ELMER D. ROBINSON

Securities Exchange Act of 1934 -- Section 15(a); Investment Advisors Act of 1940 -- Section 202(a)(11)(c)

Jan 6, 1986

Elmer D. Robinson

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
DEC 6 1985
RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT
Our Ref. No. 85-497-CC
Elmer D. Robinson
File No. 132-3

We would not recommend that the Commission take any enforcement action if you, a registered representative of a registered broker-dealer, hold yourself out to the public as a financial planner without registering as an investment adviser under the Investment Advisors Act of 1940, so long as your financial planning activities are conducted solely in your capacity as a registered representative of your broker-dealer. See Robert S. Strevell (pub. avail. April 29, 1985). If, however, your financial planning activities are, for example, (1) conducted without the knowledge of your employer broker-dealer, * (2) conducted with the knowledge but without the approval of your employer broker-dealer, or (3) conducted independently of your broker-dealer, you would have to register as an investment adviser. Our position is based upon the facts and representations of your letter of October 1, 1985, and upon our understanding that no "special compensation" is paid for your planning services. In addition, the Division of Market Regulation has advised us that under the circumstances described in (1)-(3) above, questions would arise as to whether you would be required to register as a broker-dealer pursuant to section 15(a) of the Securities Exchange Act of 1934.

We also understand that you will recommend only the financial products offered by your broker-dealer when conducting your planning activities. In the staff's view, this practice should be disclosed to all clients who receive planning advice. Moreover, for your general information, you should be aware that a broker-dealer or a person associated with a broker-dealer who employs terms such as "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. In In the Matter of Haight & Co., Inc. (Securities Exchange Act Rel. No. 9082, Feb. 19, 1971), the Commission held that a broker-dealer and its associated persons defrauded its customers in the offer and sale of securities by holding themselves out as financial planners who would, as financial planners, give comprehensive and expert planning advice and choose the best investments for their clients from all available securities, when in fact they were not expert in planning and made their decisions based on the receipt of commissions and upon their inventory of securities. Accord Institutional Trading Corporation (pub. avail. Nov. 27, 1972); Calvin A. Fisher (pub. avail. May 1, 1972); Universal Heritage Investments Corporation (pub. avail. June 18, 1971).

Thomas S. Harman
Special Counsel

* At one time, registered representatives who wished to register as investment advisers had to, as a matter of staff policy, obtain their broker-dealer's consent in order to register as an adviser. See Financial Service Corporation (pub. avail. Oct. 9, 1974). The staff no longer requires this as a matter of its policy, but believes that contract law or other considerations may dictate the same result. See generally Investment Assoc., Inc. (pub. avail. March 2, 1980); Theodore R. Woodley (pub. avail. Sept. 2, 1977).

INQUIRY-1:
136 West Main Street
Bloomsburg PA 17815
October 1, 1985

Securities and Exchange Commission
Attn: Thomas S. Harmon, Atty.
Division of Investment Management
Washington, D.C. 20549

Dear Mr. Harmon:

As you may remember, some weeks ago we had several lengthy telephone conversations regarding interpretations of the Investment Advisors Act and the need for a Financial Planner Registered Representative, under certain circumstances, to register as an Investment Advisor with the S.E.C. I do appreciate your time and help! I've enclosed a copy of my first letter to the S.E.C. for reference. You responded to my questions by sending a copy of a letter you sent to Robert S. Strevell of American Capital Financial Services who had raised questions near those I was seeking interpretations for. A copy of that letter is attached for reference.

While the letter indicated does respond to some aspects of my concerns, it does not deal with several specific issues of concern to me as they apply to FPRR of a member firm of the N.Y.S.E.

If a FPRR employed by a broker-dealer firm which is exempt under Section 202(A)(11)(C), advertises and publicly holds himself to be a "Financial Planner" and offers those planning services (not as an Investment Advisor) with no special compensation as per the interpretation on the letter (to American Capital) but renders financial planning advice solely on an "incidental basis"; does such advertisement by a FPRR by itself require and compel registration as an Investment Advisor with the S.E.C? In addition, it would be helpful to read your thoughts on where "incidental basis" ends and "non-incidental basis" begins.

If a broker-dealer is registered as an Investment Advisor but, as a firm, does not provide financial planning services, but a FPRR of that firm does provide and advertise financial planning services to his client base with no special compensation but solely on an "incidental basis", does this extended planning constitute activity "outside" the scope of his employment even if the usual commission is paid to the broker-dealer in full? Would this type of activity by a FPRR require additional registration by the FPRR as a Registered Investment Advisor with the S.E.C. under the ACT?

As it relates to the circumstances of the two previous paragraphs, what is required to judge a FPRR to be performing services "outside" the scope of his employment by an exempt broker-dealer? A separate fee or commission paid to FPRR not shared by the broker-dealer?

I do appreciate your time and effort on these questions. I've read some rather conflicting views in various articles on this subject. Apparently, I'm not alone in my confusion. Needless to say, I'm trying to avoid violation of the ACT. It appears, with or without this effort, unintentional violation could easily occur. To be unquestionably clear, one need register; but to those who provide these services as a small portion of our livelihood, the registration and reporting requirements of the ACT are indeed another burden. Burden enough so that one in the brokerage industry who feels qualified to provide these services, must give it second thought.

Sincerely,
Elmer D. Robinson

136 West Main Street
Bloomsburg, PA 17815
February 12, 1985

Investment Advisers Study Group
Mary S. Champagne, Esq.
Division of Investment Management
Securities & Exchange Commission
500 North Capital Street
Washington, D.C. 20549

Dear Ms. Champagne:

Who need register under the Investment Adviser Act of 1940? After reading several articles and your Interpretive Release on Investment Adviser Act, I'm still uncertain! Will some authority at the SEC be kind enough to offer some help.

I am a registered representative employed by a Broker-Dealer in the securities business. The firm is registered under the Investment Advisors Act of 1940, but as a salesman for that firm, I am not. If I provide financial planning services beyond the normal usual broker-dealer services, hold myself out as competent in financial planning services, RECEIVE NO FEE FOR FINANCIAL PLANNING SERVICES, and as a result of such services, a client acts upon my advice and purchase or sell investment products for which a normal commission is paid to the firm from which I receive a portion therefrom -- need such a provider of financial planning services register as Investment Adviser as a result of the no fee financial planning activity? Such planning is done to assist and guide the client with the placement of his assets to best meet his stated investment objectives.

According to your Interpretive Release, Section 202(A)(11) says -- any person, who for compensation engages in -- etc shall be defined as "Investment Adviser." It infers if no fee , one performing such services does not come under Section 202(A)(11). Is that so?

Yet, under element 3 -- Compensation it appears a person providing a variety of services to a client including investment advisory services, for which the persons receive an economic benefit, for example, by receipt of a single fee or commission upon the sale to the client of insurance product or investments, would be performing such advisory services for compensation within the meaning of Section 202(A)(11) of Adviser Act.

Element 2 - The Business Standard - allows more room for uncertainty. In part it suggests a person who provides financial services including investment advice (financial planning services) for compensation is in the business of providing investment advice within the meaning of Section 202(A)(11) UNLESS the advice being provided by such person is solely incidental to a non-investment business of the person, is non specific, and is not rewarded by special compensation for such investment advice.

I repeat, does such a registered salesman for a Broker-Dealer who extends his service as described and uses only the financial products offered by his firm, need register under the ACT? When a fee is involved, the ACT seems clear. However, the compensation element of the ACT has much room for ambiguity.

I suspect my circumstance is not unique and the question has been raised before. Can you help with an understandable response to my question? I sure welcome your help!

In addition, please mail the necessary forms for completion as Registered Investment Adviser and the reporting requirements for the registration.

Sincerely,
Elmer D. Robinson, CFP