Dir., Div. of Inv. Mgmt., Remarks at PLI: Investment Management 2022 (July 26, 2022), https://www.sec.gov/news/speech/birdthistle-remarks-pli-investment-management-2022-072622.

33. The U.S. Supreme Court has held that Advisers Act section 206 imposes a fiduciary duty by operation of law. *See, e.g.*, SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963). The Advisers Act fiduciary duty generally requires an affirmative duty of utmost good faith, a heightened duty to act with the client's investment goals and interests in mind, a full and fair disclosure of all material facts, as well as an affirmative obligation to employ reasonable care to avoid misleading clients.