Clients&FriendsMemo

SEC Proposes Significant Amendments to Investment Adviser Solicitation Rule

December 3, 2019

The Securities and Exchange Commission (the "**Commission**" or the "**SEC**"), on November 4, approved the publication of a substantial release (the "**Release**")[1] proposing significant amendments to the rules under the Investment Advisers Act of 1940 (the "**Advisers Act**") that govern advertising by investment advisers and the solicitation of both advisory accounts and investments into managed funds, as well as related recordkeeping requirements. This memorandum provides a summary of the proposed amendments to the solicitation rule and related recordkeeping requirements; a separate memorandum addresses the proposed amendments to the advertising rule.[2]

I. Overview of the Current Solicitation Rule

An adviser is prohibited from paying a cash fee to a solicitor unless the adviser complies with Rule 206(4)-3.[3] "**Solicitor**" is defined as any person who, directly or indirectly, solicits or refers clients to an investment adviser. The adviser must be registered with the Commission and may not compensate a solicitor who is subject to specified statutory disqualifications (the "**Disqualification Provisions**").[4]

An adviser and solicitor are required to enter into a written agreement which (i) describes the solicitation activities and compensation arrangement; (ii) includes an undertaking by the solicitor that it will perform its duties in accordance with the adviser's instructions and in compliance with the Advisers Act and SEC rules thereunder; and (iii) requires the solicitor to provide each client with a copy of the adviser's SEC Form ADV brochure and a separate solicitor disclosure (the "**Written**

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1 Commission Release No. IA-5407 (Nov. 4, 2019).

2 *See* Cadwalader Clients and Friends Memo titled *SEC Proposes Significant Amendments to Investment Adviser Advertising Rule*, dated December 3, 2019 (the "**Cadwalader Investment Adviser Advertising Proposal Memo**").

3 Any reference to Rules in this memorandum shall mean rules promulgated under the Advisers Act, unless otherwise specified.

4 The Disqualification Provisions of the current rule prohibit a person from acting as a solicitor if the person is "(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." Rule 206(4)-3(a)(1)(ii). The SEC has, however, issued no-action relief under the current rule permitting statutorily disqualified persons to act as solicitors subject to compliance with certain conditions. *See* Section IV: Impact on Prior No-Action Relief, *infra*.

Agreement Provisions"). The **Solicitor Disclosure** must contain the names of the solicitor and investment adviser, the nature of the relationship between the two, the terms of the compensation arrangement and the additional cost (if any) incurred by the client as a result of the solicitation arrangement.[5]

At the time an adviser enters into a contract with a client, the client must provide a signed acknowledgment of receipt of the adviser's SEC Form ADV brochure and the Solicitor Disclosure. The adviser must make a *bona fide* effort to ascertain the solicitor's compliance with the agreement and must have a reasonable basis for believing that the solicitor has complied (the "**Supervision Provisions**").

In-house solicitors,[6] affiliated solicitors[7] for whom the affiliation is disclosed to the client at the time of solicitation, and solicitors who refer investors solely for the provision of impersonal investment advice[8] must enter into a written agreement with advisers governing their solicitation arrangements and are subject to the Disqualification Provisions, but are otherwise exempt from the Written Agreement, Solicitor Disclosure and Supervision Provisions. Under current SEC guidance, solicitation of investors in funds advised by an investment adviser are not subject to the current rule, but would generally be treated as "brokers" engaged in the sale of securities, and so subject to registration under Section 15 of the Securities Exchange Act of 1934 (the "**Exchange Act**").[9]

II. Overview of the Amendments

- **Broadened Scope of Applicability:** The proposed amendments to Rule 206(4)-3 would significantly alter the scope of solicitor regulation by: (i) expanding the definition of solicitors to include, among others, persons who solicit investors to purchase securities issued by private funds;[10] (ii) rescinding previous guidance stating that persons engaged in solicitation activity with respect to managed accounts are not required to register as investment advisers;[11] and (iii) expanding the scope of the rule to include within the definition of "solicitor" persons receiving non-cash compensation.

- **Broadened Solicitor Disqualification Provisions:** The amendments would add to the disciplinary actions that would disqualify a person from acting as a solicitor primarily by expanding

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5 Rule 206(4)-3(b).

6 An in-house solicitor is a partner, officer, director or employee of an investment adviser. Rule 206(4)-3(a)(2)(ii).

7 An affiliated solicitor is a partner, officer, director or employee of a person which controls, is controlled by, or is under common control with an investment adviser. *Id.*

8 Impersonal advisory services are services that do not purport to meet the objectives or needs of specific clients, and statistical information containing no expression of opinions as to the investment merits of particular securities. Rule 206(4)-3(d)(3).

9 *See* Mayer Brown LLP, Commission Staff No-Action Letter (July 28, 2008) (the "**Mayer Brown No-Action Letter**") (no-action relief for a registered investment adviser who compensated a person soliciting investors for a private fund).

10 Accordingly, the SEC would withdraw the Mayer Brown No-Action Letter.

11 The SEC would withdraw Cunningham Advisory Services, Inc., SEC Staff No-Action Letter (Apr. 27, 1987), Koyen, Clarke and Assoc. Inc., SEC Staff No-Action Letter (Nov. 10, 1986) and Charles Schwab & Co., SEC Staff No-Action Letter (Dec. 17, 1980), and is reviewing others.

the number of regulators whose disciplinary actions against a person would be treated as disqualifying. In addition, the amendments would extend disqualification to certain persons associated with an individual or entity that is a disqualified solicitor. The Commission has requested comment as to whether to grandfather existing no-action relief allowing some bad actors to act as solicitors.

- **Administrative Provisions:** The Release proposes minor amendments to the content and delivery of the disclosure that must be delivered to clients and potential clients that are the subject of solicitations, the form of the written agreement governing the relationship between adviser and solicitor, and the related recordkeeping requirements under Rule 204-2.

- **Comment Period:** The comment period will end 60 days after the Release is published in the Federal Register.

- **Compliance Date:** Compliance with the amended rules would be required one year after the effective date.

III. Broadened Scope of Applicability

A. Overview

The proposed amendments to the solicitation rule represent a significant departure from the Commission's previous stances. As a result, much of the SEC's prior guidance regarding solicitation would be withdrawn if the amendments are adopted as proposed.

First, the Commission has previously taken the position that Rule 206(4)-3 was not intended to apply to solicitations for investors in private funds, as such solicitations would generally be regulated as a brokerage activity under the Exchange Act.[12] However, the amended rule would expand the definition of solicitors to include persons who solicit investors in private funds.[13] Thus, broker-dealers selling interests in private funds advised by an SEC-registered investment adviser would be solicitors subject to the proposed rule.

Second, the Commission has proposed to rescind its previous position that solicitors who comply with Rule 206(4)-3 are "associated persons" of investment advisers and therefore not required to register with the Commission separately as investment advisers.[14] If the rule is adopted as proposed, solicitors of advisory accounts may be required to register as investment advisers.[15]

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[12] *See* Mayer Brown No-Action Letter.

[13] Solicitations to investors in registered investment companies ("**RICs**") and business development companies ("**BDCs**") would be excluded from the proposed solicitation rule.

[14] Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Release No. 688 (July 12, 1979) ("a solicitor who engages in solicitation activities in accordance with paragraph (a)(2)(iii) of the rule . . . will be, at least with respect to those activities, an associated person of an investment adviser and therefore will not be required to register individually under the Advisers Act solely as a result of those activities.").

[15] Solicitors would thus have to make a determination whether the scope of their activities may bring them within the definition of an "investment adviser" and, if so, whether an exemption from SEC and state registration may be available. For example, a solicitor that fell within the definition of an "investment adviser" by virtue of being deemed to provide advice as to the

Third, under the proposed advertising rules, investment advisers would be permitted to advertise their investment advisory services by paying third-party promoters to provide testimonials and endorsements.[16] Depending on the arrangements, these promoters may be deemed solicitors subject to the proposed solicitation rule.[17]

Last, Rule 206(4)-3 would be renamed from "Cash Payments for Client Solicitations" to "Compensation for Solicitations" because it would now govern solicitors who receive non-cash compensation from investment advisers. Directed brokerage, discounted advisory services, and refer-a-friend arrangements would all count as compensation.

B. Exemptions

- *Impersonal investment advice*.[18] Rule 206(4)-3(a)(2)(i) currently exempts solicitors engaging in "solicitation activities for the provision of impersonal advisory services" from the Supervision Provisions and the specific content requirements of the Written Agreement Provisions, though these solicitors are required to provide their solicitation activities pursuant to a written agreement with an adviser. The proposed amendments would clarify that this exemption is intended to cover solicitation of "impersonal investment advice," as defined in the Glossary of Terms in the SEC's Form ADV. The clarification is not intended to alter the activities or persons to whom the exemption applies.[19] Such solicitors would no longer be required to enter into a written agreement with advisers and would be subject to only the Disqualification Provisions.
- *De Minimis Compensation*. The SEC is proposing to adopt a new exemption from the solicitation rule for solicitors receiving *de minimis* compensation from an investment adviser.[20] For purposes of this exemption, *de minimis* compensation would be defined as $100 or less for solicitation activities during the preceding twelve months. Compensation would include both cash and non-cash compensation.
- *In-house and affiliated solicitors*. In-house and affiliated solicitors are currently exempt from compliance with the Supervision Provisions and the specific requirements of Written Agreement Provisions, as long as (i) the solicitation activities are conducted pursuant to a written agreement

selection of investment advisers may not be subject to SEC registration due to a lack of assets under management, but would have to determine whether it was subject to state registration as an investment adviser. *See* Release, p. 203 at n.346 and accompanying text.

16 *See* Cadwalader Investment Adviser Advertising Proposal Memo, Section III.C.

17 Factors relevant to the determination of whether a promoter may be subject to the solicitation rules would include whether the promoter receives incentive-based compensation (*e.g.*, a referral fee), whether the promoter has a high level of control over the communication's content and whether the communication is directed to a particular client or private fund investor. *See* Release, p. 203. Where a promoter is deemed a solicitor, the arrangement would be subject to the requirements of both Rule 206(4)-1 (the advertising rule) and Rule 206(4)-3 (the solicitation rule).

18 The proposed rules use the SEC Form ADV Glossary of Terms definition of "impersonal investment advice": "investment advisory services that do not purport to meet the objectives or needs of specific individuals or accounts."

19 The SEC notes that advice provided by robo-advisers or internet advisers would not fall within the exemption for impersonal investment advice, at least to the extent that these entities generate investment advice based on personal information provided by clients. *See* Release, pp. 240-41.

20 To the extent that a solicitation falls within the testimonial and endorsement provisions of the proposed advertising rule, the disclosure requirements thereunder would still apply to *de minimis* payments. *See* Cadwalader Investment Adviser Advertising Proposal Memo, Section III.C. (discussing SEC proposals regarding permitted testimonials and endorsements).

and (ii) the affiliate relationship with the adviser is disclosed at the time of the solicitation. The proposed amendments would expand the definition of an affiliated solicitor to include an entity that controls, is controlled by or is under common control with any adviser ("**affiliated entities**"). The current rule covers personnel of affiliated entities, but not the affiliated entities themselves. Additionally, when the in-house or affiliated relationship between such solicitors and the investment adviser is "readily apparent," for example, because the entities share the same corporate name, disclosure of the relationship between the solicitor and the adviser would no longer be necessary. Lastly, advisers would no longer be required to enter into a written agreement with affiliated solicitors, and would be subject to only the Disqualification Provisions.

- *Nonprofit programs*. The proposed amendments would create a new exemption for adviser participation in certain nonprofit programs. To qualify for the exemption, the solicitor must be a nonprofit program, provide prospective clients with the names of at least two recommended investment advisers based on non-qualitative criteria[21] and be compensated only for costs incurred in operating the program. The adviser or solicitor must also disclose the selection criteria for the recommended advisers and that participating advisers reimburse the solicitor for the operational costs of the program.

IV. Broadened Disqualification Provisions

The current rule prevents investment advisers from compensating certain bad actors for solicitation activities unless the solicitor has obtained a waiver. The proposed amendments would significantly expand the category of persons that are ineligible to act as solicitors, absent SEC relief.

Ineligible Solicitors. An "**Ineligible Solicitor"** would be a person who, at the time of solicitation, has been the subject of either (i) a "**Disqualifying Commission Action"**[22] or (ii) a "**Disqualifying Event**,"[23] unless the Disqualifying Event was the subject of a "**Non-Disqualifying Commission Action**."

- A **Disqualifying Commission Action** would mean a Commission opinion or order barring, suspending or prohibiting a person from acting in any capacity under the Federal securities laws,[24] or ordering a person to cease and desist from committing or causing violations of the anti-fraud provisions of the Federal securities laws or registration requirements of Section 5 of the Securities Act.

- A "**Disqualifying Event"** would include solicitor disqualifications under the current rule, and additionally include the entry of any final order by the Commodity Futures Trading Commission ("**CFTC**"), federal banking agencies, state or self-regulatory authorities based on crimes of

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[21] Non-qualitative criteria include geographic proximity, type of advisory services provided and business certifications. A non-profit entity relying on the exemption from the proposed rule may not select an adviser for such qualitative criteria as the adviser's investment philosophy. *See* Release, pp. 259-60.

[22] *See* Proposed Rule 206(4)-3(a)(3)(iii)(A).

[23] *See* Proposed Rule 206(4)-3(a)(3)(iii)(B).

[24] This would include, for example, an SEC order prohibiting an individual from acting in a specific capacity (*e.g.*, as a supervisor or compliance officer). *See* Release, pp. 269-70.

dishonesty, or which bars such person from association with certain financial institutions or from engaging in the securities, banking or insurance business.[25]

- **Non-Disqualifying Commission Actions**. The proposed rule would exclude from the definition of Ineligible Solicitor a person who is subject to a Disqualifying Event where the SEC has either (i) issued a waiver under Section 9(c) of the Investment Company Act or (ii) issued an "opinion or order" that is not a Disqualifying Commission Action, as defined above, *provided that* (a) the solicitor complied with the terms of the order and (b) for ten years following the order, the solicitor includes in its Solicitor Disclosure a description of the "bad acts" that are the subject of the order.[26] While the Release does not define "opinion or order" for this purpose, it would appear to cover orders issued by the SEC in the context of enforcement actions, or waivers from ineligible status issued by the SEC. The rationale for this exclusion is that where the SEC has reviewed a person's conduct and then issued an opinion or order that does not bar or suspend the person from securities activities and that does not involve a finding of a violation of anti-fraud provisions of the securities laws, it would be appropriate to permit the person to conduct solicitation activities on behalf of an investment adviser. Conversely, a person that is the subject of a Disqualifying Event that was not the subject of an SEC opinion or order would be an Ineligible Solicitor, absent SEC relief.[27]

Impact on Prior No-Action Relief. Firms that are disqualified under current Rule 206(4)-3 as a result of actions that did not involve an SEC order may currently rely on SEC no-action relief permitting them to enter into solicitation arrangements with investment advisers subject to similar conditions under the proposed rule.[28] However, under the proposed rule, a firm would be carved out from Ineligible Solicitor status for Disqualifying Events only where the SEC itself had issued an opinion or order with respect to the conduct. An SEC no-action letter (issued by the staff of the Division of Investment Management) would not suffice for the purpose.[29] The SEC has, however, requested comment on whether solicitors relying on current SEC no-action relief should be

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[25] *See* Proposed Rule 206(4)-3(a)(3)(iii)(B)(3). The SEC notes that it drew upon certain disqualifications under the "bad actor" provisions of Regulation D under the Securities Act in expanding the categories of disqualifying events under the proposed rule. *See* Release, p. 263. However, the SEC acknowledges that while there is some overlap between the disqualifying events under Regulation D and the proposed solicitation rule, some types of conduct may be disqualifying under Regulation D but not under the proposed solicitation rule, and *vice versa*. *See* Release, pp. 458-59. Thus, for a solicitor that may be subject to both sets of rules (*e.g.*, a broker-dealer selling interests in a private fund on behalf of an adviser), it would be necessary to confirm that the solicitor is not disqualified under either Regulation D or the proposed solicitation rule.

[26] *See* Proposed Rule 206(4)-3(a)(3)(iii)(C). This relief reflects conditions of current SEC relief from ineligible solicitor status for solicitors that are subject to a disqualifying SEC order. *See* Dougherty & Company LLC, SEC Staff No-Action Letter (July 3, 2003) ("**Dougherty**"). Note, however, that while Dougherty conditions relief on the SEC disqualifying order not barring or suspending the solicitor from acting in any capacity under the federal securities laws, the proposed rule would additionally require that the SEC action not include a cease and desist order with respect to violations of the anti-fraud provisions of the Federal securities laws or registration requirements of Section 5 of the Securities Act.

[27] *See* Release, pp. 279-80. Similarly, the proposed rule would not recognize waivers granted by other regulators, including the CFTC or federal banking agencies.

[28] This relief generally includes conditions that the solicitor is not barred or suspended from acting in any capacity under the federal securities laws and that the investment adviser or solicitor discloses the statutory disqualification to solicited persons. *See, e.g.*, Release, p. 280 at n.496 (citing several SEC Staff No-Action Letters granting solicitors relief).

[29] *See* Release, p. 280 at n.496.

grandfathered into compliance under the proposed rule. If the SEC does not grandfather firms relying on existing no-action relief, these firms would have to request SEC relief in order to continue engaging in solicitation activities.[30]

Vicariously Ineligible Solicitors. If a firm were an Ineligible Solicitor, then any of the firm's employees, directors, officers, general partners, elected managers of an LLC, as well as any person directly or indirectly controlling or controlled by the firm (each, a "**control person**") would also be considered an Ineligible Solicitor.[31] Further, any of the control person's employees, directors, officers, general partners or elected managers would be Ineligible Solicitors.[32] However, a firm would not be considered an Ineligible Solicitor by mere virtue of employing individuals that are Ineligible Solicitors as long as those individuals do not conduct solicitation activities.[33] Beyond this, the scope of the definition of Ineligible Solicitor is remarkably wide, and in some cases unclear.[34]

Due Diligence. An adviser would be subject to a duty of reasonable care in determining that a person was not an Ineligible Solicitor. The Commission did not prescribe a method for satisfying this standard, in line with other rules for the treatment of bad actors,[35] but the frequency of the inquiry could vary depending on such factors as the risk to clients and compliance mechanisms the adviser already has in place.[36]

No Retroactive Effect. The expanded disqualification provisions would apply only to Disqualifying Events and Disqualifying Commission Actions where the entries of final orders or judgments occur after the amended rule comes into effect—*i.e.*, someone would not retroactively become an Ineligible Solicitor for having previously been subject to a final action that is not disqualifying under the current rule but that is disqualifying under the amended rule.[37] However, a person who is subject to a disqualifying censure after the amended rule comes into effect would be an Ineligible Solicitor, even if the conduct underlying the censure took place prior to the amended rule going into effect.

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30 *See* Release, pp. 280-81. It is surprising that the Commission would even consider withdrawing any relief that it had previously granted, as this would (i) disrupt ongoing business arrangements based in reliance on governmental action and (ii) force the Commission to waste its own resources dealing with numerous requests that the Commission approve a waiver that it had previously granted.

31 *See* Proposed Rule 206(4)-3(a)(3)(ii).

32 *See* Proposed Rule 206(4)-3(a)(3)(ii)(E).

33 *See* Release, p. 267.

34 For example, if an outside director served on the boards of two firms, one of which was for an entity that was an Ineligible Solicitor, it is unclear whether the other firm would also be an Ineligible Solicitor. Similarly, if an employee of a firm that is an Ineligible Solicitor also works for another firm, it is unclear whether the other firm would be deemed an Ineligible Solicitor. There are two principal reasons for these interpretive questions: (i) it is not clear from the wording of the proposed rule whether a person becomes vicariously ineligible only by virtue of a relationship with a sanctioned person, or, in addition, by virtue of a relationship with a vicariously ineligible solicitor and (ii) as noted above, the Release *but not the rule* carves out from ineligible solicitor status firms that employ individuals who are ineligible provided those individuals do not engage in solicitation activities.

35 *See, e.g.*, Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings, Release No. 33-9414 (Jul. 10, 2013), pp. 66-67 at nn.201-02 and accompanying text.

36 *See* Release, pp. 264-65.

37 *See* Release, p. 272.

V. Administrative Provisions

A. Solicitor Disclosures

The current rule prohibits advisers from compensating solicitors unless, at the time of solicitation, the solicitor provides investors with a Solicitor Disclosure including specified information. The proposed material changes to the Solicitor Disclosure are: (1) a solicitor would be required to disclose its potential material conflicts of interest resulting from the relationship with the adviser and the compensation arrangement;[38] (2) the proposed Solicitor Disclosure could be delivered by either the solicitor or the adviser; (3) the Solicitor Disclosure no longer need be on paper but could be presented in any electronic or recorded media format; and (4) an adviser no longer need obtain from clients signed and dated acknowledgments of receipt of the Solicitor Disclosure.

B. Written Agreements and Supervisory Responsibilities

The proposed rule would maintain the requirement of the current rule that an investment adviser enter into a written agreement with a solicitor governing the provision of the solicitor's services. However, the proposed written agreement would no longer be required to contain: (i) an assurance that the solicitor perform its duties consistent with the instructions of the adviser or (ii) a requirement that the solicitor deliver to clients the adviser's SEC Form ADV brochure. Additionally, the written agreement would replace the current requirement that a solicitor conduct its activities in accordance with the Advisers Act and SEC rules thereunder with a more limited requirement that the solicitor conduct its activities in accordance with specified anti-fraud provisions of the Advisers Act.[39] Finally, as mentioned above, advisers would no longer be required to enter into written agreements with in-house and affiliated solicitors.

The current rule requires an investment adviser to make a "*bona fide* effort to ascertain whether the solicitor has complied with the agreement, and [have] a reasonable basis for believing that the solicitor has so complied." The proposed rule would eliminate the "*bona fide* effort" clause and continue to require only the reasonable basis for belief. To satisfy the reasonable basis provision, advisers would be required to make periodic inquiries into the representations that their compensated solicitors have made to clients.

C. Amendments to the Books and Records Rule

The following amendments to Rule 204-2 have been proposed to correspond to related changes to the solicitation rules. Advisers must make and keep records of:

(i) the names of all the adviser's in-house or affiliated solicitors;

(ii) copies of any Solicitor Disclosures;

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[38] Note that as the proposal would cover non-cash and indirect compensation, descriptions of material conflicts of interest would be required to cover arrangements such as directed brokerage, or an adviser's recommendation to solicited clients to invest in proprietary financial products issued by an affiliate of a broker-dealer that acted as the adviser's solicitor. *See* Release, pp. 218-22.

[39] Specifically, the solicitor would be required to conduct its solicitation activities in accordance with Sections 206(1), (2) and (4) of the Advisers Act.

(iii) copies of any reimbursements made to nonprofit programs, and communications and documents related to the adviser's determination that such program qualifies for the exemption; and

(iv) communications and documents related to an adviser's determination that any solicitor it compensates is complying with the written agreement, and that the solicitor is not an Ineligible Solicitor.

Additionally, because advisers would no longer be required to obtain a client's written acknowledgment of receipt of the adviser's SEC Form ADV brochures, Rule 204-2 would be amended to remove the requirement that advisers keep those written acknowledgments.

VI. Summary and Policy Considerations

The SEC's proposal would significantly expand the scope of the solicitation rule, and will likely impact most solicitor arrangements. First, broker-dealers selling interests in private funds on behalf of private fund advisers would be brought within the scope of the rule. Second, as the proposal would include non-cash compensation, advisers would be required to disclose solicitor compensation arrangements involving directed brokerage, discounted advisory fees or cross-referrals. Third, and most significantly, the proposal would broaden the scope of events that would disqualify firms from acting as solicitors, while potentially rescinding current no-action relief from ineligible solicitor status. Finally, the statutory disqualification provisions would cause certain individuals and entities associated with a disqualified person to be ineligible solicitors. Firms should thus carefully consider the impact that the SEC proposals may have on their solicitor arrangements, and whether to submit a comment letter in response.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

Steve Lofchie	+1 212 504 6700	steve.lofchie@cwt.com
Dorothy Mehta	+1 212 504 6846	dorothy.mehta@cwt.com
Mark Highman	+1 212 504 5604	mark.highman@cwt.com
Nikita B. Cotton (law clerk)	+1 212 504 6008	nikita.cotton@cwt.com