

MR. ELLIOTT W. SMITH
ANCHOR NATIONAL FINANCIAL SERVICES, INC.

Securities and Exchange Commission
Division of Investment Management
Washington, D.C. 20549

March 20, 1990

Mr. Elliott W. Smith
Senior Compliance Examiner
Anchor National Financial Services, Inc.
Anchor Centre
2201 East Camelback Road
Phoenix, Arizona 85016

Dear Mr. Smith:

In your letter dated January 29, 1990, you ask whether a broker-dealer may advertise "the offering of 'financial and estate planning services' to the public without going beyond the solely incidental element of the exclusion" from the definition of investment adviser found in Section 202(a)(11)(C) of the Investment Advisers Act of 1940 ("Advisers Act"). Your letter states that you assume that any such services would be provided with the knowledge of and under the control of the employing firm. We do not believe that the offering of "financial and estate planning services" in an advertisement by a person relying on the broker-dealer exclusions is, per se, inconsistent with the requirement that the provision of advisory services be "solely incidental" to its brokerage activities.

Section 202(a)(11) of the Advisers Act defines "investment adviser" to mean:

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....

Subsection (C) of Section 202(a)(11) excludes brokers and dealers from the definition of investment adviser if they do not receive any special compensation for investment advisory services and if such services are solely incidental to the person's brokerage activities.

Your letter indicates that you seek clarification with respect to the activities of both broker-dealer firms and registered representatives of those firms. If a broker-dealer provides financial planning services that are solely incidental to its broker-dealer business and receives no special compensation for those services, 1/ it may rely on the exclusion. 2/ The staff also takes the position that a registered representative of a broker-dealer who holds himself or herself out to the public as a financial planner, but who provides financial planning services solely in his or her capacity as a registered representative of the broker-dealer, and who does not receive special compensation for such financial planning services, is not required to register with the Commission as an investment adviser unless the financial planning activities are conducted (1) without the knowledge of the employer broker-dealer, (2) with the knowledge but without the approval of the employer broker-dealer, or (3) independently of the broker-dealer. 3/

I hope that this information is responsive to your questions and concerns. If we may be of additional assistance, please do not hesitate to contact this Office at (202) 272-1030.

Sincerely,

L. Hope Lewis
Attorney
Office of Chief Counsel

Endnotes

1/ A broker-dealer or its registered representative would not be providing investment advice that is solely incidental to its brokerage business if the advice is provided on a "fee-only" basis because it would be receiving special compensation for that advice. We note also that a broker-dealer or a registered representative would be receiving special compensation for its investment advice if it is compensated by commissions that include a clearly definable charge for investment advice. For example, if two general commission schedules are in effect, the lower without investment advice and the higher with investment advice, and the difference is primarily attributable to this factor, the broker-dealer or registered representative is receiving special compensation. Robert S. Strevell (pub. Avail. April 29, 1985). See generally Investment Advisers Act Rel. No 1092 (Oct. 8, 1987) (discussing the applicability of the Advisers Act to financial planners, etc.).

2/ However, the provision of investment advice by a broker-dealer in connection with a separately operated financial planning business for which fees are assessed, would not be solely incidental to its broker-dealer business. Cf. Investment Management & Research, Inc. (pub avail. Jan, 27, 2977).

3/ Elmer D. Robinson (pub. Avail. Jan 6, 1986). See also Nathan & Lewis Securities, Inc. (pub. Avail. April 4, 1988); Brent A. Neiser (pub avail. Jan. 21, 1986). In addition, a broker-dealer or a person associated with a broker-dealer who employs the term "financial planner" merely as a device to induce the sale of securities might violate the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934. See In the Matter of Haight & Co., Inc. (Securities Exchange Act Release No. 9082, Feb. 19, 1971); Robert E. Frey (pub. Avail. May 18, 1989).

INCOMING LETTER

Anchor National Financial Services, Inc.
Anchor Centre
2201 East Camelback Road
Phoenix, Arizona
85016
602 955-0300
Fax 602 956-3167

January 29, 1990

Securities and Exchange Commission
Office of the Chief Counsel
Division of Investment Management
Washington, DC 20549

Dear Sirs:

Anchor National Financial Services, Inc., (Anchor Financial) was recently forwarded the attached competitor's advertisement by one of our representatives. The representative was questioning the use of the terms "Financial Planning" and "Estate Planning" in describing services that the competitor firm was offering as well as our policy to not allow our representatives to utilize such references unless they are registered with the Securities and Exchange Commission (the Commission) as an investment adviser.

As a result of the representative's inquiry, we forwarded a request for clarification to the NASD regarding the appropriateness of such advertising by member firms who are not also registered as investment advisers. While we agree with their conclusion that the advertisement was not inappropriate due to the fact that the firm in question was in fact properly registered as an investment adviser, some questions remain regarding certain assertions contained in the NASD response letter.

The NASD letter states "(O)ne of the distinctions made when offering investment "advice" or "counseling" in an advertisement on behalf of a Registered Investment Advisor is that such advice is provided on a "fee-only" basis. The ad which you forwarded does not purport to offer advice for a fee, but rather financial and estate planning services along with one's investment portfolio, a practice fully in line with registered representatives and/or financial planners." A copy of our inquiry and the NASD response is attached for your reference.

It is our belief that this line of reasoning is not complete since the receipt of special compensation is only one element of the broker/dealer exclusion from the definition of investment adviser. The question that remains is whether a broker/dealer relying on the broker/dealer exclusion may advertise the offering of "financial and estate planning services" to the public without going beyond the solely incidental element of the exclusion. It is assumed that any such services would be provided with the knowledge and under the control of the employing firm.

Anchor Financial desires a clarification in this matter so that our policies may be evaluated properly. If you have any question, you may contact me at (602) 954-4049.

Sincerely,

ELLIOTT W. SMITH
Senior Compliance Examiner
Anchor National Financial Services, Inc.

EWS/s
Enclosures

NASD
National Association of Securities Dealers, Inc.
1735 K Street, N.W.
Washington, DC 20006
(202) 728-8000

December 27, 1989

Mr. Elliott W. Smith
Anchor National Financial Services, Inc.
2201 East Camelback Road
Phoenix, AZ 80516

RE: First Imperial Investor Services Ad; Reference # M89-1128-004

Dear Mr. Smith:

Your November 21, 1989 letter to Thomas Pappas regarding an advertisement placed by the above firm has been referenced to me for reply. We have reviewed the ad in question and have the following comments. It is our opinion that the advertisement appears unobjectionable. While this Department is not in a position to comment under the Investment Advisers Act, over which we have jurisdiction, one of the distinctions made when offering investment "advice" or "counseling" in an advertisement on behalf of a Registered Investment Advisor is that such advice is provided on a "fee-only" basis. The ad which you forwarded does not purport to offer advice for a fee, but rather financial and estate planning services along with one's investment portfolio, a practice fully in line with registered representatives and/or financial planners.

Finally, we have checked with the Securities and Exchange Commission regarding the firm's status and have been advised that First Imperial Investor Services is registered as an Investment Adviser (file no. 8-38392).

Please do not hesitate to contact us if you have any further questions.

Sincerely,

Jayne E. Flood
Supervisor
Advertising Department

JEF/smd

Anchor National Financial Services, Inc.
Anchor Centre
2201 East Camelback Road
Phoenix, Arizona
85016
602 955-0300
Fax 602 956-3167

November 21, 1989

Mr. Thomas A. Pappas
National Association of Securities Dealers, Inc.
1735 K Street, N.W.
Washington, DC 20006

Re: First Imperial Investor Services advertisement

Dear Mr. Pappas:

Anchor National Financial Services, Inc. (Anchor Financial) is concerned about certain representations made in the advertisement referenced above (copy attached).

The advertisement states that "Financial and Preretirement Planning" and "Estate Planning" are options available through First Imperial Investor Services (First Imperial) and its "Investment Officer", John Davis. While the advertisement references First Imperial's membership in the SIPC and NASD, it makes no reference to First Imperial being registered as an investment adviser.

Anchor Financial is under the impression that the broker-dealer exclusion from the definition of investment adviser available under the Investment Adviser's Act of 1940 is applicable only when any investment advice provided is done so in a manner solely incidental to the purchase and sale of securities. It would seem that advertising the availability of financial and estate planning services through First Imperial in this manner would cause such investment advice to be rendered outside of the "solely incidental" requirement and thus necessitate the registration of First Imperial as an investment adviser.

Anchor Financial believes it can compete effectively with any broker-dealer, provided such a competition is on a level playing field with all parties playing by the same rules. Therefore, we wish a clarification of the NASD's position in this matter so that, if necessary, our policies can be adjusted accordingly. However, if you agree with the assessment stated above, we believe appropriate action by the NASD is warranted.

Sincerely,

ELLIOTT W. WMITH
Compliance Examiner
Anchor National Financial Services, Inc.

EWS.es
Cc: Securities and Exchange Commission



John Davis
Investment Officer

Invest your time with John before you invest your money.

Searching for the perfect investment? Sometimes a straightforward conversation is the first investment you should make.

We'd like you to meet John Davis, with First Imperial Investor Services, an affiliate of Imperial Savings.

John's experience, market knowledge, and superior training can help you make better informed decisions by exploring your many investment options.

Options like: Tax-advantaged and Fixed Income Investments, Financial and Preretirement Planning, Estate Planning, Annuities, Mutual Funds, U.S. Government Securities and Self-directed IRAs.

So talk to First Imperial before you invest. Just stop by John's office located in the Imperial Savings branch listed below. The time you spend with John may be the best investment you can make.

First Imperial Investor Services™

an affiliate of Imperial Savings

Serving conservative investors.

La Mesa • 4791 Spring St. • (619) 463-4441

Appointments also available at these Imperial Savings Offices:

Allied Gardens
(619) 287-5130

Lemon Grove
(619) 463-8871

Member SIPC, NASD