

March 19, 2009

VIA FIRST CLASS MAIL AND E-MAIL

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, D.C. 20549-0506

**Securities and Exchange Commission v. UBS AG, 09 Civ. No. 00316 (D.D.C.
Mar. 18, 2009)**

Dear Mr. Scheidt:

We submit this letter on behalf our client UBS AG, the settling defendant in the above-captioned civil proceeding. UBS AG 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 UBS AG, or any of its 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 UBS AG 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 UBS AG 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"), UBS AG and its affiliated persons will, as a result of the Judgment, be prohibited from serving or acting as, among other things, an investment adviser or depositor of any registered investment company or principal underwriter for any registered open-end investment company or registered unit investment

BACKGROUND

The Staff of the Division of Enforcement has engaged in settlement discussions with UBS AG in connection with the above-captioned civil proceeding, which will be brought alleging violations of Section 15(a) of the Securities Exchange Act of 1934 (“Exchange Act”) and Section 203(a) of the Advisers Act. As a result of these discussions, UBS AG submitted an executed Consent of Defendant UBS AG (the “Consent”) to be presented by the staff to the Commission.

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 AG agreed to consent to the certain undertakings and entry of a Judgment as to Defendant UBS AG (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 alleges that from at least 1999 through 2008, UBS AG acted as an unregistered broker-dealer and investment adviser to thousands of United States cross-border clients by providing cross-border brokerage and investment advisory services to those clients largely through client advisors. The Complaint alleges that this cross-border business was serviced primarily from Switzerland. The Complaint alleges that UBS AG used United States jurisdictional means to engage in a cross-border business of soliciting, establishing and maintaining brokerage accounts; executing securities transactions; and providing investment advice for its United States cross-border clients. Finally, the Complaint alleges that at all times UBS AG was aware that it could provide these services to United States cross-border clients only through an entity registered with the Commission as a broker-dealer or investment adviser.

The Judgment, among other things, will permanently restrain and enjoin UBS AG and UBS AG’s 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(a) of the Exchange Act and Section 203(a) of the Advisers Act. Additionally, UBS AG, pursuant to the Judgment, shall pay disgorgement of \$200 million to the Commission.

trust. UBS AG and affiliated persons of UBS AG who act in the capacities set forth in Section 9(a) of the Investment Company Act have filed an application under Section 9(c) of the Investment Company Act requesting the Commission to issue both temporary and permanent orders exempting them, and UBS AG’s future affiliated persons should any of them serve or act in any of the capacities set forth in Section 9(a) in the future, from the restrictions of Section 9(a). The applicants believe that they meet the standards for exemptive relief under Section 9(c), and they expect that the Commission will issue a temporary order prior to or simultaneous with the Judgment, and a permanent order in due course thereafter. In no event will UBS AG or any of its affiliated persons act in any capacity enumerated in Section 9(a) unless and until the Commission issues an order pursuant to Section 9(c) of the Investment Company Act, exempting them from the prohibitions of Section 9(a) of the Investment Company Act resulting from the Judgment.

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 UBS AG to be disqualified under the Rule, and accordingly, absent no-action relief, UBS AG 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:

[b]ecause 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

² UBS AG and certain of its affiliates have obtained similar no-action relief in the past. *See, e.g.*, UBS Securities LLC, SEC No-Action Letter (pub. avail. Dec. 23, 2008); UBS Securities LLC (f/k/a UBS Warburg LLC), SEC No-Action Letter (pub. avail. Oct. 31, 2003); In the Matter of Certain Municipal Bond Refundings, SEC No-Action Letter (pub. avail. Apr. 13, 2000); In the Matter of Certain Market Making Activities on NASDAQ, SEC No-Action Letter (pub. avail. Jan. 11, 1999); PaineWebber Incorporated, SEC No-Action Letter (pub. avail. Dec. 22, 1998); Mitchell Hutchins Asset Management Inc., SEC No-Action Letter (pub. avail. Jan. 2, 1998).

³ *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295.

suspending the right of such person to be associated with an investment adviser.⁴

The Judgment does not bar, suspend, or limit UBS AG or any person currently associated with UBS AG from acting in any capacity under the federal securities laws (except as provided in Section 9(a) of the Investment Company Act).⁵ UBS AG has 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 UBS AG 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 certain conduct or practices under the federal securities laws.⁷

⁴ See Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

⁵ See footnote 1. As noted above, the Judgment restrains UBS AG from violating Section 203 of the Advisers Act.

⁶ UBS AG 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 UBS AG or its associated persons been personally disqualified under the Rule.

⁷ Barclays Bank PLC, SEC No-Action Letter (pub. avail. June 6, 2007); EJP Capital, Inc., SEC No-Action Letter (pub. avail. Jan. 16, 2007); Morgan Stanley & Co. Incorporated, SEC No-Action Letter (pub. avail. May 15, 2006); American International Group, Inc., SEC No-Action Letter (pub. avail. Feb. 21, 2006); ING Bank N.V. (pub. avail. Aug. 31, 2005); CIBC Mellon Trust Company, SEC No-Action Letter (pub. avail. Feb. 24, 2005); Goldman, Sachs & Co., SEC No-Action Letter (pub. avail. Feb. 23, 2005); Morgan Stanley & Co. Incorporated, SEC No-Action Letter (pub. avail. Feb. 4, 2005); Prime Advisors, Inc.; SEC No-Action Letter (pub. avail. Nov. 8, 2001); Legg Mason Wood Walker, Inc., SEC No-Action Letter (pub. avail. June 11, 2001); Dreyfus Corp., SEC No-Action Letter (pub. avail. March 9, 2001); UBS Securities Inc., SEC No-Action Letter (pub. avail. Feb. 7, 2001); Tucker Anthony Inc., SEC No-Action Letter (pub. avail. Dec. 21, 2000); J.B. Hanauer & Co., SEC No-Action Letter (pub. avail. Dec. 12, 2000); Founders Asset Management LLC, SEC No-Action Letter (pub. avail. Nov. 8, 2000); Credit Suisse First Boston Corp., SEC No-Action Letter (pub. avail. Aug. 24, 2000); Janney Montgomery Scott LLC, SEC No-Action Letter (pub. avail. July 18, 2000); Aeltus Investment Management, Inc., SEC No-Action Letter (pub. avail. July 17, 2000); William R. Hough & Co., SEC No-Action Letter (pub. avail. Apr. 13, 2000); In the Matter of Certain Municipal Bond Refundings, SEC No-Action Letter (pub. avail. Apr. 13, 2000); In the Matter of Certain Market Making Activities on Nasdaq, SEC No-Action Letter (pub. avail. Jan. 11, 1999); Paine Webber, Inc., SEC No-Action Letter (pub. avail. Dec. 22, 1998); NationsBanc Investments, Inc., SEC No-Action Letter (pub. avail. May 6, 1998); Morgan Keegan & Co., Inc., SEC No-Action Letter (pub. avail. Jan. 9, 1998); Merrill Lynch, Pierce, Fenner & Smith, Inc., SEC No-Action Letter (pub. avail. Aug. 7,

UNDERTAKINGS

In connection with this request, UBS AG 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, directly or indirectly, to UBS AG which is subject to the Judgment;
2. to comply with the terms of the Judgment, including, but not limited to, the payment of disgorgement, civil or administrative penalties and fines;
3. that for ten years from the date of the entry of the Judgment, UBS AG 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 UBS AG 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 UBS AG 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,



Kenneth J. Berman

1997); Gruntal & Co., SEC No-Action Letter (pub. avail. July 17, 1996); Salomon Brothers Inc.; SEC No-Action Letter (pub. avail. Jan. 26, 1994); BT Securities Corporation, SEC No-Action Letter (pub. avail. Mar. 30, 1992); Kidder Peabody & Co. Inc., SEC No-Action Letter (Oct. 11, 1990); First City Capital Corp., SEC No-Action Letter (pub. avail. Feb. 9, 1990); RNC Capital Management Co., SEC No-Action Letter (pub. avail. Feb. 7, 1989); and Stein Roe & Farnham Inc., SEC No-Action Letter (pub. avail. Aug. 25, 1988).