

**BRIGHTON PACIFIC REALTY ASSET MANAGEMENT CO.**

**Investment Advisers Act of 1940 -- Rule 206(4)-2**

**February 10, 1992**

**Brighton Pacific Realty Asset Management Co.**

**TOTAL NUMBER OF LETTERS: 2**

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

**February 10, 1992**

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL  
DIVISION OF INVESTMENT MANAGEMENT**

**Our Ref. No. 91-198-CC  
Brighton Pacific Realty Asset Management Co.  
File No. 801-36311**

Your letter of April 15, 1991 requests our assurance that we would not recommend enforcement action to the Commission if Brighton Pacific Realty Asset Management Co. ("Brighton"), registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"), does not comply with Rule 206(4)-2(a)(5) under the Advisers Act because it is not an "investment adviser" under Section 202(a)(11) of the Advisers Act. n1

You state that Brighton provides real property management, consulting, project management, and leasing services to its clients. Brighton collects rents, pays expenses, and turns over excess cash to property owners. Brighton establishes a bank account for each of its clients, into which it deposits rents and from which it pays expenses. n2 Although Brighton's letterhead includes the phrase "Registered Investment Advisor," n3 you state that Brighton does not provide advice about securities and that it registered as an investment adviser solely to qualify as an "investment manager" under the Employee Retirement Income Security Act of 1974 ("ERISA"). n4

As earlier noted, Rule 206(4)-2(a)(5) requires that an independent public accountant annually verify by actual examination client funds and securities in the custody or possession of an investment adviser. You state that Brighton advises its clients only as to the space and leasing requirements of the property under its management, and does not advise its clients regarding securities. n5 However, Brighton has registered as an investment adviser and has custody of its clients' funds. We do not believe that a person who voluntarily registers as an investment adviser should be permitted to avoid compliance with the Advisers Act by asserting that it is not acting as an investment adviser. n6

In Smithy Braedon Property Management Company (pub. avail. Nov. 13, 1986), the staff permitted a real property management company registered as an investment adviser to comply with the Advisers Act only in connection with services it provided to a pension trust. The Department of Labor had issued a consent order to the pension trust requiring it to employ an "investment manager," as defined under ERISA, to manage all of the trust's assets. Smithy Braedon proposed to register under the Advisers Act solely to comply with the provisions of the consent order.

We cannot assure you that we would not recommend enforcement action to the Commission if Brighton does not comply with Rule 206(4)-2(a)(5) as long as it is registered as an investment adviser, particularly because it has custody of client funds through collection of rents. n7

At the same time, we believe that Brighton is not an investment adviser under Section 202(a)(11) because it does not provide advice about securities. Section 203(h) of the Advisers Act permits the Commission, by order, to cancel the registration of any person registered as an investment adviser who is not engaged in business as an investment adviser. The staff intends to recommend that the Commission cancel your registration.

Monica L. Parry  
Attorney

## Footnotes

n1 Rule 206(4)-2(a)(5) requires that an independent public accountant annually verify by actual examination all clients' funds and securities in the custody or possession of an investment adviser.

n2 The staff has taken the position that a person has custody if it directly or indirectly holds client funds or securities, has any authority to obtain possession of them, or has the ability to appropriate them. See Investment Advisers Act Rel. No. 1000 (Dec. 3, 1985). Therefore, because Brighton collects rents and pays expenses, it has custody of its clients' funds.

n3 The staff has taken the position that a person is holding himself out as an investment adviser for purposes of Section 203(b)(3) if, for example, he uses the term investment adviser or a similar term on a business card or stationery, is listed as an investment adviser in a telephone, business, or building directory, or lets it be known generally by word of mouth or otherwise that he is available to provide investment advice or will accept new clients. See, e.g., Resource Bank & Trust (pub. avail. March 29, 1991); R. Bate (pub. avail. June 28, 1988).

n4 29 U.S.C. Section 1002(38) defines an investment manager as any fiduciary (other than a trustee or named fiduciary) (A) who has the power to manage, acquire, or dispose of any plan asset; (B) who is a bank (as defined in Section 202(a)(2) of the Advisers Act), an insurance company qualified to do business in more than one state, or a registered investment adviser; and (C) who has acknowledged in writing that he is a fiduciary with respect to the plan.

n5 Section 202(a)(11), in part, defines an investment adviser as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation, and as part of a regular business, issues or promulgates analyses or reports concerning securities."

n6 The Commission rescinded Rule 202-1 in 1983 to permit in-house pension plan managers who were "investment advisers" under Section 202(a)(11) to register voluntarily with the Commission even though their registration might not have been required because they advised fewer than fifteen clients and did not hold themselves out to the public as investment advisers. The commission noted that even persons who voluntarily register in circumstances where their registration might not be required are "of course, subject to all of the provisions and rules" under the Act. Investment Advisers Act Rel. No. 870 (July 14, 1983) (proposing rescission of Rule 202-1).

n7 The fact that some clients may themselves audit certain of Brighton's accounts does not afford the level of protection provided by an independent public accountant examining all clients' assets in the custody or possession of an adviser.

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**INQUIRY-1: BRIGHTON PACIFIC**  
**A Realty Asset Management Company**  
**80 Grand Avenue, Suite 200**  
**Oakland, California 94612**  
**415-832-0900**  
**Fax 415-832-7320**

**April 15, 1991**

**Investment Advisor's Act, Rule 206(4)-2**  
**17 CFR 275.206(4)-2**

**Thomas S. Harmon, Esq.**  
**Chief Counsel**  
**Securities and Exchange Commission**  
**Division of Investment Management**  
**450 - 5th Street, N.W.**  
**Judiciary Plaza**  
**Washington, D.C. 20549**

**Re: Brighton Pacific Realty Asset Management Co.**  
**(Investment Advisor)**  
**80 Grand Avenue, Suite 200**  
**Oakland, California 94612**

Dear Mr. Harmon:

We would like to restate our request that you take a "no action position" with reference to the above-referenced Investment Advisor. It is the desire of the Investment Advisor to avoid the expensive annual audit procedure otherwise required by Rule 206(4)-2(a)(5).

Brighton Pacific Realty Asset Management Co. ("Investment Advisor") was incorporated in 1984 and is a California corporation in good standing with six shareholders. The Investment Advisor provides professional real property management, consulting, project management, and leasing expertise for a broad range of property types, including office buildings, retail properties, mobile home parks, multi-family residential units, industrial properties, shopping centers, hotels/motels, and research and development properties.

The Investment Advisor provides professional real property management services as court-appointed receiver or bankruptcy court-appointed custodian, and as privately engaged property manager. The Investment Advisor also acts as a fee basis consultant, advising clients regarding real property and evaluating real property for clients. In each case, whether privately retained or acting pursuant to court directive, the Investment Advisor carefully safeguards clients' funds.

Whether privately retained or acting pursuant to court order, the Investment Advisor acts diligently to safeguard the interest of the property owner. A separate bank account is established for each parcel of property under management, notwithstanding ownership of multiple properties by a single owner. Funds pertaining to one property are not commingled with those pertaining to another. The Investment Advisor collects rents, pays authorized property expenses, and on a monthly basis, turns over cash in excess of expenses to the property owner. The Investment Advisor keeps and maintains accurate records and renders periodic accountings to its clients and to the courts where required.

Under neither the private retention nor the court-appointed management does the Investment Advisor have discretionary authority regarding the funds in its custody. When privately engaged to manage real property, the Investment Advisor has a contractual duty to account, and renders to the property owner

a monthly statement of operating income and expenses, together with photocopies of bank records pertaining to the property accounts. The Investment Advisor collects rents, pays expenses authorized by the property management agreement, including management fees, and pays over the balance of the funds to the property owner on a monthly basis. The Investment Advisor has no discretion regarding the expenditure or the investment of clients' funds, but holds such funds solely for the purpose of paying authorized expenses relating to the real property. The Federal Deposit Insurance Corp., and other clients for whom the Investment Advisor manages property, regularly audit the Investment Advisor's accounts pertaining to the properties under management. A copy of the Investment Advisor's standard property management agreement, including provisions entitling the owner to inspect books and records, is enclosed for your information.

In its capacity as court-appointed receiver or bankruptcy court-appointed custodian, the Investment Advisor is obligated by statute and/or court order to account for all funds coming into its possession. The Investment Advisor accounts monthly to the court and to each interested party for all funds coming into its possession and for, all expenditures which it has made on behalf of the property during the accounting period. At the conclusion of its tenure as court-appointed receiver or custodian, the Investment Advisor is required to file with the court its final account, including bank account records, which becomes a matter of public record. At the conclusion of its tenure, or more frequently at the direction of the court, the Investment Advisor pays over all funds on hand to the entitled party.

On February 21, 1990, the Investment Advisor submitted its initial Form ADV application for registration as an Investment Advisor. The Investment Advisor recognized that as a firm engaged exclusively in real property management services, as described above, it was not advising others regarding "securities" as that term is defined at 15 U.S.C. § 80b-2(a)(18), and was therefore not required to be registered as an Investment Advisor. At that time, and currently, the Investment Advisor has actively sought real property management opportunities as described herein for properties owned by various public and quasi-public agencies and pension funds, including the California State Teachers Retirement System and the California Public Employees Retirement System. Both pension funds, as well as E.R.I.S.A. guidelines require that property managers be registered Investment Advisors notwithstanding the distinction between managing real property and advising regarding securities.

The Investment Advisor does not advise clients regarding "securities" as defined in 15 U.S.C. § 80b-2(a)(18). The Investment Advisor advises clients only with regard to space and leasing requirements regarding the real property currently under its management. Because the Investment Advisor manages real property on a "per-parcel" or individual property basis and because the management of each parcel, whether private or pursuant to court-appointment, includes regular periodic accountings and reconciliations, and because the Investment Advisor acts as custodian of clients' funds only for the limited purpose of paying expenses related to management of a particular parcel of property, we ask that you consider a "no action position" so that the Investment Advisor can avoid the expensive annual audit otherwise required by Rule 206(4)-2(a)(5).

Thank you for considering this request. We await your reply.

Very truly yours,

BRIGHTON PACIFIC REALTY ASSET  
MANAGEMENT CO. ("Investment Advisor")

By Donald G. Savage, President