

COMMENT LETTER

September 7, 2006

ICI Comment Letter on Revised Soft Dollar Guidance (pdf)

September 7, 2006 Ms. Nancy M. Morris Secretary Securities and Exchange Commission
100 F Street, N.E. Washington, D.C. 20549-1090 Re: Commission Guidance Regarding Client
Commission Practices Under Section 28(e) of the Securities Exchange Act of 1934 (File No.
S7-13-06) Dear Ms. Morris: The Investment Company Institute¹ commends the Commission
for issuing its final interpretive guidance on the use of soft dollars under Section 28(e) of
the Securities Exchange Act of 1934.² The final guidance properly reflects comments
received on the proposal, including those provided by the Institute,³ and strikes an
appropriate balance between the regulation of soft dollar practices and the facilitation of
soft dollar arrangements in the interests of investors. Commission-Sharing Arrangements
The Release requests further comment with respect to commission-sharing arrangements
under Section 28(e). The Institute strongly supports the flexibility provided by the
Commission in the final guidance to allow market participants to structure arrangements
that are consistent with the statute. We are particularly pleased that the Commission
recognized the variety of commission-sharing arrangements under Section 28(e) and
recommend that any further guidance reflect the need for 1 The Investment Company
Institute is the national association of the U.S. investment company industry. More
information about the Institute is available at the end of this letter. 2 SEC Release No.
34-54165 (July 18, 2006), 71 FR 41978 (July 24, 2006) ("Release"). 3 See Letter from Paul
Schott Stevens, President, Investment Company Institute, to Jonathan G. Katz, Secretary,
Securities and Exchange Commission, dated November 25, 2005. Ms. Nancy M. Morris
September 7, 2006 Page 2 flexibility in this area. We also commend the Commission for
clarifying that the final guidance does not place any affirmative obligations on money
managers with respect to the responsibility of introducing brokers involved in commission-
sharing arrangements. We urge the Commission to continue to work with the broker-dealer
community to ensure that any responsibilities imposed on brokers under the guidance with
respect to these types of arrangements are appropriate and workable. Level Playing Field
for All Investment Advisers While the interpretive guidance helps ensure a strong regulatory
framework for soft dollar practices of investment advisers and accounts subject to Section
28(e), we continue to believe that the Commission should prohibit the use of client
commissions outside the safe harbor by all investment advisers, regardless of the type of
client account involved. As we noted in our comment letter on the proposed interpretive
guidance, advisers to investment companies and advisers to pension funds under ERISA
may be prohibited from using commissions outside the safe harbor, whereas advisers to
other types of accounts are free to do so (registered advisers must provide appropriate
disclosure in Form ADV).⁴ This regulatory disparity, especially when combined with other
forces exerting downward pressure on overall commissions, may create strong incentives

for broker-dealers to favor hedge fund and other advisers who have greater freedom to use soft dollars to make payments outside of the Section 28(e) safe harbor.⁵ We urge the Commission to adopt a rule under Section 206(4) of the Investment Advisers Act that will prohibit an investment adviser from using client commissions to pay for any products or services that fall outside the safe harbor. The Commission also should pursue the recommendation of the NASD Mutual Fund Task Force that the SEC urge the Department of Labor (with respect to non- ERISA retirement accounts) and the federal banking agencies to require all discretionary investment advisers not subject to the SEC's jurisdiction to comply with the standards of the safe harbor. This approach will ensure that all advisers treat investors equitably in connection with the adviser's use of brokerage, and that broker-dealers do not have an incentive to favor advisers who are permitted to use client commissions outside the safe harbor. * * * * 4 Banks must either comply with the safe harbor or disclose their soft dollar policies and practices to fiduciary clients and obtain consent. 5 For example, broker-dealers sometimes provide important benefits by performing "functions incidental" to effecting securities transactions, such as providing access to initial public offerings, access to corporate management, and committing the broker-dealer's capital to complete client trades. These valuable benefits, while within the safe harbor, may tend to bypass mutual funds and ERISA retirement plans in favor of hedge funds and other accounts whose commission payments, due to a regulatory anomaly, can be more lucrative to the broker-dealer. Without a level playing field, all advisory clients will not be afforded the same protections relating to the adviser's use of brokerage and funds will be placed at a regulatory and competitive disadvantage to other types of client accounts. Ms. Nancy M. Morris September 7, 2006 Page 3 If you have any questions concerning these comments, or would like additional information, please contact the undersigned by at (202) 326-5815. Sincerely, /s/ Elizabeth Krentzman General Counsel cc: The Honorable Christopher Cox The Honorable Paul S. Atkins The Honorable Roel C. Campos The Honorable Annette L. Nazareth The Honorable Kathleen L. Casey Erik R. Sirri, Director Robert L.D. Colby, Deputy Director Division of Market Regulation Andrew J. Donohue, Director Division of Investment Management * * * * * About the Investment Company Institute The Investment Company Institute's membership includes 8,791 open-end investment companies (mutual funds), 652 closed-end investment companies, 195 exchange-traded funds, and 5 sponsors of unit investment trusts. Mutual fund members of the ICI have total assets of approximately \$9.273 trillion (representing 98 percent of all assets of US mutual funds); these funds serve approximately 89.5 million shareholders in more than 52.6 million households. Many of the Institute's investment adviser members render investment advice to both investment companies and other clients. In addition, the Institute's membership includes 171 associate members, which render investment management services exclusively to non-investment company clients. A substantial portion of the total assets managed by registered investment advisers is managed by these Institute members and associate members.