

MEMO# 2069

July 27, 1990

SEC LETTER PROHIBITING CERTAIN TRANSACTIONS FROM RELYING ON SOFT DOLLARS SAFE HARBOR

July 27, 1990 TO: SEC RULES MEMBERS NO. 56-90 INVESTMENT ADVISER MEMBERS NO. 38-90 INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 34-90 PENSION MEMBERS NO. 30-90 RE: SEC LETTER PROHIBITING CERTAIN TRANSACTIONS FROM RELYING ON SOFT DOLLAR SAFE HARBOR _____ At a meeting on July 25th, the SEC approved a letter from the Division of Market Regulation responding to a request from the Department of Labor concerning the application of Section 28(e) of the Securities Exchange Act to certain soft dollar practices involving employee benefit plans covered by ERISA. The staff responded that Section 28(e), which provides a safe harbor for certain soft dollar transactions, is not applicable to principal transactions, including riskless principal transactions, or futures transactions. Attached is a copy of the Division's letter and the request from the Department of Labor. The staff's position relies on a literal reading of the statute, which refers only to "commissions" and does not refer to markups or markdowns thereby suggesting that Congress did not intend to extend the safe harbor to principal transactions. The staff also notes that the legislative history of Section 28(e) indicates that the safe harbor was designed to address potential problems that may arise for equity securities resulting from the then impending demise of fixed commission rates for exchange-listed securities. Furthermore, the staff felt that it was appropriate to construe narrowly a safe harbor for conduct that otherwise may constitute a breach of fiduciary duty. For similar reasons, the staff took the position that the safe harbor does not apply to futures transactions. The staff stated in its letter that Section 28(e) simply provides a safe harbor and that practices outside the safe harbor are not per se violative but need to be analyzed under applicable statutes. We will keep you informed of developments. Amy B. Rosenblum Assistant General Counsel Attachments