

SEC Clarifies Application of Cash Solicitation Rule to Investment Pools

The Office of the Chief Counsel of the Securities and Exchange Commission's ("SEC") Division of Investment Management released on July 15, 2008 an [interpretive letter](#) clarifying that Rule 206(4)-3 (the "Cash Solicitation Rule") under the Investment Advisers Act of 1940 (the "Advisers Act") does not apply to an SEC-registered investment adviser's cash payment to a person solely to compensate that person for soliciting investors for an investment pool managed by the adviser. Prior to the release of this letter, there had been concern whether the Cash Solicitation Rule applied to cash payments by registered advisers to persons who solicit investors for investment pools.

Discussion

The Cash Solicitation Rule makes it unlawful for any investment adviser that is required to be registered with the SEC to pay a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless the payments are made in compliance with the Rule. The SEC intended for the Cash Solicitation Rule to address the conflicts of interest inherent in certain cash solicitation arrangements.

The new interpretive letter clarifies that the Cash Solicitation Rule does not apply to a registered investment adviser's cash payment to persons solely as compensation for soliciting investors for an investment pool managed by the adviser, in contrast to cash payments to persons for soliciting direct investment advisory relationships with the adviser.

The interpretive letter notes that even if the Cash Solicitation Rule does not apply to a particular situation, the solicitor may generally be required to disclose material facts relating to conflicts of interest. The letter also points out that, depending on the facts and circumstances, a solicitor may be "advising others . . . as to the advisability of investing in . . . securities" within the meaning of Section 202(a)(11) of the Advisers Act, and therefore be required to register as an investment adviser. The letter does not address whether a person's receipt of cash compensation from an investment adviser of an investment pool for soliciting investors for the pool would result in the person being deemed a "broker" under the Securities Exchange Act of 1934. However, the SEC has said elsewhere that this type of activity could require broker-dealer registration.

Contact Information

If you would like to learn more about this new SEC interpretive guidance, please contact your legal advisor at Ropes & Gray or a member of our [Investment Management](#) team.

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