

Discretionary Liabilities

Discretionary liabilities are those liabilities that are payable solely at the discretion of the broker/dealer, such as profit sharing, bonuses, and the like. If a firm satisfies the following conditions, it may be possible to exclude such liabilities from the computation of net capital. Such would require an opinion of counsel, qualified in the appropriate jurisdiction, (i.e., every state in which a person entitled to a portion of such bonuses, etc., resides, as well as the state(s) in which the firm is incorporated and/or has its place of business), that states:

- (1) No contractual obligation requires the payment of such liability.
- (2) No contractual obligation requires the payment of all or part of such liability once it is posted to the firm's records.
- (3) No law or regulation, state or federal, requires the payment of all or part of the liability once it is booked.
- (4) Following a diligent review of state and federal law and regulations, counsel has no knowledge of any such law or regulation that requires payment of such liability once it is posted to the firm's records.

Also, if a firm's Board of Directors rescinds such a liability, an opinion of counsel must be obtained that such action is valid under all applicable laws and regulations, and that the individual(s) to whom the liability was owed retains no right at any time to obtain payment of the liability that was the subject of the Board's action.

SEC Staff of DMR to NASD, September 1988