

MEMO# 34234

July 28, 2022

Speech on Investment Management Issues by Division of Investment Management Director William Birdthistle

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TO: ICI Members
Investment Company Directors
ICI Global Members
Broker/Dealer Advisory Committee
Investment Advisers Committee
Money Market Funds Advisory Committee
Operations Committee
Proxy Working Group
SEC Rules Committee SUBJECTS: Disclosure
Fees and Expenses
Financial Stability
International/Global
Investment Advisers
MiFID, EMIR, AIFMD, UCITS V
Money Market Funds
Operations
Technology & Business Continuity
Valuation RE: Speech on Investment Management Issues by Division of Investment Management Director William Birdthistle

On July 26, William Birdthistle, Director of the SEC's Division of Investment Management, gave a speech on current issues and trends in investment management at the Practising Law Institute Investment Management 2022 program.[\[1\]](#) His remarks, which include an announcement that the Division will not extend no-action relief related to payments for research that expires next year, are summarized below.

Expiration of Staff No-Action Relief Related to MiFID II Payments for Research

Director Birdthistle announced that the Division does not plan to extend the no-action relief that it previously issued related to payments for research after the relief expires on July 3,

2023. The relief currently allows a broker-dealer to avoid investment adviser registration when it provides research services to an investment manager and accepts compensation through payment arrangements required under MiFID II, i.e., payment from a manager's own money, a separate research payment account funded with client money, or a combination.^[2] Director Birdthistle emphasized the temporary nature of the existing relief and expressed his understanding from market participants that a "variety of solutions" have arisen to address the impact of MiFID II. Therefore, the staff does not expect to issue further assurances with respect to the adviser status of broker-dealers accepting compensation under MiFID II arrangements. However, Director Birdthistle also stated that any statements or positions in the letters that are independent of the "adviser" issue, such as those relating to the use of client commission arrangements, would remain in force.^[3]

Regulatory Priorities Relating to Funds and Advisers

Director Birdthistle discussed several areas where he believes there is room to improve the oversight of funds and advisers. Analogizing to the SEC's tripartite mission, he first emphasized the Division of Investment Management's role with respect to investor protection, noting the importance of helping investors to better understand fees. He believes that it is unrealistic to expect investors to closely monitor and understand complex fee arrangements and costs and expressed concerns about "opaque" fee arrangements. He noted that the Division's authority under the Investment Company Act "encompass[es] not merely the form and content of disclosure, but also helping to ensure that advisers comply with their fiduciary obligations." Second, Director Birdthistle noted, as an example of the Division's role with respect to facilitation of capital formation, the recent proposals regarding private fund advisers. Third, he cited the SEC's mission to maintain fair, orderly, and efficient markets. He believes that fund "investors' voices are being entirely delegated and used indirectly to influence portfolio companies' behavior without investors' awareness, attention, or perhaps even interest." He believes there should be increased democratization of proxy voting to "promote markets that more fairly reflect the views and priorities of American investors, not just large asset managers."

LIBOR Transition

Director Birdthistle emphasized the need for advisers and funds to be prepared for the final transition away from LIBOR on June 30, 2023. He recognized the progress that has been made by the industry in preparing for this change but noted that one remaining concern is operational readiness, which is the focus of the ARRC's Operations and Infrastructure Working Group. Director Birdthistle emphasized the importance of accurate disclosure to investors regarding LIBOR transition, the need to address any valuation risks arising from the transition, and the importance of understanding a firm's exposure to LIBOR-linked instruments.^[4] He noted that the Division will continue to engage with advisers and funds about preparedness for LIBOR transition, including through the Division's participation in examinations and outreach efforts by the SEC's Division of Examinations.

Money Market Fund Reform

Director Birdthistle spent a significant portion of his speech discussing money market fund reform. He discussed how prime money market funds were affected by the market events of March 2020, citing high redemption rates of prime money market funds during this period. He observed that the gate and redemption fee requirements the SEC adopted after the financial crisis led to investors redeeming from these funds in March 2020 on an anticipatory basis, to avoid being subject to fees or gates. Director Birdthistle believes swing pricing may be a solution to make money market funds more resilient to liquidity stresses. He acknowledged that swing pricing may raise operational challenges for the fund

industry, but noted that "[s]wing pricing, broadly adopted, might require upgrades to parts of [our system that harken back to Buttonwood trees, vacuum tubes, and reel-to-reel computing]. But perhaps the world's largest, most globally critical financial system ought to be more modern and robust."

Financial Stability

Director Birdthistle ended his speech by noting the important responsibility of the SEC to "protect for financial stability and to increase the resilience of our financial system." He observed that he has "seen what happens when firms disregard regulation in an unchecked pursuit of 'innovation,'" concluding that "[w]hen some insist on moving fast and breaking things, sometimes that just leaves things broken."

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endnotes

[1] William Birdthistle, Director, Division of Investment Management, Remarks at PLI: Investment Management 2022 (July 26, 2022), available at https://www.sec.gov/news/speech/birdthistle-remarks-pli-investment-management-2022-072622#_ftn18.

[2] Securities Industry and Financial Markets Association, SEC Staff No-Action Letter (Oct. 26, 2017), available at <https://www.sec.gov/divisions/investment/noaction/2017/sifma-102617-202a.htm>. In November 2019, SEC staff extended this no-action relief to July 2023. Securities Industry and Financial Markets Association, SEC Staff No-Action Letter (Nov. 4, 2019) ("November 2019 NAL"), available at <https://www.sec.gov/investment/sifma-110419>.

[3] For example, the November 2019 NAL specifies that the use of client commission arrangements does not affect whether the broker-dealer exclusion may be available in connection with the receipt of payments for research under section 28(e) of the Exchange Act. See November 2019 NAL at n.8.

[4] He explained that "[t]his preparation could involve understanding their exposure to LIBOR-linked issues, such as identifying data sources for security-specific updates from designated parties on fallback rates and conventions, such as compounding, lookbacks and lockouts, and planning how and when portfolio positions will convert from their use of LIBOR to an alternative reference rate."

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