The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 2458

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SEC NO-ACTION LETTER REQUIRES THIRD-PARTY ADVISERS ACTING AS SOLICITORS TO MEET REQUIREMENTS OF RULE 206(4)-3

January 11, 1991 TO: INVESTMENT ADVISER MEMBERS NO. 3-91 INVESTMENT ADVISER ASSOCIATE MEMBERS NO. 3-91 RE: SEC NO-ACTION LETTER REQUIRES THIRD-PARTY ADVISERS ACTING AS SOLICITORS TO MEET REQUIREMENTS OF RULE 206(4)-3 _____ In the attached no-action letter, the Division of Investment Management reiterated its position that registered investment advisers are subject to the requirements under Rule 206(4)-3 (which regulates cash referral fees paid to solicitors) (Dechert Price & Rhoads, pub. avail. Dec. 4, 1990). The staff was asked to reconsider an earlier letter in which it declined to take a no-action position if an adviser to mutual funds paid certain third-party advisers referral fees without disclosing the compensation arrangement in a separate written document as required by Rule 206(4)-3 (see Stein, Roe & Farnham Inc., pub. avail. June 29, 1990). In its response, the staff clarified that it did not intend to state in the earlier letter that Rule 206(4)-3 applies to such an arrangement (i.e., an investment adviser paying cash solicitation fees to third-party advisers to solicit persons to become shareholders of an investment company advised by the initial adviser). The staff only stated that it could not grant the requested no-action relief because the proposed transactions involved significant conflicts of interests and not all of the participants in the proposed transactions would comply with the separate disclosure document requirement of the Rule. The staff noted that while the Rule might not appear to apply to such arrangement, the arrangement nevertheless raised similar concerns under Section 206 since the third-party adviser would be indirectly soliciting clients on behalf of the adviser to the funds. The staff stated that its refusal to grant no-action relief from Section 206 under those circumstances should not be interpreted to mean that any arrangement whereby distribution fees, trail fees, or any other sales charges are paid would subject the participants to the requirements of Rule 206(4)-3. In addition, the staff stated that an investment adviser acting as a solicitor would not meet the requirement to provide a separate disclosure document under the Rule if it only provided its clients with its own advisory brochure, even if that brochure included disclosure regarding the solicitation agreement. Finally, the staff disagreed with the argument in the incoming letter that Rule 206(4)-3 was not intended to apply to registered investment advisers and that application of the rule is unnecessary and redundant. Amy B.R. Lancellotta Assistant General Counsel Attachment