FINANCIAL COUNSELING CORPORATION

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

Dec 7, 1974
Financial Counseling Corporation

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

Based on the foregoing facts and representations, we cannot state that we would not recommend that the Commission take any action against Financial Counseling Corporation (the "Corporation") if it does not register as an investment adviser under the Investment Advisors Act of 1940 (the "Act").

An investment adviser is defined in Section 202(a) (11) of the 1940 Act 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 part of a regular business, issues or promulgates analyses or reports concerning securities."

Since the Corporation gives its clients advice concerning the advisability investing in securities as well as analyses or reports concerning securities, it plainly falls within the definition of investment adviser. Moreover, the Corporation would not be able to rely on the exclusion for registered broker-dealers from the definition of an investment adviser provided in Section 202(a) (11) (C) of the Act since the Corporation's investment advisory service is not incidental to the conduct of its business as a broker-dealer and it receives special compensation for its advisory service. Accordingly, since the Corporation is subject to the registration provisions of Section 203(c) of the Act, I am enclosing appropriate registration materials.

You should be aware that any person who falls within the definition of investment adviser is subject to the antifraud provisions of Section 206 of the Act, whether or not he is registered. We interpret the antifraud provisions to apply to advisory fee arrangements, and any investment adviser who charges excessive fees may violate Section 206 of the Act. Because our experience indicates that any fee greater than 2% of the assets under management is greater than that normally charged in the advisory industry, it is our position that such an adviser would violate Section 206 if he did not disclose to existing and potential clients that such a fee is higher than that charged in the industry and that other advisers can provide the same or similar services at lower rates. Further, because your fee arrangement will result in a fee being charged which has no necessary relationship to the amount of assets actually under management, your fee arrangement may result in a fee which is excessive within the meaning of Section 206 in proportion to the amount of assets under management. To give some assurance that the antifraud provisions of Section 206 would not be violated, each of your advisory clients should be given in advance a written statement prepared by you which makes appropriate disclosure of this problem. It would be advisable for you to receive from each such advisory client a written acknowledgement of his receipt and understanding of the matters disclosed therein. However, even if you were to prepare such a disclosure statement, we cannot give you any assurance that, in circumstances where the fee charged was more than 2% of the assets actually under management, we would not take the position that the fee arrangement would violate Section 206 because it is doubtful whether a client in full possession of all of the facts would consent to such a fee arrangement. Cf., Donnelly, Clark, Chase & Haakh, CCH Fed. Sec. L. Rep. para. 79,377 (avail. April 27, 1973).

Alan Rosenblat, Chief Counsel
Division of Investment Management Regulation
by: Martin E. Lybecker
Attorney

NOV 7 1974

INQUIRY-1:
Financial Counseling Corporation
FIRST NATIONAL-PIONEER BUILDING
1500 BROADWAY, SUITE 808
LUBBOCK, TEXAS 79401
806/763-5959

October 2, 1974

Chief Counsel
Division of Investment Management Regulations
Securities & Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Dear Sirs:

The purpose of this letter is to request from you a "no-action" letter relieving me of the necessity of registration as an investment advisor. Our method of operation is as follows:

We secure, from the client, in-depth information concerning his insurance program, assets and liabilities and future objectives.

We assemble this information in what we designate as a "Coordinated Financial Study" in which we make a through life insurance analysis, do estate tax programming, make suggestions for asset conservation and distribution and recommend the following four principles:

1. Professional Management
2. Diversification
3. Liquidity
4. Balance

Since we market only life insurance, mutual funds and occasional tax shelters, we do not deal, what-so-ever, in any individual security issues.

We are a registered NASD broker-dealer limited to sales of investment company shares and tax shelters.

We charge a fee for this administrative work of one-half of one percent of the client's previous year's adjusted gross income.

I have been either a registered representative or principal since 1960 and the only other employee of our firm, besides one secretary, is my son who has been a registered representative for three years.

Thank you for your consideration.

Yours truly,

Bill Kingsbery