

UPDATE ON CLIENT COMMISSION ARRANGEMENTS

The new interpretation of Section 28(e) of the Securities Exchange Act of 1934, issued by the Securities and Exchange Commission (“SEC”) last July,¹ became fully effective on January 25, 2007 (“Interpretation”).²

As discussed in our Client Memorandum of January 26, 2007,³ the SEC’s Division of Market Regulation (“Staff”) issued a “no-action” letter on January 17, 2007 clarifying the operation of a new type of client commission arrangement permitted by Section 28(e).⁴ On January 30, 2007, the Staff revised this no-action letter in two respects. The original letter had referred to the arrangement described in the letter as a “commission sharing arrangement.” The revised letter replaces that phrase with “client commission arrangement.” The revised letter also adds a footnote stating that, in the client commission arrangement described in the letter, “[t]he money manager periodically directs [the broker-dealer] to pay specified dollar amounts from [the pool of client commissions].”⁵

These changes make the no-action letter more consistent with the SEC’s Interpretation. It is now clearer that: (a) a broker-dealer in this type of client commission arrangement is not deemed to be sharing commissions when it pays a service provider for its research products and services in response to a money manager’s request to make the payment; and (b) the payments in the arrangement will be in specified dollar amounts.

* * * * *

¹ Securities Exchange Act Release No. 54165 (July 18, 2006), 71 FR 41978.

² Although the Interpretation was effective on July 24, 2006, the SEC had permitted market participants to continue to rely on its prior interpretation of the statute until January 24, 2007.

³ Willkie Farr & Gallagher LLP Client Memorandum, “SEC Staff Issues No-Action Position on New Client Commission Arrangements” available at www.willkie.com/files/tbl_s29Publications/FileUpload5686/2383/SEC_Staff_Issues_No-Action_Position.pdf.

⁴ SEC Staff No-Action Letter re: Status of Service Providers in Goldman Sachs & Co.’s Research XPRESS Program (January 17, 2007), available at www.sec.gov/divisions/marketreg/mr-noaction/2007/goldmansachs011707-15a.pdf (“Goldman letter”). Client commission arrangements are commonly referred to as soft dollar arrangements. Under the Guidance, a money manager can agree with a broker-dealer effecting trades for the money manager’s accounts that a portion of the commissions paid by the accounts will be allocated to a “pool” of funds. The manager can thereafter request that the broker-dealer make payments from the pool of funds to service providers for certain research products and services. The Goldman letter contains a number of conditions to the no-action position. Please see our Client Memorandum in n.3 above.

⁵ Goldman letter at 1 n.2. The letter requesting relief had stated that the payments would be “specified dollar amounts,” but the original Staff letter did not incorporate that fact.

If you have any questions regarding this memorandum, please contact Larry E. Bergmann (lbergmann@willkie.com, 202-303-1103), Roger D. Blanc (rblanc@willkie.com, 212-728-8206), Martin R. Miller (mmiller@willkie.com, 212-728-8690), or the attorney with whom you regularly work.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, NY 10019-6099 and has an office located at 1875 K Street, NW, Washington, D.C., 20006-1238. Our New York telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111. Our Washington, D.C. telephone number is (202) 303-1000 and our facsimile number is (202) 303-2000. Our website is located at www.willkie.com.

February 9, 2007

Copyright © 2007 by Willkie Farr & Gallagher LLP.

All Rights Reserved. This memorandum may not be reproduced or disseminated in any form without the express permission of Willkie Farr & Gallagher LLP. This memorandum is provided for news and information purposes only and does not constitute legal advice or an invitation to an attorney-client relationship. While every effort has been made to ensure the accuracy of the information contained herein, Willkie Farr & Gallagher LLP does not guarantee such accuracy and cannot be held liable for any errors in or any reliance upon this information. Under New York's Code of Professional Responsibility this document may constitute attorney advertising. Prior results do not guarantee a similar outcome.