

BRENT A. NEISER

Investment Advisors Act of 1940 -- Section 202(a)(11)(C)

Jan 21, 1986

Brent A. Neiser, CFP Director of Government Affairs Institute of Certified Financial Planners

TOTAL NUMBER OF LETTERS: 1*

** No incoming letter was received from the SEC.*

**SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
December 19, 1985**

**Brent A. Neiser, CFP
Director of Government Affairs
Institute of Certified Financial Planners
3443 South Galena, Suite 190
Denver, Colorado 80231-5093**

Dear Mr. Neiser:

This responds to your letter to Director McGrath dated October 3, 1985, which, among other things, raises several questions regarding the availability of the broker-dealer exception in Section 202(a)(11)(C) of the Investment Advisors Act of 1940 ("Act") to a registered representative of a broker-dealer (a "registered representative"). As a general matter, the staff is not in a position to respond to hypothetical questions. n1 However, because the issue you raise is of general interest, I would like to take this opportunity to present our views generally about the availability of the Section 202(a)(11)(C) exception to a registered representative.

As you are aware, Section 202(a)(11) broadly defines an "investment adviser" as any person who, for compensation, is in the business of advising others about investing in securities. n2 Based on this definition, a registered representative generally would be an investment adviser under the Act, unless he can rely on the broker-dealer exception set forth in Section 202(a)(11)(C) of the Act. This provision generally excepts from the investment adviser definition any broker-dealer who does not receive special compensation for providing investment advice. n3 In the staff's view, this exception is available not only to a broker-dealer but also to any registered representative whose investment advisory activities are subject to control by a broker-dealer within the meaning of Section 3(a)(18) of the Securities Exchange Act of 1934. n4 In determining the availability of the exception to a registered representative, therefore, the key factor for analysis is the capacity in which the registered representative is acting when he provides investment advice. Generally speaking, the exception is available if he is providing investment advice in his capacity as a registered representative, and it is not available if he is providing advice outside of that capacity.

For example, if a registered representative provides advice independent of its broker-dealer employer, such as, for example, by establishing an independent financial planning practice, then he could not rely on the exception because his investment advisory activities would not be subject to control by his broker-dealer employer. n5 Similarly, the exception would be unavailable if he provides advice without the knowledge and approval of his employer because in that capacity his advisory activities would, by definition, be outside the control of his employer. n6 In short, where a registered representative provides an independent investment advisory service, he should register under the Act. n7

Regarding your question as to who must complete Schedule D to Form ADV, Item G on page one of that schedule provides that a separate Schedule D must be completed for each individual who gives advice on behalf of the applicant. The fact that more than seven persons are giving advice on behalf of the applicant does not relieve this obligation, as you have been mistakenly informed. Under Item F of the schedule, however, if the applicant has no investment committee, then Schedule D must be completed

for the individual who determines general client advice. But if there are more than five such individuals, Schedule D needs to be completed only for their supervisors.

Finally, as you requested, I am enclosing a copy of the recently adopted uniform Form ADV and the revised question-and-answer release regarding that form.

Very truly yours,
Thomas P. Lemke
Chief Counsel

Footnotes

n1 See Investment Company Act Rel. No. 6330 (Jan. 25, 1971).

n2 Section 202(a)(11), in relevant part, defines an "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities * * *."

n3 Section 202(a)(11)(C) excepts from the definition of an investment adviser "any broker or dealer whose performance of such [investment advisory] services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor." For purposes of this discussion, we shall assume that none of the other exceptions in Section 202(a)(11) or the exemptions from registration in Section 203 would be available to a registered representative and that his broker-dealer employer is not receiving special compensation for providing investment advice.

n4 See Robert S. Strevell (pub. avail. Apr. 29, 1985)("Strevell"). See also Letter from Douglas Scarff, Director, Division of Market Regulation, Securities and Exchange Commission, to Gordon S. Macklin, President, National Association of Securities Dealers, Inc. (June 18, 1982). Of course, if a registered representative receives special compensation for providing investment advice, then the broker-dealer exception is unavailable even if the advice was provided under the supervision and control of his employer. For a discussion of what constitutes special compensation, see Strevell.

n5 See, e.g., Strevell; Elmer D. Robinson (pub. avail. Jan. 6, 1986).

n6 Id.

n7 At one time, a registered representative who wished to register as an investment adviser had, as a matter of staff policy, to obtain written approval from his firm, the appropriate securities exchange, and the appropriate self-regulatory organizations. See Financial Service Corporation (pub. avail. Oct. 9, 1974). The staff no longer requires these approvals for purposes of the Act (see, e.g., Investment Assoc., Inc. (pub. avail. Mar. 2, 1980)), although we note that applicable contract law or other considerations may dictate the same result.