

FPC SECURITIES CORPORATION

Investment Advisors Act of 1940 - Section 202(a) (11) (c), 206

Dec 1, 1974

TOTAL NUMBER OF LETTERS: 2

SEC-REPLY-1: RESPONSE OF THE OFFICE OF CHIEF COUNSEL DIVISION OF INVESTMENT MANAGEMENT REGULATION

Based on the foregoing, we are unable to assure you that we would not recommend that the Commission take action against FPC if it proceeded with the Capital Asset Program (the "Program") without registering as an investment adviser under the Investment Advisors Act of 1940 (the "Act"). Section 202(a) (11) of the Act 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 a part of a regular business, issues or promulgates analyses or reports concerning securities. There are several exclusions from this definition, only one of which is pertinent here. Section 202(a) (11) (C) excludes from the definition of an investment adviser any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor. Section 203(b) of the Act exempts certain investment advisers from the provisions of the Act, but none of those exemptions appear to be applicable in this case.

The program as proposed is a plan whereby FPC would assist its clients in the selection of an investment adviser. Salesmen of FPC would initially solicit the interest of clients who would be able to place a minimum of \$50,000 under management. Clients who were interested and were willing to have their funds managed on a discretionary basis would be asked to fill out a questionnaire and would have an interview with the Program director. The Program director would recommend that the client meet with representatives of certain investment advisers, normally selected from a list of investment advisers which FPC deemed to be "qualified firms, with good reputations for research and prior investment performance." The Program director might or might not accompany clients to such meetings and might recommend particular investment advisers. If the client selected an investment adviser, FPC might participate in the selection of a custodian bank. FPC would monitor the performance of the investment adviser and would send the client quarterly reports concerning the percentage increase or decrease of the client's portfolio with that of the Standard & Poor 500, the Dow Jones Industrials, and four other indexes. These reports would be prepared by a registered investment adviser not affiliated with FPC and would bear a legend containing language to the effect that the report could not in and of itself be used to determine whether or not to retain an investment adviser. FPC would also review the performance of advisers and might recommend that its clients change advisers. FPC would be compensated pursuant to an agreement that its clients would instruct their investment advisers to direct their accounts' brokerage to FPC. An investment adviser would be able to place such brokerage elsewhere if necessary to obtain best execution but would direct unrelated brokerage to FPC to make up the difference. FPC would not accept unrelated brokerage from such advisers in any other circumstances except that FPC would accept brokerage from investment advisers in return for recommending such adviser to clients, whether or not an advisory relationship was entered into.

It is our view that the activities of FPC in connection with the Program would be those of an investment adviser within the meaning of the Act and that the broker-dealer exclusion would not be available to FPC. It is not necessary for a person to render advice on particular securities to be an investment adviser within the meaning of Section 202(a) (11); rendering advice on securities in general is sufficient to bring a person within the definition. In this case FPC proposes to give advice concerning the selection and retention of an investment adviser. Since the placing of assets under the management of an investment adviser would normally involve investing in securities, advising a client to select or dismiss an investment adviser would inherently involve advising such a client as to the advisability of investing in securities in general within the contemplation of the first clause of the definition of an investment adviser. Moreover, sending reports to clients evaluating an investment adviser's

performance as an integral part of the services of FPC would constitute promulgating reports concerning securities within the meaning of the second clause of the definition, notwithstanding that fact that such reports would not actually be prepared by FPC. In this regard, the position taken by the staff in *Schild Stock Service, Inc.* ('71-'72 CCH Fed. Sec. L. Rep. P 78,649) did not turn on the use of a hypothetical portfolio or other device but was based on the general nature of the service provided. Finally, we think it clear that the requirement in the definition that an investment adviser engage in its business for compensation is met in this case in view of the fact that the receipt of brokerage by FPC is an integral part of the Program and is viewed by FPC as compensation for its services.

As indicated above, we do not believe that the exclusion from the definition of an investment adviser in Section 202(a) (11) (C) is available in this case. It does not appear that the Program could fairly be described as incidental to the normal brokerage activities of FPC. It is evident that FPC has devoted substantial time and effort to developing the Program and that the operation of the Program would be a very significant activity outside the scope of normal brokerage functions. Since the advisory activities of FPC would not be solely incidental to its brokerage activities, the exclusion is unavailable, regardless of whether the commissions received by FPC would be regarded as "special compensation" for its services.

Your letter details a number of safeguards proposed by FPC to alleviate the conflicts of interest inherent in the operation of the Program, and you attempt to distinguish the Program from past situations in which the staff has expressed concern over conflict of interest problems. We wish to make it clear that the question of whether FPC is an investment adviser is distinct from that of whether conflict of interest problems exist with respect to the operation of the Program. Given our view that FPC would be an investment adviser, the general antifraud provisions of Section 206 of the Act would clearly apply to the operation of the Program. In this regard, we should point out that the safeguards proposed by FPC would not necessarily cure all conflict of interest problems. FPC would still be entitled to receive brokerage, equal to the amount generated by the client's account. Since FPC would play a significant role in determining whether a investment adviser was selected or retained, such an adviser might have an incentive to churn the client's account in order to provide FPC with larger compensation for its service in hopes of inducing FPC to recommend that its clients select or retain such adviser. In these circumstances there can be no assurance that the proposed safeguards would be adequate to protest against violations of Section 206 in all cases.

Furthermore, the possibility that FPC will receive unrelated brokerage, either to compensate for clients' brokerage lost because FPC could not provide best execution or in return for recommending certain advisers, raises additional problems. In the first place, you have not indicated that FPC would only receive such unrelated brokerage where it could provide best execution. Secondly, the same potential for churning exists with respect to such unrelated brokerage as exists with respect to clients' brokerage.

In view of the foregoing problem, as is the case generally regarding the antifraud provisions of the federal securities laws, we specifically decline to give you any comfort on the legality of your proposed brokerage arrangements.

Finally, since it appears that you have sought guidance to some extent from the Report of the Advisory Committee on Investment Management Services for Individual Investors in developing the proposed safeguards, we would like to point out that the recommendations therein are those of the Committee only and do not purport to represent the view of the Commission or its staff.

Although you do not ask for any interpretive advice as to the status of any discretionary accounts with investment advisers established pursuant to the operation of the Program, there well may be some substantial legal problems in connection with such accounts. As you know the Advisory Committee on Investment Management Services for Individual Investors considered problems involving the applicability of the Investment Company Act of 1940 and the Securities Act of 1933 to such services. Since, as indicated above, the Commission has not adopted the recommendations of the Committee, we cannot take any position with respect to these status questions. However, the Commission is presently considering basic legal and policy questions in this area, and you should carefully consider the applicability of the Commission and staff positions discussed in Section III of the Committee's Report to FPC's proposed activities.

In view of the foregoing, we are enclosing appropriate explanatory and investment adviser registration materials for your use.

Alan Rosenblat, Chief Counsel
Division of Investment Management Regulation

NOV 1 1974

INQUIRY-1:
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September 5, 1974

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Re: Proposed Capital Asset Program to be Offered by FPC Securities Corporation, a Registered Broker-Dealer (Our File 1663(2)-1)

Gentlemen:

Our firm represents FPC Securities Corporation (hereinafter "FPC") a registered broker-dealer. FPC has developed a service which it proposes to offer to its clients under the name "Capital Asset Program," (hereinafter the "Program"). The purpose of this letter is to request a letter from each of your divisions indicating that no action against FPC would be recommended to the Commission if FPC proceeds to offer its Program to clients.

FPC is not currently registered as an adviser under the Adviser's Act of 1940, nor does it have an application pending for such registration. Should your divisions determine that such a registration is necessary in connection with the offering of this program, FPC would so register. Please indicate in your responses to this letter whether you deem such registration to be necessary. We address ourselves to this issue later on in this letter, taking the position that registration should not be required.

FPC has attempted to structure its Program to comply with the principals expressed in the report submitted to the SEC by its "Advisory Committee on Investment Management Services for Individual Investors" as contained in that committee's "Recommendations For Clearer Guidelines and Policies," dated January, 1973.

SYNOPSIS OF PROGRAM

As a preliminary synopsis, the Program can be described as a process by which FPC brings its clients (both individual and corporate) into contact with nationally respected investment counseling firms for the purpose of enabling such clients to determine whether or not they wish to retain such a firm for

individual portfolio management. The Program is intended to make arrangements solely for clients discretionary accounts with investment counselors. FPC does not plan to arrange for nondiscretionary accounts.

If a client elects to retain one of the firms FPC introduces to it, then, once that account is in operation, FPC will monitor the investment counselors performance, comparing it to a number of selected market indexes and provide a written monitoring report to the client on a quarterly basis. FPC will not share in any portion of the fee received by the investment counselor firm, however, arrangements will be made between the client and FPC, to have the client direct the investment counselor to place trades through FPC in order the FPC might obtain commissions. In this regard, the directions which are to be given to the investment counselor will provide that the investment counselor may place trades with any broker it chooses, if such a deviation from FPC is necessary in order to obtain "best execution."

There will be no affiliation between FPC and any investment counseling firm recommended to its clients. FPC has no arrangements and will not enter into any arrangement to receive unrelated brokerage from investment counselors who obtain clients through FPC's Program. FPC will not, however, refuse to execute unrelated trades from such investment counselors, but in connection with any such trades, will maintain separate records of such in order to insure that no course of conduct arises which could be intended to influence FPC's independent judgment with respect to any given firm. The matter of unrelated brokerage is discussed more fully below.

DETAILS OF THE PROGRAM

In addition to the descriptive statements contained in this letter, we are enclosing a copy of the "brown-line draft" of the brochure FPC has had its advertising agency prepare in connection with the Program.

(1) Clients to Whom The Program is Presented. FPC intends to make its Program available to the widest spectrum of its clients, including: individuals, personal trusts, pension and profit sharing funds for corporations, religious institutions, professional groups, trade unions, general corporate clients, and other tax exempt funds.

The Program will be presented only to those clients who would be able to place a minimum of \$50,000 under management by an investment counselor. There will be no maximum on the size of any account.

In connection with the determination of whether or not the Program ought to be presented to a client, and/or, whether a client ought to in fact retain an investment counselor, consideration will be given as to whether or not that client's financial resources and needs would make it appropriate to put a minimum of \$50,000 under management by an investment counselor. Although funds could be withdrawn from such an account at any time, any strong possibility of having such an account terminated because it may fall below the minimum dollar amount which the investment counselor is willing to manage, might make the expense of setting up such an account unjustifiable.

Only those clients who intend to grant discretionary authority to the investment counselor are invited to pursue the Program. Those clients seeking to retain discretion over their portfolios will be told that the Program is not designed to assist them.

(2) How FPC Selects Investment Counselors to be Recommended In its Program. FPC understands that there are more than 3,000 investment counseling firms or individuals registered with the SEC pursuant to the Advisers Act of 1940. Obviously it would be a mammoth task to analyze each of them, and, accordingly, FPC selected only 180 of such investment counselors for their initial review. Of these 180 firms, FPC selected 50 firms for more intensive review, and finally selected 8 firms to be interviewed and studied in depth.

After selecting these 8 firms, FPC visited their offices and questioned management at length. The reputation of each firm and its financial resources were determined, and the staff of each firm was studied in terms of depth and experience. Past investment performance was analyzed as was the nature and quality of research performed by each firm. The size and types of accounts handled by each firm was analyzed. A study was also made of salaries paid to key people.

FPC does not guarantee the success of the investment counselor it recommends. It merely presents them as qualified firms, with good reputations for research and prior investment performance. The clients are told that the screening process which FPC goes through is an attempt to reduce the risks involved in choosing a good investment counselor.

Investment firms initially placed on FPC's list will stay on the list unless their investment performance is so poor that it dictates their removal. Additional firms may have their names placed on the list if FPC determines them to be properly qualified. It should be noted that FPC does not necessarily show its list of selected investment counselors to every client, rather, on the basis of an interview with a client, FPC will recommend the (firms) thought most appropriate for the particular situation at hand.

(3) Manner in Which the Program is Offered. Registered representatives of FPC who are familiar with the particular circumstances surrounding each of their clients will introduce the Program to them and solicit their further interest. If the client wishes to pursue the matter, the salesman will fill out an informational questionnaire. This questionnaire will be used by the director of FPC's Program at an interview which is to be arranged by the salesman. Once this interview is set up, the salesman becomes a bystander to the situation and the Program director becomes the active party in bringing together the client and selected investment counselors. Any future commissions which FPC may earn in connection with an account set up by the client with an investment counselor will be shared with the salesman.

The Program director elicits information from the client in addition to that set forth in the initial questionnaire, and in consultation with the client recommends that the client meet with representatives of certain investment counseling firms. A convenient time is then arranged for such a meeting. If the client wishes, he may ask the Program director to arrange for him to meet with the representative of an investment counseling firm which is not on FPC's list, and the director will so accommodate him.

The Program director may or may not accompany the client in his meeting with representatives of the selected investment counseling firms. Although the Program director may make a specific recommendation of one firm after such interviews, final selection is left in the hands of the client.

(4) Creation of A Bank Custodial Account to Facilitate Management by The Investment Counselor. Unless a client already has a bank custodial account it will be necessary to establish one in order to facilitate the investment counselors discretionary trading authority. If the bank handling the client's present custodial account is willing to work with the investment counselor, the appropriate arrangements will be made. Otherwise, FPC has made arrangements with a number of banks who are willing to service such accounts. Clients may avail themselves of various advantages offered by the different banks, such as proximity to the client's residence, or lower service charges. Selection of a bank custodian rests solely with the client and he is not confined to those suggested by FPC.

(5) Execution of Documents Pertaining to The Retention of An Investment Counselor. If a salesman's client is new, it will, of course, be necessary to complete the broker's new account card. Next, unless there is a preexisting custodial account, bank forms will have to be completed in order to create the necessary custodial account, transfer securities, and grant a stock power. Of principal importance is the contract to be executed between the investment counseling firm and the client. Finally, the client executes certain FPC forms which constitute instructions to both the bank custodian and the investment counselor with respect to the transmittal of all reports, statements and records of account, etc. to FPC. This is to facilitate FPC's monitoring service. The FPC forms also include directions to the investment counselor concerning the matter of placing brokerage with FPC.

(6) Monitoring Service. FPC will provide each client who establishes an account with an investment counselor, with a monitoring service which is intended to reflect the level of investment performance obtained in the client's account as compared to certain market indexes. More specifically, report will compare the percentage increase or decrease in the value of the client's portfolio with that of the Standard & Poor 500, the Dow Jones Industrials, and four other indexes. Such reports will be sent to clients on a quarterly basis showing the percentage increase and decrease of the last quarterly period, for year to date, and on an annualized basis since inception of the account. There will be no special charge for this monitoring service.

The data contained in the monitoring reports will be computed by a firm, unrelated to FPC, which

specializes in the preparation of such reports. The report will bear a legend on its face containing language similar to that in Rule 206(4)-1(a) (3) under the Advisers Act, to the effect that the report cannot in and of itself be used to determine whether or not to continue to retain one's investment counselor.

As monitoring reports are prepared and distributed to customers, FPC will review the success or lack of success which the various investment counselors are having in the discretionary management of accounts of FPC clients. Based upon all of the information in FPC's hands, FPC will, when necessary and appropriate, make recommendations to clients that they retain a different investment counselor. A client can, of course, decide on his own on the basis of the monitoring report, and/or other information, that he wishes to retain a new investment counselor, or simply discontinue the one that he has.

(7) Financial Remuneration to FPC. FPC's only compensation for offering this Program will be those commissions which it is able to earn pursuant to the directions received by the investment counseling firm from its mutual client with FPC.

As stated in the synopsis above, the directions which are to be given to the investment counselor with respect to the channeling of brokerage, will provide that the investment counselor may place trades with any broker he chooses, if such a deviation from FPC is necessary in order to obtain "best execution."

Because FPC cannot offer research to an investment counselor, that investment counselor's only incentive to provide FPC with unrelated brokerage would be this Program. Accordingly, FPC will not execute trades for those investment counselors servicing FPC clients, if commissions received on those trades would exceed the amount of total commissions generated from trades in such client's accounts. FPC would execute unrelated trades only to the extent necessary to realize commissions lost because the adviser took related trades to another broker for "best execution." Some investment counselors have indicated that they will give FPC limited unrelated commissions when FPC introduces them to a prospective client, regardless of whether the client decides to retain that firm. FPC does not intend to refuse such commissions unless your divisions would object.

ISSUES RAISED BY FPC'S OFFERING OF THE PROGRAM

(1) Whether FPC Should Register As An Investment Adviser. Section 202(a) (11) (C) of the Advisers Act excepts from the definition of "investment adviser" "any broker or dealer whose performance of such services (i.e., advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities) is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefore." We see two subissues involved here. One, is whether FPC is rendering investments advisory services as described in the Act, and the other, is whether FPC, if it does render such advice, will be receiving "special compensation therefore."

In the offering of its Program FPC does not advise its clients, or even allude to the value of any specific securities or portfolio of securities. In recommending certain investment counselors, FPC makes neither a recommendation nor value judgment concerning securities. Insofar as FPC analyzes the investment counseling business or renders reports concerning the same, it does not do so in connection with a client's investment in that business.

In *Shield Stock Service, Inc.* (SEC 1972) '71-'72 CCH Dec. P 78,649, the Division of Trading and Markets refused to take a no-action position with respect to the nonregistration (as an adviser) of a publication firm which intended to distribute a magazine which would have attempted to evaluate investment advisers for its clients. *Shield Stock's* advice concerning investment advisers was coupled with the use of a hypothetical portfolio in a manner which, in the view of the Division of Trading and Markets, violated certain antifraud provisions of the Advisers Act.

It is submitted that FPC's activity of merely recommending certain investment counseling firms ought not to be treated as the rendering of investment advice, inasmuch as it does not perform that activity in connection with a review of any such "hypothetical portfolio" or other device for inducing a client's retention of any particular investment counselor. FPC believes that nearly every broker-dealer firm in the country which is not itself a registered adviser, engages in the practice of referring clients to investment counseling firms. To require FPC and every other broker-dealer making such

recommendations to register as an adviser would unnecessarily increase the administrative burden on the SEC without any corresponding benefit in terms of the Commission's regulation of an activity which jeopardizes the fairness or honesty of the securities industry.

In our opinion the rendering of advice concerning investment counseling firms does not fall within the definition of investment advice contained in the Advisers Act. In the case of FPC's Program, even if such advice were considered "investment advice" it would be "incidental" to its function as a broker-dealer. Because FPC receives no fee from its client, and no share of the fee paid by its client to the investment counselor, FPC cannot be said to receive any "special compensation" for its advice. Because any advice which FPC may give is "incidental" to its function as a broker-dealer, and because it receives no "special compensation" for it, it is, in our opinion exempt from registration under the Advisers Act.

The monitoring service which FPC provides to clients as a part of its Program is again offered without any "special compensation." The monitoring service does no more than show facts and figures which reflect past events. It makes no recommendations and renders no value judgments concerning securities. In *Foundation Services, Inc.* (SEC 1972), '72-'73 CCH Dec. P 79,294, the Division of Investment Company Regulation indicated that under such circumstances registration as an adviser would not be required. In any event, the report does not render advice to investors concerning securities since its use and distribution is restricted to clients who have transferred investment decisions to an investment counselor.

We note that in a letter of interpretative advice to *FINANCE Magazine* (SEC 1971) '71-'72 CCH Dec. P 78,536, the Commission's staff took the position that a magazine which referred to the investment merits of specific securities would not be required to register as an investment adviser as long as it properly attributed advisory material to its source and made no references to past recommendations. The monitoring report which FPC will distribute to its clients will have on it a legend indicating that it was prepared by Computer Directions Advisers, Inc. of Silver Spring, Maryland. That firm is a registered adviser.

In the "recommendations for clearer guidelines and policies" submitted to the SEC in the report of the "Advisory Committee on Investment Management Services for Individual Investors" the committee discussed on page 59 of that report the applicability of the Investment Advisors Act of 1940 to the registered broker-dealer which operates an investment management service for brokerage commissions only. This portion of the report seems to deal only with the situation where a broker-dealer actively solicits discretionary accounts to be managed by that firm, rather than by an investment counseling firm. The obvious conflict of interest which arises in that situation is that the broker-dealer is soliciting accounts with respect to which it will have an opportunity to churn the portfolio in order to generate commissions. The dangers inherent in that type of a situation are not present in the operation of FPC's Program which, indeed, is directed towards the reduction of such discretionary accounts of the broker. Accordingly, we believe that nonregistration of FPC under these circumstances would be consistent with the recommendations of the SEC's advisory committee.

We have noted the positions taken by the Commission's staff in *Argus Securities Management Corporation* (SEC 1971), '71-'72 CCH Dec. P 78,366 and in *Reinholdt & Gardner* (SEC 1971), '71-'72 CCH Dec. P 78,120, and generally the comments on *Argus* contained in the Special Committee Report to the SEC (see Report, pp. 39-41). The conflict of interest problems which are raised in those letters and the report are discussed in the following portions of this letter. Suffice it to say at this point that we feel the conflict of interest problems have been properly dealt with by FPC in a manner consistent with the Committee recommendation, (see Report, page 35).

In summary it is our opinion that neither the offering of the Program nor the monitoring reports provided in connection with the Program would require registration of FPC under the Advisers Act of 1940.

CONFLICTS OF INTEREST AND OTHER INVESTOR PROTECTION PROBLEMS WHICH MIGHT ARISE IN THE OPERATION OF A PROGRAM SIMILAR TO THAT OF FPC'S.

We have reviewed SEC interpretative and no-action letters dealing with the above captioned matter, and we have also considered such problems as discussed in the report received by the SEC from its Advisory

Committee on Investment Management Services for Individual Investors (see pages 39 through 58 of the Report). We note here that FPC's Program will be offered not only to individual investors, but also to corporations, trusts, and other funds as described in paragraph (1) above, under the caption "Details of The Program." We would again point out that the Program will relate only to accounts operated by the investment counselor on a discretionary basis.

(1) Fee Sharing and The Promotion of A Small Account Service. FPC will not receive any portion of the fees paid to the investment counselor. In acting as broker in connection with a customer's account, FPC will have absolutely no discretionary authority with respect to the recommendations made by the investment counselor.

(2) FPC's Receipt of Unrelated Brokerage. It is recognized that FPC's receipt of unrelated brokerage could represent a conflict of interest similar to that which would arise if FPC were to receive a portion of the advisory fee. However, FPC proposes to accept unrelated brokerage in a very limited manner. That is where an investment counselor has diverted brokerage away from FPC in order to obtain "best execution." In such a case, FPC will determine the amount of commissions that it would have received if it had executed that trade, and it will then accept an unrelated trade, the commissions on which will be the same as that on the trade diverted from it for best execution. It appears that the SEC Advisory Committee did not consider unrelated brokerage in this type of situation. We believe that it is self evident that no conflict of interest will arise in such a situation. Indeed, FPC's reasons for wanting to accept unrelated brokerage on such a limited scale is to prevent an investment counselor from taking advantage of its latitude to divert trades away from FPC in order to facilitate best execution. An investment counselor might engage in such a practice in order to compensate an affiliate, or another broker who may or may not have rendered some service. FPC does not insist that investment counselors give them unrelated brokerage, rather the latitude to do so is incorporated into the Program in order that an investment counselor will not be prevented from fairly compensating FPC for the services rendered to its client and to the investment counselor in arranging for the account. [See page 6, (7) Financial Remuneration to FPC.]

The receipt of such limited unrelated brokerage would not provide FPC with the incentive to refrain from recommending to the customer any other investment adviser who might afford a superior service at an equal or lesser cost. It seems significant in this regard that Chairman Garrett has recently indicated that the anti-reciprocal rule was to come under reconsideration insofar as reciprocal agreements do no more than promote mutual fund sales. (See, SEC News Digest, 79-96, May 16, 1974). The conflict of interest considerations which induced promulgation of the anti-reciprocal rule are similar to those present in this situation and the reconsideration of that rule indicates a pattern of thought which is consistent with the limited unrelated brokerage which FPC proposes to receive under its Program.

We would note that inasmuch as FPC's Program does not provide for FPC to retain any discretionary role in the purchase of a security, FPC is not in a position to be between the investment counselor and the client so as to obscure legal and fiduciary duties.

(3) Choice of Broker. The SEC Advisory Committee Report expressed a belief that it is desirable for the client of an investment counselor to select his own broker. In this case, direction of brokerage to FPC is of demonstrable benefit to the client in that the cost of the Program's overhead will be supported, as well as the monitoring service which will assist the client in evaluating the investment counselor. Moreover, FPC is qualified to properly execute trades and a continuing relationship between the client and FPC will inure to their mutual benefit. With the separation of investment discretion and brokerage, the conflict of interest inherent in the merging of those two functions with the same entity is avoided.

(4) Placement and Execution of Brokerage Orders. Obtaining "best execution" for customer's accounts is understood to be a requirement of the fiduciary duty owed by an investment counselor to its client. In acknowledging the fiduciary duty which FPC owes as a broker to its client, FPC relinquishes the opportunity to insist that it obtain all brokerage in connection with a client's professional managed account. Indeed, FPC insists that when its client directs its investment counselor to place trades with FPC, that client should also give instructions to divert brokerage away from FPC when necessary in order to obtain "best execution."

(5) Absence of Investment Managers Affiliations with FPC. FPC is not affiliated with any

investment counseling firm. Notwithstanding the absence of any affiliation, FPC will not execute any order to place in the professionally managed account of one of its clients, a security which FPC is in the process of distributing. As an exception to this general rule, FPC will execute such an order if the client makes an unsolicited request for such.

Since neither FPC nor any of its affiliates are publicly held. Securities of such entities will not be purchased for the account of one of FPC's clients unless a client makes an unsolicited request for such a security. It may be that one of the existing shareholders of FPC or an affiliate, will set up an account through the Program. In such a case, FPC or an affiliate may make offers of its securities directly to such a shareholder. FPC does not intend to offer such securities to investment counselors who are participating in its Program. Moreover, if such investment counselors should become aware of the availability of such securities, FPC would not execute an order to place such a security in one of its client's accounts, unless that client receives full written disclosure concerning FPC's participation in the offering thereof.

(6) Miscellaneous. FPC will not use the term "investment counseling" or any similar term in order to characterize its participation in the Program. The terms "investment counselor", "investment manager" and similar terms will not be used by FPC to refer to itself.

Individualized services is what FPC wants to introduce its clients to when meetings are arranged with prospective investment counseling firms. FPC does not, however, set down requirements which the investment counselors must meet in terms of how "individualized" the service must be. Compliance with SEC guidelines concerning the individualized treatment given to each client by an investment counselor is treated by FPC as a responsibility of the investment counselor in the conduct of its own business.

(7) FPC's Compliance with Recommendations of The Advisory Committee on Investment Management Services for Individual Investors. The conflict of interest and other investor protection problems which might arise in the operation of a program such as that offered by FPC have been avoided by FPC, or dealt with in a fully disclosed manner so as to eliminate any possibility of violating the responsibilities of brokers and advisors. The SEC Committee Report studied the offering of investment advisory services in a manner which posed many problems to them. FPC's Program differs from the advisory services studied by the SEC Committee because it has adopted most of the suggestions made by the Committee subsequent to its study. At page 34 of its Report the Committee stated:

..., assuming that the operation of an investment management services does not require a compliance with the registration provisions of the Securities Act of 1933, the Committee recommends that persons offering such a service be required, as a matter of Commission policy, to furnish prospective clients, in writing, certain material information, which is set forth below: (The Report then sets forth eight different categories of information.)

FPC has attempted to comply with the recommendations of the SEC's Advisory Committee by taking the following steps:

(1) FPC provides its clients with a brochure containing a description of the nature of the Program, a discussion of how investment counseling firms operate, and what steps FPC has taken in determining which investment counseling firms it proposes to introduce to its clients.

(2) FPC provides its clients with a brochure containing a description, albeit in general terms, of how investment counseling firms deal with their accounts, and how FPC will continue to deal with the accounts of its clients once they are established with the investment counseling firm.

(3) FPC provides each of its clients with a brochure that contains a description of how clients are introduced to investment counseling firms, and how those investment counseling firms make presentations to them concerning the nature of their research and how their research is applied to the accounts which they manage.

(4) FPC provides each of its clients with a brochure which contains a statement indicating that in all

accounts created under the Program the investment counselor is to receive full discretionary authority. FPC in no way participates in the investment counselor's discretion.

(5) FPC provides each of its clients with a brochure which contains a statement (i) on the custody of the client's securities and cash; (ii) how brokers are selected or designated, and (iii) how brokerage orders are placed.

(6) FPC provides each of its clients with a brochure which contains a statement concerning the frequency and nature of (i) the review of the client's account and the investment performance thereof relative to other investment performance indexes, and (ii) any reports furnished to clients by the investment counselors.

(7) FPC provides each of its clients with a brochure containing a statement relating to other services provided by FPC to any and all clients (i.e., the usual and customary broker-dealer activities).

(8) FPC provides each of its clients with a brochure containing a statement concerning possible conflicts of interest and the steps taken to avoid or minimize the adverse effects of such conflicts.

FPC is providing the SEC with copies of all of its sales literature concerning the Program. FPC has determined that each of those investment counseling firms which will provide services to its clients will furnish those clients with reports on at least a semi-annual basis.

In summary, it is our opinion that the Program to be offered by FPC avoids conflict of interest and investor protection problems by virtue of its design and through full and meaningful disclosure to FPC's clients. As stated above, we request a letter from each of your divisions indicating that no action against FPC would be recommended to the Commission if FPC proceeds to offer its Program to clients. If you have any questions on this matter or require any additional information, please contact the undersigned by telephone at our offices. As you can see by the enclosed brownline copy of the brochure which FPC intends to use in connection with this Program, our client has committed much time, effort and expense to the development of this Program and wishes to make it available as soon as possible. Therefore, we would appreciate a reply as promptly as possible.

Very truly yours,

ABERG, BELL, BLAKE & METZNER, S.C.

Warren G. Andersen