

NOTICE OF REQUEST FOR PUBLIC COMMENT ON NEW MODEL RULES PERTAINING TO INVESTMENT ADVISER SOLICITORS

NASAA's Investment Adviser Regulatory Policy and Review Project Group ("Project Group") is soliciting comments from the public on a proposed model rule regarding solicitors for investment advisers ("Proposed Rule"). The Proposed Rule keeps intact the increased investor protection standards presently required by the states, while clarifying the conditions under which investment advisers, investment adviser representatives, and solicitors must operate. Additionally, the Proposed Rule provides an optional template for Administrators wishing to exempt solicitors performing limited activities from registration under specified conditions. The Proposed Rule is being provided under the Uniform Securities Act of 1956 ("1956 Act") and under the Uniform Securities Act of 2002 ("USA 2002").

The comment period begins on Tuesday, July 28, 2009, and will remain open for 20 days. Accordingly, all comments should be submitted on or before Monday, August 17, 2009. Comments should be submitted by email or in writing and addressed to:

Kenneth L. Hojnacki
Director of Professional Registration & Compliance
Wisconsin DFI, Division of Securities
PO Box 1768
Madison, WI 53701-1768
kenneth.hojnacki@dfi.wisconsin.gov

Copies of all comments should *ALSO* be sent to everyone listed below under the heading "Contact Information."

Background and Purpose of the Model Rule

The Project Group has been charged with creating model rules that address issues involving investment advisers and their representatives. One such issue is the treatment of persons who solicit advisory clients for, and receive compensation from, investment advisers. Both the 1956 Act and the USA 2002 include solicitation activity as part of the business that triggers the definition of investment adviser representative. However, the role of solicitors varies greatly as does the treatment of solicitors among the NASAA jurisdictions that regulate investment adviser representatives. In addition, the industry has long sought guidance regarding solicitor registration and qualification under state law. The Project Group therefore believes that the Proposed Rule is necessary and appropriate to facilitate the regulation of solicitor activity for the benefit of investors, to promote uniformity among the states and between state and federal rules, and to provide guidance to the industry.

Summary of the Model Rule

- **Definitions.** Subsection (a)(1) defines "solicitor" by restating the definition found in Section 401(g) of the 1956 Act and Section 102(16) of the USA 2002. In addition, subsection (a)(2) clarifies that "client" means a prospective client being solicited or referred to an adviser.
- **Core Provision – Conditions for Payments to Solicitors.** Subsection (b)(3) makes it unlawful for an investment adviser to pay any form of compensation to a solicitor unless:

- the solicitor is registered as an investment adviser representative, or the solicitor is exempt from registration as provided for in subsection (e);
 - the solicitor has not been the subject of certain administrative, civil, or criminal actions;
 - the fee is paid pursuant to a written agreement between the adviser and the solicitor that sets forth the solicitation arrangement, including the compensation formula; and
 - the fee is paid for solicitations that are impersonal in nature in that they are not based on the needs or objectives of the client nor is any information about the benefits of using a particular adviser or security provided to the client.
 - exceptions are provided for officers, directors, and employees of the adviser.
- **Solicitor Disclosure Document.** Subsection (c) specifies the contents of the disclosure document that solicitors must provide to clients, as required under the written agreement between the adviser and the solicitor. The Proposed Rule tracks the disclosure requirements of federal brochure rule 206(4)-3 under the Investment Advisers Act of 1940 regarding cash payments for solicitation activity while recognizing the present day reality that solicitors may receive payments in forms other than cash. In addition, the Proposed Rule eliminates the ability of an investment adviser to pay *any* form of solicitor compensation without the written disclosure documents and contractual obligations in place and disseminated as prescribed in the Proposed Rule. This will strengthen investor protection while maintaining a high degree of uniformity with the federal rule.
 - **Fiduciary Duty.** Subsection (d) makes clear that none of these rules should be construed as relieving the adviser or any other person involved in solicitation activity from any fiduciary duty in the adviser/client relationship or otherwise.
 - **Optional Exemption From Registration.** Subsection (e) provides an optional avenue for those states that wish to provide an exemption from the requirement for registration of solicitors as investment adviser representatives under specified conditions. While only a minority of states have some type of solicitor registration exemption at this time, this provision is included to act as a template and to promote uniformity for those states that do provide this type of exemption or may seek to do so in the future. Subsection (e)(1) limits the solicitor's activities to "impersonal" solicitations as detailed in subsection (b)(3), while subsection (e)2 provides an exemption if the person receives a waiver from the Administrator. It should be noted that if an Administrator or state provides such an exemption from registration, all of the written disclosure documents and contractual obligations must be in place and disseminated as prescribed by the other elements of the Proposed Rule.

Contact Information

Patricia D. Struck (IA Section Chair)
Securities Division Administrator
DFI Division of Securities
PO Box 1768
Madison, WI 53701-1768
kenneth.hojnacki@dfi.wisconsin.gov

Kelvin M. Blake
Office of the Attorney General
Division of Securities
200 Saint Paul Place
Baltimore, MD 21202-2020
kblake@oag.state.md.us

Hugo Mayer
Office of the Securities Commissioner
230 East William, Suite 7080
Wichita, KS 67202
hugo.mayer@ksc.ks.gov

David Finnigan
Office of the Secretary of State
Securities Department
Jefferson Terrace, Suite 300A
300 West Jefferson Street
Springfield, IL 62702
dfinnigan@ilsos.net

Lindsay DeRosia
Office of Financial & Insurance Services
P.O. Box 30701
Lansing, MI 48909
derosiaL@michigan.gov

Kenneth L. Hojnacki (PG Chair)
DFI Division of Securities
PO Box 1768
Madison, WI 53701-1768

kenneth.hojnacki@dfi.wisconsin.gov

Paul Schwartz
Pennsylvania Securities Commission
Eastgate Office Building
1010 North 7th Street, 2nd Floor
Harrisburg, PA 17102-1410
pschwartz@state.pa.us

David Smith
Arkansas Securities Department
Heritage West Building
201 East Markham, Room 30010
Little Rock AR 72201-1692
david.smith@securities.arkansas.gov

David Swafford
Colorado Division of Securities
1560 Broadway Suite 900
Denver, CO 80202
David.Swafford@dora.state.co.us

Jackie L. Walter
Department of Banking and Finance
PO Box 95006
Lincoln, NE 68509
jackie.walter@nebraska.gov

Steve Hall
NASAA Corporate Office
Legal Department
750 First Street, NE Suite 1140
Washington DC 20002
sh@nasaa.org