SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
60 STATE STREET
36TH FLOOR
BOSTON, MA 02109
+1 617 223 0300
+1 617 223 0301 FAX

emarino@sidley.com
+1 617 223 0362

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April 14, 2017

By E-Mail and Overnight Courier

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-0506

Re: In the Matter of *SEC v. Macquarie Capital (USA) Inc.*, Case No. 15-CV-02304 (S.D.N.Y. Mar. 31, 2015)

Dear Mr. Scheidt:

We are writing on behalf of Macquarie Capital (USA) Inc. ("MCUSA"), the defendant in the injunctive action captioned above brought by the Securities and Exchange Commission (the "Commission") in 2015. MCUSA seeks the assurance of the staff of the Division of Investment Management ("Staff") that it would not recommend enforcement action to the Commission under Section 206(4) of the Investment Advisers Act of 1940 (the "Advisers Act"), or Rule 206(4)-3 thereunder (the "Rule"), if an investment adviser registered or required to be registered pursuant to Section 203 of the Advisers Act pays MCUSA or any of its associated persons a cash payment directly or indirectly for the solicitation of advisory clients, notwithstanding the entry of final judgment as to MCUSA by the U.S. District Court for the Southern District of New York on April 1, 2015 (the "Final Judgment"), as described below. While the Final Judgment does not prohibit or suspend MCUSA or any of its associated persons from being associated with or acting as an investment adviser (except as provided in Section 9(a) of the Investment Company Act of 1940 (the "Company Act"), for which exemptive relief was separately granted to

MCUSA's Covered Affiliates[1] by the Commission)[2] and does not relate to solicitation activities on behalf of any investment adviser, the Final Judgment may affect the ability of MCUSA and its associated persons to receive such payments.

The Staff in many other instances has granted no-action relief under the Rule in similar circumstances.

BACKGROUND

MCUSA, a Delaware corporation, is a U.S.-based broker-dealer registered under the Securities Exchange Act of 1934 (the "Exchange Act") and an indirect, wholly-owned subsidiary of Macquarie Group Limited ("Macquarie"), a global diversified financial services group listed on the Australian Securities Exchange and headquartered in Sydney, Australia.

On March 27, 2015, the Commission filed a complaint against MCUSA, alleging violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933 ("Securities Act") in connection with MCUSA's role as lead underwriter of a follow-on registered offering of common stock in December 2010 by Puda Coal, Inc. ("Puda Coal"), a Delaware corporation that purported to own a coal company in the People's Republic of China, named the Shanxi Puda Coal Group Co., Ltd ("Shanxi Coal"). The Complaint alleged that MCUSA was negligent as an organization by underwriting and marketing the offering, in which Puda Coal falsely disclosed that it held a 90% ownership stake in Shanxi Coal.

On April 1, 2015, Final Judgment was entered as to MCUSA by the U.S. District Court for the Southern District of New York, to which MCUSA consented without admitting or

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[1] Delaware Management Business Trust, on behalf of its series, Delaware Management Company and Delaware Investments Fund Advisers; Four Corners Capital Management, LLC; Macquarie Capital Investment Management LLC; Macquarie Funds Management Hong Kong Limited; and Delaware Distributors L.P., (the "Fund Servicing Affiliates") and any existing company of which MCUSA is an affiliated person within the meaning of Section 2(a)(3) of the Company Act and any other company of which MCUSA may become an affiliate in the future (together with the Fund Servicing Affiliates, the "Covered Affiliates").

[2] Under Section 9(a) of the Company Act, as a result of the Injunction (as defined below), MCUSA and the Fund Servicing Affiliates were prohibited from serving or acting as, among other things, investment advisers or depositors of any registered investment company or as principal underwriter for any registered open-end investment company or registered unit investment trust. On the basis of representations and conditions contained in an application filed by MCUSA, on August 3, 2015, the Commission issued a permanent order (Release No. IC-31734) exempting the Covered Affiliates from the prohibitions of Section 9(a) of the Company Act resulting from the Injunction. MCUSA currently does not engage in any Fund Servicing Activities, and will not engage in any Fund Servicing Activities, absent seeking relief under Section 9(a) of the Company Act. Since the entry of the Injunction, MCUSA has not received any cash solicitation fees pursuant to Rule 206(4)-3.

denying the allegations made in the Complaint. The Final Judgment permanently restrains and enjoins MCUSA from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act in the offer or sale of any security by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly: (a) to obtain money or property by means of any untrue statement of a material fact or any omission of a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (b) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser (the "Injunction"). The Final Judgment required MCUSA to pay a total of $15 million, comprised of $10,728,525 in disgorgement, $1,271,475 in prejudgment interest and $3,000,000 in civil penalty, which MCUSA has paid. MCUSA is covering the costs of setting up a Fair Fund to compensate investors who suffered losses after purchasing shares in the offering. MCUSA is in compliance with all of the terms of the Final Judgment.

DISCUSSION

Rule 206(4)-3 prohibits an investment adviser that is required to be registered under the Advisers Act from paying a cash fee, directly or indirectly, to any solicitor that has been permanently or temporarily enjoined by an order, judgment, or decree of a court of competent jurisdiction (among other disqualifying events) from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. The Final Judgment causes MCUSA to be disqualified under the Rule, and accordingly, absent no-action or other relief, MCUSA and its associated persons are unable to receive cash payments for the solicitation of advisory clients.

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."[3] 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 – namely, to prevent an investment adviser from hiring as a solicitor a person whom the adviser would not be permitted to hire as an

[3] *See Requirements Governing Payments of Cash Referral Fees by Investment Advisers*, Release No. IA-688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295, at note 10.

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.[4]

MCUSA has not been sanctioned for conduct in connection with the solicitation of advisory clients for investment advisers. Accordingly, consistent with the Commission's rationale in proposing and adopting the Rule, there is no reason to prohibit any investment adviser from paying MCUSA 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 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.[5]

UNDERTAKINGS

In connection with this request, MCUSA undertakes that:

1. It will conduct any cash solicitation arrangement entered into with any investment adviser registered or required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 as if MCUSA were not a disqualified person for purposes of Rule 206(4)-3 by virtue of the Final Judgment;

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[4] *See Requirements Governing Payments of Cash Referral Fees by Investment Advisers*, Release No. IA-615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

[5] *See, e.g., Stifel, Nicolaus & Company, Inc.*, SEC No-Action Letter (Dec. 6, 2016); *F. Porter Stansberry and Stansberry & Associates Investment Research LLC,* SEC No-Action Letter (Sept. 20, 2015); *JPMorgan Chase & Co.*, SEC No-Action Letter (May 20, 2015); *Royal Bank of Canada*, SEC No-Action Letter (Dec. 19, 2014); *Bank of America, N.A. and Merrill Lynch, Pierce, Fenner & Smith Incorporated*, SEC No-Action Letter (Nov. 25, 2014).

2. The Final Judgment does not bar, suspend or limit MCUSA[6] or any person currently associated with MCUSA[7] from acting in any capacity under the federal securities laws (except as provided in Section 9(a) of the Company Act);

3. It has complied and will continue to comply with the terms of the Final Judgment, including, but not limited to, the Injunction and the payment of disgorgement and a civil monetary penalty; and

4. Until April 1, 2025 (ten (10) years from the date of the entry of the Final Judgment), MCUSA and any person through whom MCUSA directly or indirectly conducts its solicitation activities or any investment adviser with which it or any such person has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Final Judgment in a written document that is delivered to each person whom MCUSA or such persons solicit (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 five 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

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[6] As discussed in note 2, *supra*, the Commission issued a permanent order (Release No. IC-31734) on August 3, 2015, exempting the Covered Affiliates from the prohibitions of Section 9(a) of the Company Act resulting from the Final Judgment. In addition, the Division of Corporation Finance, acting pursuant to delegated authority, waived any disqualification that would arise as to MCUSA pursuant to Rule 506 under the Securities Act of 1933 by virtue of the Final Judgment. *Macquarie Capital (USA) Inc.*, SEC Waiver Letter (July 6, 2015) (the "Rule 506 Waiver"). MCUSA did not at that time seek relief from the disqualifications from relying on Regulation A or Rule 505 of Regulation D because it did not and does not now use or participate in transactions under such offering exemptions. MCUSA would seek such waivers in the future if circumstances change.

[7] Two individuals were also named in the Complaint: Aaron Black and William Fang. On April 1, 2015, final judgments were entered as to Black and Fang, similarly permanently restraining and enjoining them from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act in the offer or sale of any security. *Securities and Exchange Commission v. Macquarie Capital (USA) Inc., et al.*, Civil Action No. 15-CV-02304 (S.D.N.Y. Apr. 1, 2015) (Final Consent Judgment as to Defendant Aaron Black); *Securities and Exchange Commission v. Macquarie Capital (USA) Inc., et al.*, Civil Action No. 15-CV-02304 (S.D.N.Y. Apr. 1, 2015) (Final Consent Judgment as to Defendant William F. Fang). Black is subject to a supervisory bar for a period of at least five years, and Fang is subject to an associational bar for a period of at least five years. *In the Matter of Aaron Black*, Release No. 34-74710 (Apr. 10, 2015); *In the Matter of William F. Fang*, Release No. 34-74711 (Apr. 10, 2015). Black has moved back to Sydney, Australia and is no longer licensed with and no longer provides services to MCUSA or any other U.S. registered broker-dealer or investment adviser. Fang is no longer employed by MCUSA or any of its affiliates.

Commission pays MCUSA or its associated persons a cash payment for the solicitation of advisory clients, notwithstanding the Final Judgment.

Very truly yours,

Elizabeth A. Marino