

GEORGE J. DIPPOLD

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SEC LETTER

Advisers Act Sec. 202(a)(11)(B)

May 7, 1990

**Mr. George J. Dippold
Dippold, Cooper & Nelson
2024 Kohler Memorial Drive
Post Office Box 726
Sheboygan, Wisconsin 53082-0726**

Dear Mr. Dippold:

This responds to your letter dated November 8, 1989, in which you request assurance that we would not recommend any enforcement action to the Commission under the Investment Advisers Act of 1940 (the "Act") if Dippold, Cooper & Nelson ("Dippold"), an accounting firm, provides financial planning services for selected clients without registering as an investment adviser under the Act.

Section 202(a)(11) of the Act defines the term "investment adviser" as "[a]ny person who, for compensation, engages in the business of advising others . . . 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." Whether a person providing financially related services is an investment adviser within the meaning of the Act depends on all the relevant facts and circumstances.

The brochure entitled "The CPA as Personal Financial Planner" that you enclosed with your letter states that "CPAs can guide you through the maze of investment opportunities - money market funds, stock funds, . . . bonds, . . . and many others." These types of investments are securities, and a person providing advice about them for compensation would fall within the definition of investment adviser in the Act. See, e.g., Suzanne Clark-James (pub. avail. Aug. 30, 1984). The fact that the fees that a person may earn from providing this kind of advice may not constitute a major or substantial part of his revenues does not, in and of itself, lead to the conclusion that the person is not in the business of providing investment advice. See Investment Advisers Act Release No. 1092 (Oct. 8, 1987); see also, Robert S. Goetz (pub. avail. Feb. 23, 1990); Peter J. Huang (pub. avail. May 18, 1984).

As a general matter, the staff no longer issues no-action letters concerning the applicability of the Act to financial planners. See Mary E. Rogers (pub. avail. May 20, 1982). However, the Commission has issued a release setting forth the staff's views about the circumstances under which financial planners, or those who provide services including financial planning, are subject to the Act's requirements. A copy of the release, Investment Advisers Act Release No. 1092 (Oct. 8, 1987), is enclosed for your convenience.

A person who falls within the definition of investment adviser must register with the Commission unless he falls within one of the exceptions to the definition or is exempt from registration under the Act. Section 202(a)(11)(B) of the Act excepts from the definition of investment adviser any accountant whose performance of advisory services is solely incidental to the practice of his profession. Three factors are relevant in determining whether advisory services are solely incidental to the accounting practice:

- 1) whether the accountant (or firm) holds himself out to the public as an investment adviser;
- 2) whether the advisory services rendered are in connection with and reasonably related to accounting services; and

3) whether the fee charged for advisory services is based on the same factors as those used to determine the accounting fee.¹

In addition, Section 203(b)(3) of the Act exempts from registration any adviser who, during the previous twelve months, has had fewer than fifteen clients, provided the adviser does not hold himself out generally to the public as an investment adviser or act as an investment adviser to any registered investment company or business development company.

An adviser would hold himself out to the public as an investment adviser if he promotes advisory services by general advertising or general mailings, uses the term investment adviser or a similar term on a business card or stationery, is listed as such in a telephone, business or building directory, or lets it be known generally that he is available to provide investment advice or will accept new clients. See, e.g., Alan P. Woodruff (pub. avail. Aug. 20, 1987); Mr. R. Bate (pub. avail. June 28, 1988). Thus, if Dippold were to advertise generally its financial advisory services, it could not rely on the accountant's exception in Section 202(a)(11)(B) or the registration exemption in Section 203(b)(3).

Finally, Section 203(b)(1) of the Act exempts from registration

any investment adviser all of whose clients are residents of the State within which such investment adviser maintains his or its principal office and place of business, and who does not furnish advice or issue analyses or reports with respect to securities listed or admitted to unlisted trading privileges on any national securities exchange.

If Dippold meets all of the requirements of the exemption, it need not register under the Act.² You should note, however, that the antifraud provisions of Section 206 of the Act, and the rules adopted by the Commission thereunder, apply to any person who is an investment adviser as defined in the Act, whether or not the person is required to be registered with the Commission as an investment adviser.

I regret the delay in responding to your letter. If you have further questions, you may write or call this Office at (202) 272-2030.

Sincerely,

Nancy M. Morris
Assistant Chief Counsel

Footnotes

¹ See Hauk, Soule & Fasani, P.C. (pub. avail. May 2, 1986).

² You state that Dippold has "no unlisted trading privileges on any securities exchange." Please note that the exemption from registration in Section 203(b)(1) refers to "securities listed or admitted to unlisted trading privileges on any national securities exchange." Whether Dippold has or does not have "unlisted trading privileges on any securities exchange" is irrelevant for purposes of Section 203(b)(1).

INCOMING LETTER

November 8, 1989

**Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549**

This letter is a request for staff interpretive or no-action advice concerning the applicability of the Investment Advisors Act of 1940.

I am a partner in a firm of Certified Public Accountants, and have recently passed the examination of the International Board of Standards and Practices for Certified Financial Planners, Inc. (IBCFP) and will be issued the designation CFP.

Our firm performs the normal services of CPA's, mainly auditing, accounting, tax preparation and advice. We plan to include within our present services financial planning for selected clients. We plan to prepare financial reports and programs for several clients which will include financial advice. We will charge our normal hourly fees for these services. These services are to be incidental to the practice of accounting. Our firm's gross revenue in 1990 from personal financial planning will be less than 1% of our total income and is anticipated to be less than 3% in future years.

We will not sell any investments or insurance products nor will we will receive any commissions for our recommendations. We will not provide advice regarding any specific investment or stock or prepare any analysis or report about a specific stock.

We do not plan to actively advertise in newspapers our services as financial planners, we may print one newspaper article stating that I have been granted the CFP designation and a brief description of the CFP's functions.

I do not intend to become an investment advisor on specific stocks or investments but practice as a financial planner within the framework of a regular CPA practice.

I would presume that I might be in the same position of the case of Suzanne Clark-James where the SEC took the position that a person whose principal business is providing financial services other than investment advice would not be regarded as being in the business of giving investment advice within the meaning of Section 202(a)(11) of the Investment Advisors Act of 1940.

I believe that I should also be exempted from registration because all of our clients are residents of Wisconsin where we maintain our only office and place of business, and we will not furnish advice or issue analysis or reports with respect to securities listed and we have no unlisted trading privileges on any securities exchange.

My opinion is that I will not have to register with the SEC and will appreciate your reply.

Very truly yours,

George J. Dippold

Enclosed is a brochure published by the AICPA as a guide for services a CPA may perform as a personal financial planner.