Securities and Exchange Commission

§ 275.206(4)–3 Cash payments for client solicitations.

(a) It shall be unlawful for any investment adviser required to be registered pursuant to section 203 of the Act to pay a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless:

(1) The investment adviser is registered under the Act;

(ii) The solicitor is not a person (A) subject to a Commission order issued under section 203(f) of the Act, or (B) convicted within the previous ten years of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Act, or (C) who has been found by the Commission to have 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 Act, or (D) is subject to an order, judgment or decree described in section 203(e)(4) of the Act; and

(iii) Such cash fee is paid pursuant to a written agreement to which the adviser is a party; and

Note: The investment adviser shall retain a copy of each written agreement required by this paragraph as part of the records required to be kept under §275.204-2(a)(10) of this chapter.

(2) Such cash fee is paid to a solicitor:

(i) With respect to solicitation activities for the provision of impersonal advisory services only; or

(ii) Who is (A) a partner, officer, director or employee of such investment adviser or (B) a partner, officer, director or employee of a person which controls, is controlled by, or is under common control with such investment adviser: Provided, That the status of such solicitor as a partner, officer, director or employee of such investment adviser or other person, and any affiliation between the investment adviser and such other person, is disclosed to the client at the time of the solicitation or referral; or

(iii) Other than a solicitor specified in paragraph (a)(2) (i) or (ii) of this section if all of the following conditions are met:

(A) The written agreement required by paragraph (a)(1)(iii) of this section:

(1) Describes the solicitation activities to be engaged in by the solicitor on behalf of the investment adviser and the compensation to be received therefor;

(2) Contains an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the Act and the rules thereunder;

(3) Requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser’s written disclosure statement required by §275.204-3 of this chapter (“brochure rule”) and a separate written disclosure document described in paragraph (b) of this rule.

(B) The investment adviser receives from the client, prior to, or at the time of, entering into any written or oral investment advisory contract with such client, a signed and dated acknowledgment of receipt of the investment adviser’s written disclosure statement.
§ 275.206(4)–4

Financial and disciplinary information that investment advisers must disclose to clients.

(a) It shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b–6(4)) for any investment adviser registered or required to be registered under section 203 of the Act (15 U.S.C. 80b–3) to fail to disclose to any client or prospective client all material facts with respect to:

(1) A financial condition of the adviser that is reasonably likely to impair the ability of the adviser to meet contractual commitments to clients, if the adviser has discretionary authority (express or implied) or custody over such client’s funds or securities, or requires prepayment of advisory fees of more than $500 from such client, 6 months or more in advance; or

(2) A legal or disciplinary event that is material to an evaluation of the adviser’s integrity or ability to meet contractual commitments to clients.

(b) It shall constitute a rebuttable presumption that the following legal or disciplinary events involving the adviser or a management person of the adviser (any of the foregoing being referred to hereafter as “person”) that were not resolved in the person’s favor or subsequently reversed, suspended, or vacated are material within the meaning of paragraph (a)(2) of the rule for a period of 10 years from the time of the event:

(1) A criminal or civil action in a court of competent jurisdiction in which the person—

(i) Was convicted, pleaded guilty or nolo contendere (“no contest”) to a felony or misdemeanor, or is the named subject of a pending criminal proceeding (any of the foregoing referred to as “pending criminal proceeding”); or

(ii) Was the named subject of a pending civil proceeding in which the person was alleged to have (A) engaged in any act or practice which would constitute a violation of section 203 of the Act, 15 U.S.C. 80b–3, (B) engaged in any act which would constitute an unqualified basis for the imposition of an administrative censure, or (C) engaged in any act or practice which would constitute a violation of any law of any state which is material to an evaluation of the person’s integrity or ability to meet contractual commitments to clients.

(2) A pending criminal proceeding (any of the foregoing referred to as “pending criminal proceeding”); or

(i) The person was convicted, pleaded guilty or nolo contendere (“no contest”) to a felony or misdemeanor, or is the named subject of a pending civil proceeding in which the person was alleged to have (A) engaged in any act or practice which would constitute a violation of section 203 of the Act, 15 U.S.C. 80b–3, (B) engaged in any act which would constitute an unqualified basis for the imposition of an administrative censure, or (C) engaged in any act or practice which would constitute a violation of any law of any state which is material to an evaluation of the person’s integrity or ability to meet contractual commitments to clients.

(c) Nothing in this section shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law.

(d) For purposes of this section,

(1) Solicitor means any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser.

(2) Client includes any prospective client.

(3) Impersonal advisory services means investment advisory services provided solely by means of (i) written materials or oral statements which do not pur-