

DOUGHERTY & COMPANY LCC, MR. THOMAS ABOOD

Investment Advisors Act of 1940 — Section 206(4) and Rule 206(4)-3

July 3, 2003

**Response of the Senior Counsel
Division of Investment Management**

**Mr. Thomas J. Abood
Dougherty & Company LLC
90 South Seventh Street, Suite 4400
Minneapolis, Minnesota 55402-4115**

Dear Mr. Abood:

By letter dated March 21, 2003, we advised you that we would not recommend enforcement action to the Commission under section 206(4) of the Investment Advisers Act of 1940 (the "Advisers Act") and rule 206(4)-3 thereunder if any investment adviser that is required to be registered pursuant to section 203 of the Advisers Act paid Dougherty & Company LLC ("Dougherty") or any of its associated persons a cash fee, directly or indirectly, for the solicitation of advisory clients in accordance with the rule, notwithstanding two Commission administrative orders that otherwise would preclude the investment adviser from paying Dougherty such a fee (the "Dougherty letter").¹ Our position in that letter was based upon, among other things, your representation that:

for a period of ten years following the date of each [Disqualifying Order],² the solicitor discloses the order to each person whom the solicitor solicits in the separate written disclosure document required to be delivered to such person under Rule 206(4)-3(a)(2)(iii)(A) or, if the solicitor is a person specified in Rule 206(4)-3(a)(2)(i) or (ii), the solicitor discloses the order to each person whom the solicitor solicits by providing the person at the time of the solicitation with a separate written disclosure document that discusses the terms of the order.

Since we issued the letter to you, others have inquired as to whether they could employ alternative methods for delivering written disclosure of Disqualifying Orders to solicited persons. We agree. Our revised position is that we would not recommend enforcement action to the Commission under section 206(4) of the Advisers Act and rule 206(4)-3 thereunder if any investment adviser pays a cash fee to any solicitor that is subject to a Disqualifying Order, provided that:

- (1) the cash solicitation arrangement is conducted in compliance with the terms of rule 206(4)-3 except for the investment adviser's payment of cash solicitation fees to a solicitor who is subject to a Disqualifying Order;
- (2) no Disqualifying Order bars or suspends the solicitor from acting in any capacity under the federal securities laws;
- (3) the solicitor has complied with the terms of each Disqualifying Order, including, but not limited to, the payment of disgorgement, pre-judgment interest, civil or administrative penalties and fines; and
- (4) for ten years from the date of the entry of each Disqualifying Order, the solicitor or any investment adviser with which it has a solicitation arrangement subject to rule 206(4)-3 discloses the Disqualifying Order in a written document that is delivered to each person whom the solicitor 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.

Thus, as stated in the Dougherty letter, we no longer will respond to requests for no-action relief under section 206(4) and rule 206(4)-3 with respect to any cash solicitation arrangement under which an investment adviser proposes to pay cash solicitation fees to a solicitor that is subject to a Disqualifying Order under the foregoing circumstances, unless the requests present novel or unusual issues. ³ We will continue to consider on a case-by-case basis, however, requests for no-action relief under section 206(4) and rule 206(4)-3 with respect to any cash solicitation arrangement that is proposed to be conducted in a different manner. We also will continue to consider on a case-by-case basis requests for no-action relief under section 206(4) and rule 206(4)-3 with respect to any cash solicitation arrangement involving a solicitor that:

- has been subject to a Disqualifying Order that suspends or bars the solicitor from acting in any capacity under the federal securities laws;
- has been convicted within the previous ten years of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Advisers Act but that is not subject to a Disqualifying Order relating to such conviction or order, judgment or decree;
- is subject to an order, judgment or decree described in section 203(e)(4) of the Advisers Act, but that is not subject to a Disqualifying Order relating to such conviction or order, judgment or decree.

Sincerely,
Susan Olson
Senior Counsel

Endnotes

¹ 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 with respect to solicitation activities if the solicitor is a person that is subject to the disqualifications that are listed in the rule ("Solicitor Disqualifications").

² As described in the Dougherty letter, a Disqualifying Order is an order issued by the Commission under section 203(f) of the Advisers Act, or an order issued by the Commission in which the Commission has found that the solicitor: (a) has been convicted of any felony or misdemeanor involving conduct described in Section 203(e)(2)(A) through (D) of the Advisers Act; (b) has engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (5) or (6) of Section 203(e) of the Advisers Act; or (c) was subject to an order, judgment or decree described in Section 203(e)(4) of the Advisers Act (collectively, "Disqualifying Orders"). Please note that Disqualifying Orders do not include all Solicitor Disqualifications.

³ Any investment adviser that pays a cash fee to a solicitor that previously received a no-action letter under section 206(4) and rule 206(4)-3 thereunder in connection with a Solicitor Disqualification may rely on this letter or may continue to rely on the previous letter.