

SEC Staff Issues No-Action Relief for Advisers Covered by MiFID II Research Payment Restrictions

Primarily of interest to registered fund and hedge fund advisers, on October 26, 2017, the SEC Staff issued [three related no-action letters](#) that permit certain market participants to comply with the research requirements of the EU's Markets in Financial Instruments Directive (MiFID II) in a manner consistent with U.S. federal securities laws.¹ The no-action relief may also be of interest to large managers that have both private equity and public market investments.

As the January 3, 2018 MiFID II implementation date approaches, its provisions applicable to EU-based investment firms requiring such firms to unbundle research and execution costs have raised concerns among U.S. firms. In particular, U.S. firms have been considering how to deal with requests from EU firms to price and separately receive hard dollars in exchange for research services without violating their Advisers Act fiduciary duties and, for advisers to registered investment company clients, the Investment Company Act's joint transaction prohibitions. The no-action relief is aimed at clarifying these obligations and alleviating potential operational difficulties associated with facilitating compliance with MiFID II's research provisions.

The relief lays out a number of conditions, but generally provides that:

- Investment advisers may continue to aggregate orders for RICs and other clients. Although certain clients may pay different amounts for research given MiFID II requirements, the relief permits advisers to aggregate orders for purchases and sales of securities if each client pays or receives the same average price for the purchase or sale of the underlying security and each client pays the same amount for execution of the purchase or sale.
- Money managers may continue to rely on the existing safe harbor under Exchange Act Section 28(e) when paying broker-dealers through a research payment account for research alongside payments for execution services.
- For 30 months from MiFID II's implementation date, broker-dealers may receive research payments from money managers in hard dollars or from advisory clients' research payment accounts without being deemed "investment advisers" under the Advisers Act.

The Staff, mindful of the potential limitations of its no-action relief,² stated that it will continue to monitor and seek comment on the impact of MiFID II's research provisions to determine whether additional or different action (e.g., rulemaking) is necessary.

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- 1 Section 28(e) of the Securities Exchange Act of 1934, as amended, provides a safe harbor for advisers to use client commissions to obtain research and brokerage services without paying the lowest commission rate.
 - 2 Signaling skepticism about the efficacy of the Staff's relief, Commissioner Stein took the unusual step of issuing a [public statement](#) saying the relief "merely kicks the can down the road."
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If you have any questions about the matters addressed in this *Kirkland AIM*, please contact the following Kirkland attorneys or your regular Kirkland contact.

INVESTMENT FUNDS

Norm Champ, P.C.

norm.champ@kirkland.com
+1 212 446 4966

Kevin R. Bettsteller

kevin.bettsteller@kirkland.com
+1 415 439 1427

Michael Chu

michael.chu@kirkland.com
+1 312 862 2101

Marian Fowler

marian.fowler@kirkland.com
+1 202 879 5171

Elizabeth L. Richards

elizabeth.richards@kirkland.com
+1 212 446 5971

Aaron Schlaphoff

aaron.schlaphoff@kirkland.com
+1 212 446 4996

Jamie Lynn Walter

jamie.walter@kirkland.com
+1 202 879 5069

Scott A. Moehrke, P.C.

scott.moehrke@kirkland.com
+1 312 862 2199

Lisa Cawley

lisa.cawley@kirkland.com
+44 20 7469 2140

Matthew Cohen

matthew.cohen@kirkland.com
+1 415 439 4706

Alpa Patel

alpa.patel@kirkland.com
+1 202 879 5141

Jaime D. Schechter

jaime.schechter@kirkland.com
+1 212 446 4979

Robert H. Sutton

robert.sutton@kirkland.com
+1 212 446 4897



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Formation and Management:
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