

FIRST COMMERCE INVESTORS, INC.

TOTAL NUMBER OF LETTERS: 2

**SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549**

January 31, 1991

**Our Ref. No. 90-641
First Commerce Investors, Inc.
File No. 801-33094**

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT**

By letter dated December 19, 1990, National Bank of Commerce Trust and Savings Association ("NBC") and First Commerce Investors, Inc. ("FCI") request the staff to provide a ruling under Section 202(a)(11)(F) of the Investment Advisers Act of 1940 ("Advisers Act") on the basis that FCI, a wholly owned subsidiary of NBC, will not be advising "others" under Section 202(a)(11). n1 Alternatively, you request assurance that the staff would not recommend any enforcement action to the Commission under Section 203(a) of the Advisers Act if FCI does not remain registered as an investment adviser.

You state that First Commerce Bancshares, Inc. ("FCB") is a bank holding company which owns all of the stock of NBC, FCI, and other affiliated banks ("Affiliates"). FCB created FCI in 1986 primarily to provide investment advice to the trust departments of NBC and the Affiliates. FCI also provides limited investment advisory services directly to institutional customers of NBC and publishes a newsletter which is sent to customers. FCI is registered as an investment adviser under the Advisers Act.

You also state that FCB contemplates restructuring FCI by transferring all of the stock of FCI to NBC. You state that after the restructuring, FCI will provide investment advisory services only to NBC and the Affiliates. In connection with these services, an FCI employee may occasionally meet with customers of NBC or the Affiliates. Finally, you state that FCI will continue to publish a newsletter, which will be on the joint letterhead of FCI and NBC and sent primarily to customers of NBC and the Affiliates. These newsletters and other promotional materials, issued as joint publications, will also be provided to prospective customers of NBC and the Affiliates.

Section 202(a)(11)(F) excludes from the definition of investment adviser "such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order." The Commission staff does not have the authority under Section 202(a)(11)(F) to exclude a person from the definition of investment adviser by interpretive or no-action response. n2 Therefore, we cannot provide you with the requested ruling under Section 202(a)(11)(F). The proper procedure for obtaining an order of the Commission requires the filing of an exemptive application with the Commission. The application should be prepared and filed in accordance with 17 C.F.R. § 275.0-4 and Investment Company Act Rel. No. 14492 (April 30, 1985). We cannot assure you that an application, if filed, would be granted.

You also state that rather than operating FCI as a wholly owned subsidiary of NBC, NBC could provide investment advisory services through an unincorporated division without being required to register under the Advisers Act. You cite Section 202(a)(11)(A) of the Advisers Act, which excludes from the definition of investment adviser "a bank, or any bank holding company as defined in the Bank Holding Company Act of 1956, which is not an investment company." As you stated, an unincorporated investment advisory division of a bank is excluded from the definition of investment adviser under Section 202(a)(11)(A). However, the Advisers Act "does not specifically except a subsidiary of a bank or a bank holding company from the definition of investment adviser," unless that subsidiary is itself a bank or bank holding company. n3 A subsidiary providing investment advisory services would be required to register under the Advisers Act. n4

Finally, you state that FCI should no longer be required to register under the Advisers Act because FCI will no longer be in the business of advising "others" due to the complete identity of interests of FCI, NBC, and the Affiliates. As you noted, the Commission has provided exemptive relief under Section 202(a)(11)(F) to subsidiaries of banks and bank holding companies where the subsidiaries provided services only to their affiliate banks or, in one case, to their affiliate banks and a very small number of individual bank customers. Because FCI's current and proposed promotional brochures state that FCI customers include "employee-benefit plans, corporations, estates, and individual investors" and because FCI anticipates that its employees may meet with customers of NBC and the Affiliates, it does not appear that FCI will be providing investment advisory services solely to NBC and the Affiliates. n5 Instead, FCI will be providing advisory services to others within the meaning of Section 202(a)(11).

Therefore, on the basis of the facts and representations contained in your letter, we cannot concur with your opinion that FCI does not fall within the definition of investment adviser, and we are unable to assure you that the Division will not recommend enforcement action to the Commission if FCI deregisters as an investment adviser.

Monica L. Parry
Attorney

Footnotes

n1 Section 202(a)(11) 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 part of a regular business, issues or promulgates analyses or reports concerning securities."

n2 Unlike a no-action or interpretive response, which the staff can issue on its own, a Commission order must be preceded by a notice published in the Federal Register, which gives interested persons an opportunity to request an administrative hearing on the proposed relief. Further, the Commission has not adopted any rules under Section 202(a)(11)(F).

n3 Chase Investors Management Corporation New York, Investment Advisers Act Rel. No. 333 (Aug. 21, 1972).

n4 See Jeffries and Company (pub. avail. June 16, 1989); Curtis L. Stewart (pub. avail. Feb. 7, 1975); William Casey (pub. avail. June 1, 1974).

n5 Further, FCI proposes to continue, with NBC, publishing a newsletter which will be distributed to members of the public and which will include the FCI name and letterhead.

**INQUIRY-1:
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TELEPHONE (402) 475-7011**

December 19, 1990

**Securities and Exchange Commission
Division of Investment Management
450 Fifth Street, N.W.
Washington, D.C. 20549**

**Re: First Commerce Investors, Inc.; Investment
Advisers Act §§ 202(a)(11) and 203(a)**

Ladies and Gentlemen:

We are acting as counsel to National Bank of Commerce Trust and Savings Association, a national banking association ("NBC") and First Commerce Investors, Inc. First Commerce Bancshares, Inc. is a holding company which owns all of the stock in NBC and other affiliated banks (the "Affiliates"). In 1986, First Commerce Bancshares, Inc. created a wholly-owned subsidiary now known as First Commerce Investors, Inc. ("FCI"). FCI was formed primarily to provide investment advice to the trust departments of NBC and the Affiliates, but FCI also provided limited investment advisory services directly to institutional customers of NBC.

FCI registered as an investment adviser with the SEC and with the State of Nebraska.

A restructuring of FCI is now contemplated by First Commerce Bancshares, Inc. It is proposed that the stock of FCI will be transferred to NBC, so that FCI will become a wholly-owned subsidiary of NBC. FCI's activities will now be strictly limited to providing investment advisory services to NBC and the Affiliates. In the course of providing fiduciary services to their customers, NBC and the Affiliates have entered into trust agreements and NBC has entered into agency agreements with customers, pursuant to which NBC and the Affiliates will provide investment advisory as well as other fiduciary services. Some of the Affiliates' trusts are invested in collective investment funds maintained by NBC. NBC will contract with its subsidiary, FCI, to obtain the financial and investment information and advice needed by NBC to perform its contractual obligations to customers. FCI will be paid a fee by NBC for such services. In connection with FCI's services to NBC, it is contemplated that an FCI employee may occasionally meet with customers of NBC or the Affiliates.

As a registered investment adviser, FCI has published a newsletter which has been sent by FCI to customers. After the restructuring, it is anticipated that such newsletter will now be sent out on the joint letterhead of NBC and FCI. It will be sent primarily to customers of NBC or the Affiliates. It is contemplated that such newsletters and other brochures describing NBC's and the Affiliates' fiduciary services will also be provided to prospective customers of NBC or the Affiliates, and that such promotional materials will also be published as joint publications of NBC and FCI.

Section 202(a)(11)

In pertinent part, Section 202(a)(11) of the Investment Advisers Act of 1940 (the "Act") defines "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 part of a regular business, issues or promulgates analyses or reports concerning securities; but does not include (A) a

bank . . . or (F) such other persons not within the intent of this paragraph, as the Commission may designate by . . . order."

We have been asked by the Comptroller of the Currency to provide written evidence of the concurrence of the Securities and Exchange Commission in our opinion that FCI, as a wholly-owned bank subsidiary providing services only to such bank and its affiliates, does not fall within the definition of investment adviser. I am therefore writing to request from the Division of Investment Management a ruling pursuant to Section 202(a)(11)(F) of the Act to the effect that FCI is excluded from the statutory definition of investment adviser because it is not a person within the intent of the statute. Alternatively, we request that the Division confirm that it will recommend that no enforcement action be taken by the Securities and Exchange Commission in the event FCI does not register pursuant to Section 203(a) of the Act.

Because of the complete identity of interests of FCI, NBC and the Affiliates, it is our opinion that FCI will no longer be engaged in the business of advising "others" within the meaning of Section 202(a)(11) of the Act and will therefore not be a person within the intent of such statute.

In support of this request, I refer you to the following decisions of the Securities and Exchange Commission:

1) Marine Midland Group, Inc., '41-'44 CCH Federal Securities Law Reporter Dec. para. 75,105 (1940), 1946 CCH Federal Securities Law Reporter Dec. para. 75,698 (1946), 1947 CCH Federal Securities Law Reporter Dec. para. 75,819 (1947); 2) First Service Corp., 8 S.E.C. 152, '41-'44 CCH Federal Securities Law Reporter Dec. para. 75,105 (1940); 3) Touche Holdings, Inc., '87-'88 CCH Federal Securities Law Reporter Dec. para. 78,550 (1988).

I would also point out that Section 202(a)(11)(A) of the Act excludes banks from the definition of investment adviser. Thus, it is clear that NBC could provide the investment advisory services itself through an unincorporated division. In order to maintain stability and efficiency within the investment division, however, NBC would prefer to operate the investment advisory aspect of its business through the existing entity as a wholly-owned subsidiary. We do not believe that any public policy will be better served if FCI is required to continue its registration as an investment adviser.

If you need any more information in order to act on this request, please do not hesitate to call.

Sincerely yours,

Paula J. Metcalf
For the Firm