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BY HAND AND E-MAIL

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Securities and Exchange Commission v. UBS Securities LLC and UBS Financial Services, Inc. (File No. HO-10915)

Dear Mr. Scheidt:

We submit this letter on behalf our clients UBS Securities LLC and UBS Financial Services, Inc. (collectively, “UBS” or the “Settling Firms”), the settling defendants in the above-captioned civil proceeding. UBS seeks the assurance of the staff of the Division of Investment Management (the “Staff”) that it would not recommend any enforcement action to the Commission under Section 206(4) of the Investment Advisers Act of 1940 (the “Advisers Act”) or Rule 206(4)-3 thereunder (the “Rule”), if an investment adviser that is required to be registered under the Advisers Act pays the Settling Firms, or any of their associated persons as defined in Section 202(a)(17) of the Advisers Act, a cash payment for the solicitation of advisory clients, notwithstanding the existence of the Judgment (as defined below). While the Judgment does not operate to prohibit or suspend the Settling Firms or any of their associated persons from being associated with or acting as an investment adviser and does not relate to solicitation activities on behalf of investment advisers, it may affect the ability of a Settling Firm and its associated persons to receive such payments.¹ The Staff in many other instances has granted no-action relief under the Rule in similar circumstances.

¹ Under Section 9(a) of the Investment Company Act of 1940 (“Investment Company Act”), the Settling Firms and their affiliated persons will, as a result of the Judgment, be prohibited from serving...
BACKGROUND

The staff of the Division of Enforcement has engaged in settlement discussions with the Settling Firms in connection with the above-captioned civil proceeding, which will be brought alleging violations of Section 15(c) of the Securities Exchange Act of 1934 ("Exchange Act"). As a result of these discussions, the Settling Firms submitted an executed Consent of Defendants UBS Securities LLC and UBS Financial Services, Inc. (the "Consent").

In the Consent, solely for the purpose of proceedings brought by or on behalf of the Commission or in which the Commission is a party, UBS agreed to consent to the entry of the Judgment as to Defendants UBS Securities LLC and UBS Financial Services, Inc. (the "Judgment"), without admitting or denying the allegations contained in the above-captioned Complaint (other than those relating to personal and subject matter jurisdiction, which are admitted). The Complaint concerns the marketing and sale of auction rate securities ("ARS") by the Settling Firms to investors. The Complaint alleges that the Settling Firms misled tens of thousands of their customers regarding the fundamental nature and increasing risks associated with ARS that the Settling Firms underwrote, marketed and sold. The Complaint further alleges that through their financial advisors, marketing materials, and account statements, the Settling Firms misrepresented to their customers that ARS were safe, highly liquid investments that were equivalent to cash or money-market funds. The Complaint alleges that, as a result, numerous customers invested their savings in the Settling Firms’ ARS that they needed to have available on a short-term basis. The Complaint further alleges that (i) on February 13, 2008, the Settling Firms determined that they would not continue to support auctions, as they had historically done, and that they would let their auctions fail and (ii) as a direct result of auction failures, over 40,000 Settling Firm accounts holding more than $35 billion in ARS had their investments rendered virtually illiquid overnight and, because of the illiquidity, many customers incurred mark to market losses on the par value of their
ARS investments held at the Settling Firms. The Complaint alleges that the Settling Firms violated Section 15(c) of the Exchange Act.

The Judgment, among other things, will permanently restrain and enjoin UBS and its agents, servants, employees, attorneys, and all persons in active concert or participation with them who receive actual notice of the Judgment from violating, directly or indirectly, Section 15(c) of the Exchange Act. Additionally, pursuant to the Judgment, the Settling Firms shall establish a plan to restore multiple billions of dollars in liquidity to their customers holding ARS.

EFFECT OF RULE 206(4)-3

The Rule prohibits an investment adviser that is required to be registered under the Advisers Act from paying a cash fee to any solicitor that has been temporarily or permanently enjoined by an order, judgment or decree of a court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. Entry of the Judgment will cause the Settling Firms to be disqualified under the Rule, and accordingly, absent no-action relief, the Settling Firms may be unable to receive cash payments for the solicitation of advisory clients.2

DISCUSSION

In the release adopting the Rule, the Commission stated that it "would entertain, and be prepared to grant in appropriate circumstances, requests for permission to engage as a solicitor a person subject to a statutory bar."3 We respectfully submit that the circumstances present in this case are precisely the sort that warrant a grant of no-action relief.

The Rule's proposing and adopting releases explain the Commission's purpose in including the disqualification provisions in the Rule. The purpose was to prevent an investment adviser from hiring as a solicitor a person whom the adviser was not permitted to hire as an employee, thus doing indirectly what the adviser could not do directly. In the proposing release, the Commission stated that:


because it would be inappropriate for an investment adviser to be permitted to employ indirectly, as a solicitor, someone whom it might not be able to hire as an employee, the Rule prohibits payment of a referral fee to someone who has engaged in any of the conduct set forth in Section 203(e) of the [Advisers] Act and therefore could be the subject of a Commission order barring or suspending the right of such person to be associated with an investment adviser. 4

The Judgment does not bar, suspend, or limit the Settling Firms or any person currently associated with a Settling Firm from acting in any capacity under the federal securities laws (except as provided in Section 9(a) of the Investment Company Act). 5 The Settling Firms have not been sanctioned for conduct in connection with the solicitation of advisory clients for investment advisers. 6 Accordingly, consistent with the Commission's reasoning, there does not appear to be any reason to prohibit any investment adviser from paying a Settling Firm or its associated persons for engaging in solicitation activities under the Rule.

The Staff previously has granted numerous requests for no-action relief from the disqualification provisions of the Rule to individuals and entities found by the Commission to have violated a wide range of federal securities laws and rules thereunder or permanently enjoined by courts of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. 7


5 See footnote 1.

6 Each Settling Firm additionally notes that it has not violated, or aided and abetted another person in violation of, the Rule, nor have individuals who may perform solicitation activities on behalf of such Settling Firm or its associated persons been personally disqualified under the Rule.

UNDEAKINGS

In connection with this request, each Settling Firm undertakes:

1. to conduct any cash solicitation arrangement entered into with any investment adviser required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 except for the investment adviser’s payment of cash solicitation fees to the Settling Firm which is subject to the Judgment;

2. to comply with the terms of the Judgment, including, but not limited to, the payment of disgorgement, pre-judgment interest, civil or administrative penalties and fines;

3. that for ten years from the date of the entry of the Judgment, a Settling Firm or any investment adviser with which it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Judgment in a written document that is delivered to each person whom the Settling Firm solicits (a) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser or (b) at the time the person enters into such a contract, if the person has the right to terminate such contract without penalty within 5 business days after entering into the contract.

CONCLUSION

We respectfully request the Staff to advise us that it will not recommend enforcement action to the Commission if an investment adviser that is required to be registered with the Commission pays a Settling Firm or any of its associated persons a cash payment for the solicitation of advisory clients, notwithstanding the Judgment.

Please do not hesitate to call the undersigned at (202) 383-8050 regarding this request.

Very truly yours,

[Signature]

Kenneth J. Berman