



March 23, 2023

Via Electronic Mail

Hon. Gary Gensler, Chair
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Research Payment Practices and Expiration of SIFMA No-Action Letter re MiFID II Implementation¹

Dear Chair Gensler:

The Healthy Markets Association,² CFA Institute,³ and Council of Institutional Investors⁴ write jointly once again to call upon the Commission to protect investors by requiring:

- firms that receive cash payments for investment research to register, as anticipated by the law;

¹ Letter from Elizabeth Miller, SEC, to Steve Stone, Morgan Lewis (on behalf of SIFMA), Oct. 26, 2017, available at <https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm> (“SIFMA No-Action Letter”).

² Healthy Markets Association (“HMA”) is a not-for-profit member organization of public pension funds, investment advisers, broker-dealers, exchanges, and market data firms focused on reducing conflicts of interest and improving the transparency, efficiency, and fairness of the capital markets. To learn more about HMA or our members, please see our website at <https://healthymarkets.org>.

³ CFA Institute is the global association of investment professionals that sets the standard for professional excellence and credentials. The organization is a champion of ethical behavior in investment markets and a respected source of knowledge in the global financial community. Our aim is to create an environment where investors’ interests come first, markets function at their best, and economies grow. There are more than 190,000 CFA charterholders worldwide in more than 160 markets. CFA Institute has nine offices worldwide and 160 local societies. In the U.S., it has nearly 82,000 members and 67 societies. For more information, visit www.cfainstitute.org or follow us on [LinkedIn](#) and Twitter at [@CFAINstitute](#).

⁴ Council of Institutional Investors (“CII”) is a nonprofit, nonpartisan association of United States (“U.S.”) public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management of approximately \$4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families, including public pension funds with more than 15 million participants – true “Main Street” investors through their pension funds. Our associate members include non-U.S. asset owners with about \$4 trillion in assets, and a range of asset managers with more than \$40 trillion in assets under management. For more information about CII, including its board and members, please visit CII’s website at <http://www.cii.org>.

- investment advisers that seek to rely on the safe harbor for best execution under Section 28(e) to implement policies and procedures to disclose amounts paid for research from client assets; and
- investment advisers that seek to rely on the safe harbor to implement best execution policies and procedures to ensure research benefits the asset owners who pay for it.

While the latter bullets would require changes to rules or guidance, the first point could be achieved by simply allowing a temporary no-action letter granted to the Securities Industry and Financial Markets Association (“SIFMA”) over five years ago, and extended nearly four years ago, to expire as scheduled.

SIFMA No-Action Letter

Shortly before MiFID II’s implementation, SIFMA petitioned the Commission staff for no-action relief, asserting that subjecting research providers who would soon be compelled to accept cash payments in Europe to Advisers Act regulation “would be unnecessary ... and could disrupt a broker-dealer’s role in providing liquidity and acting as counterparty to its clients.”⁵

Weeks before MiFID II went into effect, the Commission staff released a time-limited “no-action” letter declaring that it “would not recommend enforcement action ... if a broker-dealer provides research services ... to a Manager that is required to pay for the research services” “from its own money, from a separate research payment account (“RPA”) funded with its clients’ money, or a combination of the two.”⁶ That letter was expected to expire on July 3, 2020. The Commission staff extended the letter in November 2019 until July 3, 2023.⁷

In Europe, investment research became transparently priced, investors were suddenly freed to separately shop for investment research and trading services (unbundled), and research and trading costs plummeted – without any measurable decrease in access or quality.⁸ Worse than being just left behind and in the dark, many US investors have been instead left with the tab.⁹

⁵ Letter from Steve Stone, Morgan Lewis LLP, to Douglas Scheidt, SEC, at 3, Oct. 17, 2017, *available at* <https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a-incoming.pdf>.

⁶ SIFMA No-Action Letter.

⁷ Letter from Elizabeth Miller and Erin Moore, SEC, Nov. 4, 2019, *available at* <https://www.sec.gov/investment/sifma-110419>.

⁸ At the same time, as a result of competitive market forces (and not MiFID II), many asset managers with MiFID II clients committed to not having their MiFID II-covered clients pay for research. We take no position as to whether the costs for investment research should be ultimately borne by asset managers or their customers. That said, we believe asset owners who are asked to pay for investment research should know (1) how much they are paying, and (2) that the research for which they are paying benefits them.

⁹ For example, one large public pension fund’s investment professionals have determined that while one bank’s research is important, the bank’s trade performance was weaker than some alternatives. Thus, in order to pay the bank for research, that public retirement fund has been essentially sending the bank large

The expiration of the SIFMA No-Action Letter would not compel US-based investment advisers to pay for research out of their own expenses. It would not compel unbundling. Rather, it would force a research provider in Europe that is not already registered as an investment adviser to: (1) register as investment adviser so as to receive separate payments for research from MiFID II-covered clients; (2) move its research provision under an already registered affiliate; or (3) make other changes, including stopping accepting payments for research in Europe.

We believe it is likely that many of the remaining unregistered research providers would register as investment advisers. In that case, they would also be legally able, if they chose, to accept payments from non-MiFID-covered research customers, including US customers. Thus, even though the SIFMA No-Action Letter does not address non-MiFID clients, we believe that its expiration could have a significant impact on non-MiFID clients; i.e., could enable them to pay separately for research.

As HMA wrote to the Commission last year:

Ultimately, the SIFMA No-Action Letter has preserved ... bank-compelled bundling ... in the US. This regime harms US investors and markets in several ways, including by:

1. Allowing banks with strong research to effectively preclude US investment advisers from competitively, separately shopping for trading and research services, leading to difficulties in achieving best execution and restrictions on competition in the provision of trading and research services;¹⁰
2. Putting US investment advisers and their customers (who are compelled to trade to obtain research) at a competitive disadvantage to their European counterparts; and
3. Encouraging investment advisers to use customer assets to generate commissions to pay for research that may not benefit the paying customers, including

“market-on-close” orders periodically at inflated commission rates to pay for the research expenses while attempting to mitigate any potentially negative impact on its fund from trading more with the bank.

¹⁰ See CII, Policies on Other Issues, Guiding Principles for Trading Practices, Commission Levels, Soft Dollars and Commission Recapture (Adopted Mar. 31, 1998), available at https://www.cii.org/policies_other_issues#principles_trading_commission_softdollar (“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.”).

having US investors pay for research that may benefit exclusively non-US investors.¹¹

Relying, in part, upon the SIFMA No-Action Letter, some global banks have continued to compel US-based investors (including public pension funds) to trade with them in order to pay for separately provided investment research. While this may provide the bank with greater trading volumes (and revenues), it may not provide the US investors with best execution. After all, providing quality research is materially different than providing quality trading services.

As many asset owners (including pension funds) in Europe have essentially stopped paying for investment research from banks, there has been tremendous pressure on global asset managers to shift those costs onto their other customers, including US-based pension funds, mutual fund customers, and others.

In July 2022 (one year before the scheduled expiration of the letter), the Director of the Division of Investment Management, William Birdthistle, declared his intention to let that time-limited no-action relief finally expire, as anticipated.¹² Thus, for any market participants who had not yet come into compliance during the prior four and a half years of the time-limited relief, this Commission staff announcement essentially gave the industry a nearly full year of warning to come into compliance with the law.

There is a growing body of evidence detailing how the existing lack of transparency and bundling practices for research in the US have harmed investors.¹³ Nevertheless, SIFMA and other market intermediaries have urged the Commission to once again extend the no-action relief.¹⁴

Path Forward

In 2019, our organizations jointly called on the Commission to: “revise guidance under Section 28(e) of the Securities Exchange Act of 1934 to: (1) require investment managers and advisers who seek to rely on the safe harbor to disclose amounts paid for research from client assets; and (2) require investment [advisers] who seek to rely on the safe harbor to have procedures to ensure research benefits the asset owners who pay for it.”¹⁵

¹¹ Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler, SEC, Apr. 18, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/04/Letter-to-SEC-re-MiFID-II-Research-Practices-4-18-22.pdf>.

¹² Remarks of William Birdthistle, SEC, before the Practising Law Institute, July 26, 2022, available at <https://www.sec.gov/news/speech/birdthistle-remarks-pli-investment-management-2022-072622>.

¹³ See, e.g., Howell Jackson and Jeffrey Zhang, *'Nobody is Proud of Soft Dollars': The Impact of MiFID II on U.S. Financial Markets*, Feb. 20, 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4365036; see also, Letter from Tyler Gellasch, HMA, to Hon. Gary Gensler, SEC, Apr. 18, 2022, available at <https://healthymarkets.org/wp-content/uploads/2022/04/Letter-to-SEC-re-MiFID-II-Research-Practices-4-18-22.pdf>.

¹⁴ See, e.g., *The SEC Should Take Immediate Action to Preserve Critical Research Under MiFID II*, SIFMA, Feb. 21, 2023, available at <https://www.sifma.org/resources/news/the-sec-should-take-immediate-action-to-preserve-critical-research-under-mifid-ii/>.

¹⁵ Joint Letter I.

In 2020, we jointly urged the Commission to require funds to disclose, amongst other things, (1) costs of investment research paid from fund assets and (2) funds' best execution policies.¹⁶ We further urged the Commission to require such best execution policies to ensure that commission dollars generated by the fund be used to directly benefit the asset owners in the fund.¹⁷

Today, we urge the Commission to require:

- firms that receive cash payments for investment research to register, as required by law;
- investment advisers that seek to rely on the safe harbor for best execution under Section 28(e) to have policies and procedures to disclose amounts paid for research from client assets; and
- investment advisers that seek to rely on the safe harbor to have best execution policies and procedures to ensure research benefits the asset owners who pay for it.

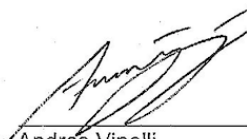
Conclusion

The Commission should finally allow the temporary no-action relief granted to SIFMA over five years ago to expire. In our view, this would ultimately benefit not only entities covered by MiFID II, but also US investors, independent trading firms, and independent research providers.

Sincerely,



Tyler Gellasch
Healthy Markets Association



Andres Vinelli
CFA Institute



Jeff Mahoney
Council of Institutional Investors

¹⁶ Joint Letter II.

¹⁷ Joint Letter II.