July 22, 2010
IM Ref. No. 2010791141
Goldman, Sachs & Co.

RESPONSE OF THE OFFICE OF CHIEF COUNSEL

We would not recommend enforcement action to the United States Securities and Exchange Commission ("Commission") under Section 206(4) of the Investment Advisers Act of 1940 ("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 pays to Goldman, Sachs & Co. (the "Settling Firm") or any of its associated persons, as defined in Section 202(a)(17) of the Advisers Act, a cash solicitation fee, directly or indirectly, for the solicitation of advisory clients in accordance with Rule 206(4)-3,[1] notwithstanding an injunctive order issued by the United States District Court for the Southern District of New York (the "Judgment") that otherwise would preclude such an investment adviser from paying such a fee, directly or indirectly, to the Settling Firm or certain related persons.[2]

Our position is based on the facts and representations in your letter dated July 21, 2010, particularly the representations of the Settling Firm that:

(1) it will conduct any cash solicitation arrangement entered into with any investment adviser required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 except for the investment adviser's payment of cash solicitation fees, directly or indirectly, to the Settling Firm, which is subject to the Judgment;

(2) the Judgment does not bar or suspend the Settling Firm or any person currently associated with the Settling Firm from acting in any capacity under the federal securities laws;[3]

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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, among other things, the solicitor is subject to an order, judgment or decree described in Section 203(e)(4) of the Advisers Act.

2 *Securities and Exchange Commission v. Goldman, Sachs & Co. and Fabrice Tourre*, No. 10-CV-3229 (July 20, 2010).

3 Section 9(a) of the Investment Company Act of 1940 (the "Investment Company Act") provides, in pertinent part, that a person may not serve or act as, among other things, an investment adviser or depositor of any investment company registered under the Investment Company Act or a principal underwriter for any registered open-end investment company or registered unit investment trust if, among other things, that person, by reason of any misconduct, is permanently or temporarily enjoined from acting, among other things, as an underwriter, broker, dealer or investment adviser, or from

(3) it will comply with the terms of the Judgment, including, but not limited to, the payment of disgorgement and the civil penalty; and

(4) for ten years from the date of the entry of the Judgment, the Settling Firm or any investment adviser with which it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Judgment in a written document that is delivered to each person whom the Settling Firm 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.

This position applies only to the Judgment and not to any other basis for disqualification under Rule 206(4)-3 that may exist or arise with respect to the Settling Firm or any of its associated persons.

Wendy Friedlander
Senior Counsel

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engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

The entry of the Judgment, absent the issuance of an order by the Commission pursuant to Section 9(c) of the Investment Company Act that exempts the Settling Firm from the provisions of Section 9(a) of the Investment Company Act, would effectively prohibit the Settling Firm and its affiliated persons from, among other things, acting as an investment adviser to any registered investment company. You state that, pursuant to Section 9(c) of the Investment Company Act, the Settling Firm and certain affiliated persons, on behalf of themselves and future affiliated persons, submitted an application to the Commission requesting (i) an order of temporary exemption from Section 9(a) of the Investment Company Act and (ii) a permanent order exempting the Settling Firm, certain affiliated persons and future affiliated persons from the provisions of Section 9(a) of the Investment Company Act.

On July 21, 2010, the Commission issued an order granting the Settling Firm, certain affiliated persons and future affiliated persons a temporary exemption from Section 9(a) of the Investment Company Act pursuant to Section 9(c) of the Investment Company Act, with respect to the Judgment, until the date the Commission takes final action on the application for a permanent order. *Goldman, Sachs & Co., et al.*, SEC Rel. No. IC-29366 (July 21, 2010). Therefore, the Settling Firm, certain affiliated persons and future affiliated persons are not currently barred or suspended from acting in any capacity specified in section 9(a) of the Investment Company Act as a result of the Judgment.

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July 21, 2010

Via E-Mail

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel,
Division of Investment Management,
U.S. Securities and Exchange Commission,
100 F Street, N.E.,
Washington, D.C. 20549.

Re: SEC v. Goldman, Sachs & Co. and Fabrice Tourre (S.D.N.Y. 2010)

Dear Mr. Scheidt:

Our client, Goldman, Sachs & Co. (the "Firm"), is a defendant in the above-captioned civil action (the "Action") brought by the Securities and Exchange Commission (the "Commission") in the United States District Court for the Southern District of New York (the "Court"). The Action relates to alleged violations of the federal securities laws by the Firm in connection with its sale of synthetic collateralized debt obligations to two institutional investors.

The Firm, a broker-dealer registered under Section 15 of the Securities Exchange Act of 1934, and an investment adviser registered under Section 203 of the Investment Advisers Act of 1940 (the "Advisers Act"), seeks the assurance of the staff of the Division of Investment Management ("Staff") that it would not recommend any enforcement action to the Commission under Section 206(4) of the Advisers Act, or Rule 206(4)-3 thereunder (the "Rule"), if an investment adviser pays the Firm, or any of its associated persons, a cash payment for the solicitation of advisory clients,

notwithstanding the existence of the judgment (defined below). While the judgment does not operate to prohibit or suspend the Firm or any of its associated persons from being associated with or (except as provided in Section 9(a) of the Investment Company Act of 1940 (the "Company Act"), from which Section relief is separately being requested by the Firm)[1] acting as an investment adviser and does not relate to solicitation activities on behalf of investment advisers, it may affect the ability of the Firm and its associated persons to receive payments for such solicitation activities. The Staff in many other instances has granted no-action relief under the Rule in similar circumstances.

BACKGROUND

The conduct of the Firm alleged in the complaint in the Action involved an offering of a synthetic collateralized debt obligation, which referenced a portfolio of synthetic residential mortgage-backed securities, by the Firm or its affiliates to qualified institutional buyers in reliance on the exemption from registration under the Securities Act provided by Rule 144A thereunder and to non-U.S. persons in reliance on the safe harbor from registration provided by Regulation S thereunder. Specifically, the complaint alleged that the offering materials, in describing the Portfolio Selection Agent for the portfolio of synthetic residential mortgage-backed securities, should have disclosed that the hedge fund assuming the short side of the transaction had played a role in the selection process. In its consent to the judgment (described below), the Firm acknowledged that it was a mistake not to disclose the role of the hedge fund.

In connection with the above-captioned proceeding, the Firm and the Division of Enforcement reached an agreement in principle to settle the Action as described below, and the Firm has executed a consent to the entry of a judgment by the Court (the "Judgment") without admitting or denying the matters set forth in the Commission's complaint in the Action (except as to the jurisdiction of the Court).

In the Judgment, dated July 20, 2010, the Court permanently restrains and enjoins the Firm[2] from violating Section 17(a) of the Securities Act in the offer or sale of any security. The Judgment decrees that the Firm is liable for disgorgement of $15

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1 The Firm and certain affiliates, pursuant to Section 9(c) of the Company Act, are separately filing an application requesting (i) a temporary order exempting the Firm and certain affiliates from the provisions of Section 9(a) of the Company Act pending the determination of the Commission on an application for permanent exemption and (ii) a permanent order exempting the Firm and certain affiliates from the provisions of Section 9(a) of the Company Act.

2 The injunction also applies to the Firm's agents, servants, employees, attorneys and all persons in active concert or participation with them who receive actual notice of the Judgment.

million and a civil penalty in the amount of $535 million. Finally, the Judgment requires the Firm to comply with certain undertakings relating to (i) the vetting and approval process for offerings of residential mortgage-related securities, (ii) review of marketing materials used in connection with residential mortgage-related securities offerings by the Firm's Legal Department and Compliance Department, (iii) annual internal audits of the review of such marketing materials, (iv) where the firm is the lead underwriter of an offering of residential mortgage-related securities and retains outside counsel to advise on the offering, review of the related offering materials by outside counsel and (v) education and training of persons involved in the structuring or marketing of residential mortgage-related securities offerings.

EFFECT OF RULE 206(4)-3

The Rule prohibits an investment adviser from paying a cash fee to any solicitor that has been temporarily or permanently enjoined by an order, judgment or decree of a court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. Entry of the Judgment could cause the Firm to be disqualified under the Rule, and accordingly, absent no-action relief, the Firm may be unable to receive cash payments for the solicitation of advisory clients.[3]

DISCUSSION

In the release adopting the Rule, the Commission stated that it "would entertain, and be prepared to grant in appropriate circumstances, requests for permission to engage as a solicitor a person subject to a statutory bar".[4] We respectfully submit that the circumstances present in this case are precisely the sort that warrant a grant of no-action relief.

The Rule's proposing and adopting releases explain the Commission's purpose in including the disqualification provisions in the Rule. The purpose was to prevent an investment adviser from hiring as a solicitor a person whom the adviser was

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[3] The Firm has obtained similar no-action relief in the past. *See In the Matter of Certain Initial Public Offering Allocations*, SEC No-Action Letter (pub. avail. February 23, 2005); *In the Matter of Certain Analyst Conflicts of Interest*, SEC No-Action Letter (pub. avail. Oct. 31, 2003); *In the Matter of Certain Municipal Bond Refundings*, SEC No-Action Letter (pub. avail. Apr. 13, 2000).

[4] *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295, at note 10.

not permitted to hire as an employee, thus doing indirectly what the adviser could not do directly. In the proposing release, the Commission stated that:

> [b]ecause it would be inappropriate for an investment adviser to be permitted to employ indirectly, as a solicitor, someone whom it might not be able to hire as an employee, the Rule prohibits payment of a referral fee to someone who . . . has engaged in any of the conduct set forth in Section 203(e) of the [Advisers] Act . . . and therefore could be the subject of a Commission order barring or suspending the right of such person to be associated with an investment adviser. [5]

The Judgment does not bar, suspend, or limit the Firm or any person currently associated with the Firm from acting in any capacity under the federal securities laws (except as provided in Section 9(a) of the Investment Company Act).[6] The Firm has not been sanctioned in connection with the Action for activities relating to its activities as an investment adviser or its solicitation of advisory clients.[7] Accordingly, consistent with the Commission's reasoning, there does not appear to be any reason to prohibit an adviser from paying the Firm or its associated persons for engaging in solicitation activities under the Rule.

The Staff previously has granted numerous requests for no-action relief from the disqualification provisions of the Rule to individuals and entities found by the Commission to have violated a wide range of federal securities laws and rules thereunder and SRO rules or permanently enjoined by courts of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.[8]

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5 *See* Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

6 See footnote 1.

7 The Firm additionally notes that the Action does not allege that it has violated, or aided and abetted another person in violation of, the Rule.

8 *See, e.g., General Electric Company*, SEC No-Action Letter (pub. avail. Aug. 12, 2009); *Banc of America Securities LLC*, SEC No-Action Letter (pub. avail. June 10, 2009); *Citigroup Global Markets, Inc.*, SEC No-Action Letter (pub. avail. Dec. 23, 2008); *Prudential Financial, Inc.*, SEC No-Action Letter (pub. avail. Sept. 5, 2008); *Barclays Bank PLC*, SEC No-Action Letter (pub. avail. June 6, 2007); *Emanuel J. Friedman and EJF Capital LLC*, SEC No-Action Letter (pub. avail. Jan. 16,2007); *Ameriprise Financial Services Inc.*, SEC No-Action Letter (pub. avail. Apr. 5, 2006); *Millenium Partners, L.P.*, et al., SEC No-Action Letter (pub. avail. Mar. 9, 2006) (no-

UNDERTAKINGS

In connection with this request, the Firm undertakes:

1. to conduct any cash solicitation arrangement entered into with any investment adviser required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3, except for the investment adviser's payment of cash solicitation fees, directly or indirectly, to the Firm, which is subject to the Judgment;

2. to comply with the terms of the Judgment, including, but not limited to, the payment of disgorgement and the civil penalty; and

3. that, for ten years from the date of the entry of the Judgment, the Firm or any investment adviser with whom it has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Judgment in a written document that is delivered to each person whom the Firm 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.

CONCLUSION

We respectfully request the Staff to advise us that it will not recommend enforcement action to the Commission if an investment adviser that is required to be registered with the Commission pays the Firm, or any of its associated persons, a cash payment for the solicitation of advisory clients, notwithstanding the Judgment.

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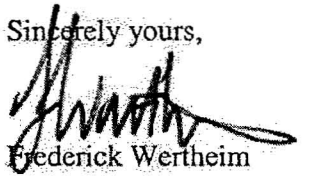
action request and relief encompassed natural persons); *American International Group, Inc.*, SEC No-Action Letter (pub. avail. Feb. 21, 2006); *CIBC Mellon Trust Company*, SEC No-Action Letter (pub. avail. Feb. 24,2005); *Goldman, Sachs & Co.*, SEC No-Action Letter (pub. avail. Feb. 23, 2005); and *Morgan Stanley & Co. Incorporated*, SEC No-Action Letter (pub. avail. Feb. 4, 2005).

If you have any questions regarding this request, please contact the undersigned at (212) 558-4974.

Sincerely yours,



Frederick Wertheim

cc: Kenneth R. Lench, Esq.
Melissa E. Lamb, Esq.
(Division of Enforcement)