DOUBLE D. MANAGEMENT, LTD.

Investment Advisers Act of 1940 -- Section 201(1)

Jan 31, 1983

Forty Four Management, Ltd., Forty Four Management, Inc.

TOTAL NUMBER OF LETTERS: 3

SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
December 30, 1982
RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 81-836-CC
Double D. Management, Ltd.
File No. 132-3

In a telephone conversation between you and Lawrence W. Koltun of the staff on February 23, 1982, you represented that it is intended that Double D. Management, Ltd. ("Double D."), a Cayman Islands investment adviser, would give advice about United States issuers of securities to 44/Cayman Equity Investors Corporation ("Investors"), an open-end investment company organized under the laws of Panama with its principal office in the Cayman Islands, B.M.I., which intends to sell its shares to individuals and entities who and which are neither citizens, domiciliaries, or residents of the United States. Double D. would receive information about securities issued by United States issuers through the mails. Double D. would also telephone broker-dealers in the United States to effect transactions in securities of United States issuers. Double D. would charge Investors a fee which may be based on capital gains or appreciation.

David H. Baker, Jr. ("Baker"), a United States citizen resident in the Cayman Islands B.W.I., owns 78 1/2% of the outstanding capital stock of Double D. Investment advice will be given by Double D. through Baker and Peter A. Tomkins ("Tomkins'), a British subject with Caymanian status also resident in the Cayman Islands, B.W.I. Baker and Tomkins are the only officers of Double D. and of Forty Four Management, Ltd. ("44 Ltd."), a Cayman Islands corporation which is registered with the Commission as an investment adviser and which is wholly-owned by Baker, being the President and Secretary, respectively, of such companies. Baker also is sole owner of Forty Four Management, Inc. ("44 Inc."), a Delaware Corporation registered with the Commission as an investment adviser, and the only officer, director and full-time employee of 44 Inc.

Your letter raises two issues. The first is whether a foreign investment adviser to a foreign investment company is subject to the Investment Advisors Act of 1940 ("Act") if the investment company invests in securities issued by United States issuers about which the adviser is informed through the mails, and if the adviser, by telephone, orders transactions in securities of United States issuers on behalf of the investment company through United States broker-dealers. The second is whether the sole owner of a registered investment adviser, which has no officer, director, or employee but the sole owner, or the registered investment adviser, is in violation of the Act if another company, operated and majority-owned by the sole owner of the registered investment adviser, engages in a practice, the charging of a fee based on capital gains, that would constitute a violation of the Act if done by the registered investment adviser.

Section 203(a) of the Act provides that except as provided in subsection (b) "it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser." We assume that Double D. would not solicit clients through the United States mails or other means or

instrumentalities of interstate commerce (hereinafter referred to as "jurisdictional means") or provide investment advice by jurisdictional means, but that Double D. would use jurisdictional means to acquire information about securities of United States issuers and would use jurisdictional means to instruct United States broker-dealers to effect transactions in securities of United States issuers on behalf of Investors. The question, therefore, is whether such use of jurisdictional means is "in connection with" Double D.'s business an an investment adviser. For the following reasons we do not believe that it is.

Section 201(1) of the Act states, in part, that investment advisers are of national concern in that, among other things, their advice, counsel, publications, writings, analysis, and reports are furnished and distributed, and their contracts, subscription agreements, and other arrangements with clients are negotiated and performed by the use of the mails and the means and instrumentalities of interstate commerce. If Congress thought that investment advisers were of national concern because they received information about securities through jurisdictional means, it would have been appropriate for it to have so stated in section 201(1). The fact that this was not stated as being a basis of national concern suggests that Congress did not consider it to be so.

If section 203(a), which prohibits an investment adviser, unless registered under the Act, from making use of jurisdictional means in connection with his or its business as an investment adviser, is read in the light of section 201(1) of the Act, it appears that the business of an investment adviser is the getting of clients and the providing of advice, see SEC v. Myers, 285 F. Supp. 743 (D.C. Md. 1968), but not the receiving of information about securities and, moreover, that such an activity is not "in connection with" the "business" of the investment adviser as those terms are used in section 203(a). The mere fact that a foreign adviser gives advice abroad about securities issued by United States issuers, and, presumably, has been informed about such securities through jurisdictional means, is not, therefore, a sufficient basis for the application of the Act to the foreign adviser. It remains to be determined whether such a foreign adviser by telephoning United States brokers or dealers to effect transactions in United States securities becomes subject to the Act. For the following reasons we do not believe that it does.

If the foreign adviser used a foreign broker to contact an American broker by telephone, the foreign adviser would not be using jurisdictional means, and, thus, would not be subject to the Act. It is difficult to see any policy under the Act that would warrant applying the Act to a foreign adviser who telephones the American broker or dealer directly. Therefore, we do not believe that such a use of jurisdictional means subjects a foreign adviser to the Act. Cf. Shearson International Dollar Reserves (pub. avail. July 15, 1981) in which it was stated that when a foreign investment company, without any order of the Commission pursuant to section 7(d) of the Investment Company Act of 1940 ("Investment Company Act"), offers and sells its redeemable shares to only non-United States persons in areas outside the United States and any decisions to buy or redeem the shares are made abroad, and not by an adviser in the United States, no action to the Commission would be recommended based on section 7(d) of the Investment Company Act simply because some of such non-United States persons have assets or accounts in the United States that are used to acquire such interests or to receive the proceeds of any non-United States redemption or sale of such interests or because the interests of such persons in such shares may be held in the name of an American broker.

Turning to the second question, we note that Section 208(d) of the Act provides that it shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of the Act or any rule or regulation thereunder. In so far as in pertinent here, Section 205(1) provides that no investment adviser, unless exempt from registration pursuant to section 203(b), shall make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to enter, extend, or renew any investment advisory contract, or in any way to perform any investment advisory contract entered into, extended, or renewed on or after the effective date of the Act, if such contract provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client. The fee Double D. intends to charge Investors would not be in compliance with section 205 if Double D. was subject to the Act.

The question is whether section 205 or 208 is violated by Baker, 44 Inc., or 44 Ltd., if Double D., a company of which Baker owns 78 1/2 percent and of which he is the president, uses jurisdiction means, i.e., the telephone, to perform an advisory contract with Investors which provides for a fee based on

capital gains. For the following reasons we do not believe that such action by Double D. would render Baker, 44 Inc., or 44 Ltd. in violation of sections 205 or 208.

First, Baker is not a registered investment adviser; it is 44 Inc. and 44 Ltd. which are registered as investment advisers. Second, 44 Inc. and 44 Ltd. have no investment in Double D. Therefore, Baker cannot be said to be doing through Double D. what he could not do directly, and 44 Inc. and 44 Ltd. cannot be said to be doing through Double D. what they could not do directly.

Baker, however, would be doing through 44 Ltd., 44 Inc. and Double D. what he could not do himself without violating section 205 of the Act. This is because the business conducted by 44 Ltd., and 44 Inc., registered investment advisers, presumably would, if conducted by Baker, require the registration of Baker, and Baker, as a registered investment adviser, would be prohibited from charging a fee based on capital gains to Investors.

We do not believe, however, that because Baker owns and operates two registered investment advisers, i.e., 44 Ltd. and 44 Inc., he would violate the Act of Double D., a foreign adviser of which he is the majority owner and operator, charges a foreign client a fee based on capital gains for advisory services which, although performed primarily by Double D. abroad, involve Double D.'s telephoning broker-dealers in the United States to order transactions on behalf of Investors. No part of the Act, including section 208, suggests that there is a policy under the Act of preventing a person from doing a thing which a non-investment adviser can do, or an unregistered investment adviser can do, merely because the person owns a registered investment adviser which cannot do the thing or is a person which is owned by a person who owns a registered investment adviser which cannot do the thing. Cf. Davis, Skaggs & Co., Inc. (pub. avail. August 21, 1981) in which it was stated that no action would be taken against a parent corporation and two of its separately operated subsidiary corporations, one of which was formed to be a general partner in business development companies not electing to be business development corporations under section 54 of the Investment Company Act, and, as such, to receive fees based upon capital gains, and the other of which was formed to be a registered investment adviser to the public, if the number of clients of the second subsidiary was not integrated with the number of clients of the first subsidiary for the purposes of determining whether the first subsidiary was entitled to the exception from registration under the Act provided by section 203(b)(3) for an investment adviser who during the course of the preceding twelve months has had fewer than fifteen clients and who neither holds himself out generally to the public as an investment adviser not acts as an investment adviser to any registered investment company or company which has elected to be a business development company pursuant to section 54 of the Investment Company Act.

Stanley B. Judd
Deputy Chief Counsel

INQUIRY-1:
LAW OFFICES OF
RUFFEN H. COTTON, JR.
630 THIRD AVENUE
NEW YORK, NEW YORK 10017
(212) 986-5995

December 11, 1981

Securities and Exchange Commission
Division of Investment Management
Office of the Chief Counsel, Room 208
500 North Capitol Street
Washington, D.C. 20549

Attention: Sidney L. Cimmet, Esq.

Re: Forty Four Management, Ltd. and Forty Four Management, Inc.

Dear Sirs:

On behalf of Forty Four Managment, Ltd. ("44 Ltd.") and Forty Four Management, Inc. ("44 Inc."), confirmation is requested to the effect that enforcement action against 44 Ltd. or 44 Inc. will not be recommended by the staff to the Securities and Exchange Commission (the "Commission") if Double D Management, Ltd. ("Double D") acts as investment adviser to and manager for 44/Cayman Equity Investors Corporation ("Investors") upon the terms and conditions set forth in the Investment Advisory Agreement between Investors and Double D, a copy of which proposed Investment Advisory Agreement is attached hereto as Exhibit A.

Bakground

44 Inc. is a corporation organized under the laws of the State of Delaware and is registered with the Commission as an investment adviser under the Investment Advisors Act of 1940 (the "Act") (File No. 801-7895; effective October 4, 1971). 44 Ltd. is a corporation organized under the laws of the Cayman Islands and also is registered with the Commission as an investment adviser under the Act (File No. 801-14217; effective November 1, 1978). Both 44 Ltd. and 44 Inc. act as investment advisers to and managers for open-end investment companies registered as such with the Commission.

All of the outstanding capital stock of both 44 Ltd. and 44 Inc. are owned by Mr. David H. Baker, Jr. ("Baker"), a U.S. citizen who is a resident of the Cayman Islands, B.W.I. Baker also is the Chief Executive Officer and director of the two U.S. registered mutual funds as to which 44 Ltd. and 44 Inc. act as investment adviser and investment manager, respectively.

In July 1981, Double D was formed under the laws of the Cayman Islands, B.W.I. Double D's only office is located in Grand Cayman, Cayman Islands, B.W.I. Baker owns 78-1/2% of the outstanding capital stock of Double D. The balance of the equity interest is owned by an unrelated Caymanian entity. The proposed principal activity for Double D will be that of investment adviser to and manager for investment companies organized and operating in jurisdictions other than the United States. Double D will not advise or manage U.S. individuals or entities, and at all times will operate in and from jurisdictions other than the United States. Double D is not registered, and does not contemplate registering, under the Act as an investment adviser.

Baker is the only officer, director and full-time employee of 44 Inc. As a consequence, all management services provided by 44 Inc. are provided by or under the direction of Baker. Baker and Peter A. Tomkins ("Tomkins") are the only officers of 44 Ltd. and of Double D, being the President and Secretary,

respectively. Tomkins is a British subject with Caymanian status, and is a resident of the Cayman Islands, B.W.I. Baker and Tomkins are the individuals through whom investment advice has been rendered by 44 Ltd. and will be rendered by Double D. Neither 44 Ltd. nor Double D does business in the U.S. nor has or will have any U.S. operations. However, it is expected that the advisory clients of 44 Ltd. will continue to consist of U.S. entities and also may consist of U.S. individuals. On the other hand, Double D will not have any U.S. individuals or entities as advisory clients.

Investors was organized in July 1981 under the laws of the Republic of Panama, and maintains its principal office in the Cayman Islands, B.W.I. Investors proposes to operate as an open-end investment company and to sell its shares to individuals and entities who and which are neither citizens, domiciliaries or residents of the United States. Investors has two classes of capital stock: Class A and Class B. An initial offering will be made of approximately $3.3 million in value of the Class A shares. After this initial offering, no further Class A shares will be offered or sold by Investors. Thereafter, only Class B shares will be offered and sold as of December 31 of each year. The rights, privileges and preferences of the Class A and Class B shares are the same in all respects, except that (i) the investment advisory fee with respect to the Class A shares will be approximately one-half the rate charged to the Class B shares and (ii) the Class B shares are non-voting.

Prior to the public offering of Investors' shares, Investors will enter into an Investment Advisory Agreement with Double D. Pursuant to the agreement, Double D will be compensated annually, as of the close of business on December 31 of each year, in an amount equal to: (i) 8% of the excess of Investors' net asset value on such December 31 attributable to Investors' Class A shares over the net asset value attributable to such Class A shares on December 31 of the immediately preceding year, and (ii) 20% of the excess of Investors' net asset value on such December 31 attributable to the Class B shares over the net asset value of such Class B shares on December 31 of the immediate preceding year. In other words, the advisory fee is a percentage of the increase in Investors' net asset value; if there is no increase, no advisory fee will be payable.
Question Presented

The proposed Investment Advisory Agreement, which provides for a fee based upon a percentage of capital appreciation, raises a question as to whether the registered investment advisers are doing indirectly that which may not be done by them directly. In view of the facts that (i) a majority of Double D's shares are owned by Baker and (ii) Baker also owns all of the outstanding stock of two U.S. registered investment advisers, there exists a question as to whether any entity under common control with the registered advisers is subject to the same statutory prohibitions as the registered advisers.

For the reason discussed below, I believe that the provision of Sections 205(1) and 208(d) of the Act do not preclude such an arrangement by Double D with Investors, nor are there any adverse leg consequences for 44 Ltd. or 44 Inc.

Discussion

Section 205(1) of the Investment Advisors Act of 1940 (15 U.S.C. § 80b-5(1)) prohibits registered investment advisers from entering into or performing an advisory contract which provides for compensation in the form of a percentage of capital gains or capital appreciation of the funds of a client. In addition, Section 208(d) of the A (15 U.S.C. § 80b-8(b)) provides that any person may not do indirectly any act which would be directly prohibited under any provision of the Act. Literally applied, neither section directly impacts the proposed contractual arrangement between Double D and Investors or the status of 44 Inc. or 44 Ltd. under the Act. Nor does there appear to be any basis in the legislative history or judicial interpretations of the Act which would support any application of those sections to the situation described herein.

The lack of a clear statutory prohibition to the proposed arrangement, coupled with the even more fundamental question of the jurisdiction of the Act over foreign entities involved in foreign transactions, has resulted in my opinion to the effect that the proposed compensatory arrangement between Double D and Investors does not result in any indirect violation of the Act by either 44 Inc. or 44 Ltd.

Since the entities involved are anxious to begin their proposed arrangement, I request that you confirm my opinion to the effect that the proposed contractual arrangement between Double D and Investors does not result in any direct violation of the Act by Double D or any indirect violation of the Act by either 44 Inc. or 44 Ltd.

If for any reason you do not have sufficient information to allow you to respond to this request for advice and confirmation, or you believe that this letter raises other questions which you do not have sufficient information to comment upon, I request that you call the undersigned, collect.

Very truly yours,
Ruffen H. Cotton, Jr.

INVESTMENT ADVISORY AGREEMENT

AGREEMENT, dated December 31, 1981 between FORTY FOUR/CAYMAN EQUITY INVESTORS CORPORATION, a corporation organized and existing under the laws of the Republic of Panama (the "Company"), and DOUBLE D MANAGEMENT, LTD., a Caymanian corporation (the "Adviser").

WHEREAS, the Company is empowered to invest and reinvest its assets;

WHEREAS, the Adviser provides advice and management with respect to investments in securities.

NOW, THEREFORE, in consideration of the mutual promises herein contained, the Company and the Adviser understand and agree as follows:

1. The Adviser will, during the term of this agreement, place at the disposal of the Company its judgment and experience and furnish to the Company advice and recommendations with respect to investments, investment policies, the purchase and sale of securities and the management of the cash balances of and credit extended to the Company. The Adviser will perform such research as it shall deem necessary in order to render investment advisory services to the Company. The Adviser also shall provide management supervisory services for the Company, which shall include the supervision and direction of all individuals or entities which render services to the Company.
2. The Adviser is a corporation organized under the laws of the Cayman Islands, B.W.I. It is understood and agreed that all investment advisory services to be rendered to the Company shall be performed outside the United States of America, its territories or possessions. It is further understood that the Adviser shall maintain its staff and offices and render such investment advisory services principally from the Cayman Islands.
3. The Adviser shall be responsible for the development and maintenance of all relationships with brokers and dealers who execute transactions on behalf of the Company. Upon receipt of instructions from the Company regarding any portfolio security transaction, the Adviser will be responsible for maintaining contact with those brokers or dealers chosen by the Company and using its best efforts to assure that such brokers and dealers obtain best price and execution in respect of each transaction. The Adviser also will be responsible for negotiating with such brokers and dealers the commission charges to be paid by the Company. The Adviser is authorized to do business with brokers or dealers on terms and at rates which it believes, in good faith, to be reasonable in view of the overall nature and quality of the services provided, including knowledge and experience relating to buyers and sellers of a particular security, research, statistical and other factual information and services provided, without necessarily obtaining the lowest commission charge at which such broker or dealer, or another, is willing to do business. It will be the responsibility of the Adviser to seek the best overall value to the Company on all trades that circumstances permit, including the value inherent in continuous relationships with various brokers and dealers. In the allocation of portfolio brokerage, the Adviser is authorized to consider research and brokerage services provided by dealers, and is authorized to cause the Company to pay to a dealer a commission rate or amount in excess of the rate or amount

another dealer would have charged for effecting that transaction if the Adviser determines in good faith that such rate or amount of commission is reasonable in relation to the value of the research and brokerage services provided. The Company will from time to time furnish to the Adviser detailed statements of the investments and resources of the Company, and will make available to the Adviser such financial reports, and other information relating to its investments as may be in the possession of the Company or available to it.

4. In connection with purchases or sales of portfolio securities for the account of the Company, neither the Adviser nor any of its directors, officers or employees will act as a principal or receive any commission as agent.
5. All costs and expenses incurred by or on behalf of the Company shall be paid by the Company, including but not limited to (i) commissions, (ii) taxes and duties, if any, (iii) legal and accounting fees, (iv) fees of custodians, transfer agents and registrars, (v) licensing and corporate maintenance fees, and (vi) the cost of printing prospectuses and stockholder reports.
6. For the services to be rendered and the charges and expenses assumed and to be paid by the Adviser, as provided herein, the Company will pay to the Adviser compensation annually, as of the close of business on December 31 of each year, equal to: (i) 8% of the excess of the Company's net asset value on such December 31 attributable to the Company's Class A shares over the net asset value of such Class A shares on December 31 of the immediately preceding year and (ii) 20% of the excess of the Company's net asset value on such December 31 attributable to the Class B shares over the net asset value of such Class B shares on December 31 of the immediately preceding year.
7. The services of the Adviser to the Company hereunder are not to be deemed exclusive, and the Adviser will be free to render similar services to others so long as its services hereunder are not impaired thereby.
8. Nothing herein contained will be deemed to require the Company to take any action contrary to its Charter or any applicable statute or regulation, or to relieve or deprive the Board of Directo of the Company of its responsibility for and control of the conduct of the affairs of the Company.
9. The Company will cause its books and accounts to be audited at least once each year by a reputable, independent public accountant or organization of public accountants who shall render a report to the Company.
10. Subject to and in accordance with the Charter and By-Laws of the Company and the Memorandum of Association and By-Laws of the Adviser, it is understood that directors, officers, agents and stockholders of the Company are or may be interested in the Adviser (or any successor thereof) as directors, officers or stockholders, or otherwise, that directors, officers, agents and stockholders of the Adviser are or may be interested in the Company as stockholder or otherwise, and that the effect of any such adverse interests shall be governed by such Charter, Memorandum of Association and By-Laws.
11. The Adviser will not be liable for any loss sustained by the Company by reason of the adoption of any investment policy or the purchase or sale of or investment in any security on the recommendation of the Adviser, whether or not such recommendation shall have been based upon investigation and research by any other individual, firm or corporation; but nothing herein contained shall be construed to protect the Adviser against any liability to the Company or its stockholders by reason of willful misfeasance, bad faith or gross negligence in the performance of its obligations and duties under this agreement.
12. This agreement shall continue in effect from year to year, but only so long as such continuance is approved annually by a majority of the outstanding voting securities of the Company.
13. This agreement may be terminated at any calendar year end by the Company upon 60 days' written notice to the Adviser, without payment of penalty, by vote of the Board of Directors of the Company or by vote of the holders of a majority of the outstanding voting securities of the Company. This agreement may also be terminated at any calendar year end by the Adviser upon 60 days' written notice to the Company.
14. This agreement may not be amended, transferred, assigned sold or in any manner hypothecated or pledged without the affirmative vote or written consent of the holders of a majority of the outstanding voting securities of the Company; and this agreement shall automatically and immediately terminate in the event of its assignment by the Adviser.

IN WITNESS WHEREOF, each of the parties hereto has caused this instrument to be executed on its behalf on the day and year first above written.

ATTEST:
FORTY FOUR/CAYMAN EQUITY INVESTORS CORPORATION
By

ASSETS:
DOUBLE D MANAGEMENT, LTD.
By

INQUIRY-2:
LAW OFFICES OF
RUFFEN H. COTTON, JR.
630 THIRD AVENUE
NEW YORK, NEW YORK, 10017
(212) 986-5995
November 3, 1982

Securities and Exchange Commission
Division of Investment Management
Office of the Chief Counsel
450 Fifth Street, N.W.
Washington, D.C. 20549

Attention: Sydney L. Cimmet, Esq.

Re: Forty Four Management, Ltd.
(File No. 801-14217) and
Forty Four Management, Inc.
(File No. 801-7895)

Dear Sirs:

By letter dated December 11, 1981, a copy of which is attached hereto, I requested confirmation from you as to may opinion that enforcement action would not be recommended by the staff to the Securities and Exchange Commission against Forty Four Management, Ltd. or Forty Four Management, Inc. if and in the event the transactions referred to in such letter were consummated. As of this date, I have not received any reply to my letter, other than a telephone call from a member of your legal staff requesting additional information which I gave to him in that conversation. If there is anything further I can do in order to assist you in rendering the confirmation which I have requested, please do not hesitate to call or write.

Very truly yours,
Ruffen H. Cotton, Jr.