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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

**Re: Securities and Exchange Commission v. Stifel, Nicolaus & Company, Inc., et al.,  
Case No. 2:11-cv-00755 (E.D. Wisconsin, August 10, 2011)**

Dear Mr. Scheidt:

This letter is submitted on behalf of our client, Stifel, Nicolaus & Company, Inc. (“Stifel Nicolaus”), a registered broker-dealer and investment adviser, in connection with the settlement of the above-captioned civil action (the “Action”) brought by the U.S. Securities and Exchange Commission (the “Commission”) against Stifel Nicolaus and David W. Noack (“Noack”) in connection with sales of certain synthetic collateralized debt obligations (collectively, “CDO Investments” or “CDOs”) as described below.

Stifel Nicolaus seeks the assurance of the staff of the Division of Investment Management (the “Staff”) that it would not recommend any enforcement action to the U.S. Securities and Exchange Commission (the “Commission”) under Section 206(4) of the Investment Advisers Act of 1940 (the “Advisers Act”) and Rule 206(4)-3 thereunder (the “Rule”), if any investment adviser that is required to be registered pursuant to Section 203 of the Advisers Act pays to Stifel Nicolaus, or any of its associated persons as defined in Section 202(a)(17) of the Advisers Act, a cash payment, directly or indirectly, for the solicitation of advisory clients in accordance with the Rule, notwithstanding the existence of the Final Judgment (as described below) that otherwise would preclude such an investment adviser from paying such a fee, directly or indirectly, to Stifel Nicolaus or its associated persons. While the Final Judgment does not operate to prohibit or suspend Stifel Nicolaus or any of its associated persons<sup>1</sup> from being associated with or acting as an investment adviser (except as provided in Section 9(a) of the Investment Company Act of 1940 (the “Investment Company

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<sup>1</sup> As a result of the Action, Noack is also subject to an industry bar as set forth in a separate consent and offer of settlement entered into by Noack. Noack resigned from Stifel Nicolaus’s Milwaukee Public Finance office in February 2007 and is not an associated person of Stifel Nicolaus.

Act”)<sup>2</sup> and does not relate to solicitation activities on behalf of any investment adviser, it may affect the ability of Stifel Nicolaus and its associated persons to receive such payments. The Staff in many other instances has granted no-action relief under the Rule in similar circumstances.

## BACKGROUND

The staff of the Division of Enforcement (the “Enforcement Staff”) and Stifel Nicolaus have engaged in settlement discussions in connection with the filing of the Action. As a result of these settlement discussions, the Enforcement Staff and Stifel Nicolaus reached an agreement to settle the Action as described below, and the Enforcement Staff presented to the United States District Court for the Eastern District of Wisconsin (the “Court”) a Consent of Defendant Stifel, Nicolaus & Company, Inc. (the “Consent”) that contains certain admitted facts and a form of a Final Judgment as to Defendants Stifel, Nicolaus & Company, Inc. and David W. Noack (the “Final Judgment”). As described below, the Final Judgment imposes an injunction (the “Injunction”) and monetary sanctions upon Stifel Nicolaus.

In 2006, Stifel Nicolaus and Mr. Noack, who was at the time a Senior Vice President of Stifel Nicolaus and head of its Milwaukee office, recommended that five school districts in eastern Wisconsin<sup>3</sup> (the “School Districts”) invest their own funds, together with funds borrowed by specially-created trusts (the “OPEB Trusts”), in the CDO Investments in order to cover other post-employment benefits, such as healthcare and life insurance (“OPEB liabilities”), that the School Districts had agreed to provide their employees but had not funded prior to 2005. The 2006 investments were funded by contributions to the OPEB Trusts by the School Districts and borrowings by the OPEB Trusts. In the aggregate, the School Districts contributed \$37.3 million to their respective OPEB Trusts and the OPEB Trusts borrowed \$166.5 million from Depfa Bank, for an aggregate \$200 million of investments in the CDOs. The Depfa notes were collateralized by the OPEB Trusts’ assets (specifically, the CDOs investments) and by the moral obligation of the School Districts to fund any collateral shortfalls arising due to a decline in the value of the CDOs. In 2008,

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<sup>2</sup> Under Section 9(a) of the Investment Company Act, Stifel Nicolaus and its affiliated persons as defined in section 2(a)(3) of the Investment Company Act (“Affiliated Persons”) will, as a result of the Injunction included in Final 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 trust (“Fund Servicing Activities”). Stifel Nicolaus, together with Choice Financial Partners, Inc. (doing business as EquityCompass Strategies) (“Choice”), 1919 Investment Counsel, LLC (“1919ic”), and Ziegler Capital Management, LLC (“ZCM”) and collectively with Choice and 1919ic, the “Fund Servicing Applicants”) filed an application under Section 9(c) of the Investment Company Act (the “Application”) requesting that the Commission issue both temporary and permanent orders exempting the Fund Servicing Applicants, any existing company of which Stifel Nicolaus is an Affiliated Person, and any other company of which Stifel Nicolaus may become an Affiliated Person in the future (together, the “Covered Persons”), from the restrictions of Section 9(a). On the basis of the representations and conditions contained in the Application, the Commission issued a notice and temporary order exempting the Covered Persons from the prohibitions of Section 9(a) of the Investment Company Act resulting from the Injunction included in the Final Judgment. Stifel Nicolaus was a party to the Application, but does not currently engage in any Fund Servicing Activities and accordingly did not request relief under Section 9(a) of the Investment Company Act. Stifel Nicolaus will not engage in any Fund Servicing Activities absent seeking relief from the Commission.

<sup>3</sup> The School Districts are: School District of West Allis-West Milwaukee, Kenosha School District No. 1, School District of Waukesha, Kimberly Area School District, and School District of Whitefish Bay.

one of the School Districts contributed an additional \$10 million to fund its collateral shortfall to Depfa Bank. The investments failed and the School Districts suffered a complete loss of their cash investment of \$47.3 million in the aggregate.

The Final Judgment contains factual admissions that Stifel Nicolaus and Noack acted negligently by making material misstatements and omissions to the School Districts and by failing adequately to investigate the appropriateness of the CDO Investments and, further, that by engaging in those acts and admissions, Stifel Nicolaus and Noack violated the federal securities laws. The Final Judgment by the Court provides that (i) Stifel Nicolaus and Noack are permanently restrained and enjoined from violating, directly or indirectly, Sections 17(a)(2) and 17(a)(3) of the Securities Act, (ii) Stifel Nicolaus and Noack are jointly and severally liable for disgorgement of \$1.66 million and prejudgment interest of \$0.84 million, (iii) Stifel Nicolaus is liable for a civil penalty in the amount of \$22.0 million and (iv) Noack is liable for a civil penalty in the amount of \$100,000.

### **EFFECT OF RULE 206(4)-3**

Rule 206(4)-3 prohibits any investment adviser that is required to be registered under the Advisers Act from paying a cash fee, directly or indirectly, to any solicitor that (among other disqualifying events) has been permanently or temporarily 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. The existence of the Final Judgment will cause Stifel Nicolaus to be disqualified under the Rule, and accordingly, absent no-action or other relief, Stifel Nicolaus would be unable to receive cash payments for the solicitation of advisory clients. In addition, because the Final Judgment is not a Commission order, Stifel Nicolaus cannot rely on the Staff's no-action letters, dated March 26 and July 3, 2003, to Dougherty & Company, LLC (the "Dougherty Letters").

### **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."<sup>4</sup> We submit that the circumstances present in this case warrant, and are particularly suited to support, such 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

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<sup>4</sup> 9 See Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rei. No. 688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295, at note 10.

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.<sup>5</sup>

The Injunction included in the Final Judgment does not bar, suspend, or limit Stifel Nicolaus or any person currently associated with them<sup>6</sup> from acting in any capacity under the federal securities laws (except as provided in Section 9(a) of the Investment Company Act<sup>7</sup>). Stifel Nicolaus has neither been sanctioned in the Final Judgment for any activity relating to the solicitation of advisory clients, nor was any such activity at issue. Accordingly, consistent with the Commission's reasoning, there does not appear to be any reason to prohibit an adviser from paying Stifel Nicolaus or its associated persons for engaging in solicitation activities under the Rule.

In addition, the need for the no-action relief requested is neither theoretical nor speculative, but instead is concrete. Stifel Nicolaus is currently contractually entitled to receive cash compensation from certain investment advisers in connection with its solicitation of advisory clients for those advisers. Furthermore, Stifel Nicolaus would like to solicit clients for other investment advisers, both affiliated and unaffiliated with it. 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 and SRO rules 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.<sup>8</sup>

## UNDERTAKINGS

In connection with this request, Stifel Nicolaus undertakes with regard to its solicitation activities that:

1. It or any person associated with it will conduct any cash solicitation arrangement entered into with any investment adviser registered or required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 as if Stifel Nicolaus were not a disqualified person for purposes of Rule 206(4)-3 by virtue of the Final Judgment;

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<sup>5</sup> See Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Release No. 615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

<sup>6</sup> See *supra* note 1.

<sup>7</sup> See *supra* note 2.

<sup>8</sup> Royal Bank of Canada, SEC No-Action Letter (pub. avail. Dec. 19, 2014); Bank of America, N.A., SEC No-Action Letter (pub. avail. Nov. 25, 2014); Citigroup Global Markets Inc., SEC No-Action Letter (Aug. 6, 2014); RBS Securities, Inc., SEC No-Action Letter (Nov. 26, 2013); J.P. Morgan Securities LLC, SEC No-Action Letter (pub. avail. Jan. 9, 2013); GE Funding Capital Market Services, Inc., SEC No-Action Letter (Jan. 25, 2012); Wells Fargo Bank, N.A., SEC No-Action Letter (pub. avail. Dec. 12, 2011); J.P. Morgan Securities LLC, SEC No-Action Letter (pub. avail. July 11, 2011); J.P. Morgan Securities LLC, SEC No-Action Letter (pub. avail. June 29, 2011); UBS Financial Services Inc., SEC No-Action Letter (May 9, 2011).

2. The Final Judgment does not bar or suspend any person currently associated with Stifel Nicolaus from acting in any capacity under the federal securities laws;
3. It will comply with the terms of the Final Judgment, including, but not limited to, the Injunction and the payment of disgorgement and a civil monetary penalty; and
4. Until ten (10) years from the date of the entry of the Final Judgment on December 6, 2016, Stifel Nicolaus and any person associated with it or any investment adviser with which it or any person associated with it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Final Judgment in a written document that is delivered to each person whom Stifel Nicolaus or its associated persons solicit (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 five 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 Stifel Nicolaus or any associated person of Stifel Nicolaus a cash payment for the solicitation of advisory clients, notwithstanding the Final Judgment.

Very truly yours,



Robert J. Endicott