

INVESTMENT COMPANY ACT OF 1940 - 203(b)

Feb. 26, 1973

**RAMI HOFSHI**

**TOTAL NUMBER OF LETTERS: 2**

**SEC-REPLY-1:**

Your letter raises a number of questions under the federal securities laws. The first question is whether your "Investment Club" must be registered under the Investment Company Act of 1940. Section 3(a) of that Act defines investment company as any issuer which is primarily engaged in the business of investing, reinvesting, or trading in securities. Since your "Investment Club" falls within this definition, it would be required to register under the Investment Company Act and register its securities under the Securities Act, unless certain exemptions are available. In this regard, Section 3(c)(1) of the Investment Company Act excepts from the definition of investment company any issuer which is beneficially owned by not more than 100 persons (as determined in accordance with the attribution rule in the Section) and which is not making and does not presently propose to make a public offering of its securities. These two conditions must be met independently. Also, Section 4(2) of the Securities Act of 1933 exempts from the registration provisions of that Act any transaction not involving a public offering of securities. Please note that the term "public offering" has a different meaning from that used in common parlance. Hence, there may be a public offering even in the absence of formal or informal advertising. You should consider carefully the criteria for the non-public offering exemption, as discussed in Securities Act Release No. 4552, which is enclosed. I have also enclosed the Commission's proposed Rule 146 under the Securities Act which would provide more objective standards for determining whether an issuer may rely on the private offering exemption (see Securities Act Release No. 5336). Since it has not been adopted by the commission, it cannot be relied upon as a basis for the exemption.

It is not clear from the limited facts in your letter whether the Investment Club would be excluded from registration by the exemption provided by Section 3(a)(1) of the Investment Company or Section 4(2) of the Securities Act. If you are relying on these exceptions, please furnish us with the following information in order to enable us to reach a more definitive determination: (1) The names and financial status of all persons who were solicited to become members of the Investment Club, including those who did not become members; (2) how these persons were solicited; (3) the relationship between you and the persons who were solicited; (4) the extent to which each person solicited was given information which would otherwise be provided by a prospectus complying with Section 10 of the Securities Act; (5) why the persons solicited did not need the protection of the Securities Act; and (6) whether there are any restrictions on the transfer of membership interests. It would also be helpful if you could furnish us an opinion of counsel regarding the availability to the Investment Club of the exemptions in Section 3(c)(1) of the Investment Company Act and Section 4(2) of the Securities Act.

If you start other investment clubs and partnerships, there would also be a question whether those clubs and partnerships would also be subject to the Investment Company Act and Securities Act. Thus, before proceeding you should furnish us the same information above with respect to each of the proposed clubs and partnerships.

As you recognize in your letter, your activities as "operations partner" for the Investment Club raise a question whether you are an "investment adviser" as defined in Section 202(a)(11) of the Investment Advisors Act of 1940. An investment adviser is defined as any person who, for compensation, engages in the business of advising others, either directly or through publications of 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. It appears that you would fall into this category and would be required to register as an investment adviser, unless some exemption is available. In this regard, Section 203(b)(3) excepts from registration any investment adviser who, during the course of the preceding 12 months, has had 14 clients or less and who neither holds himself out generally

to the public as investment adviser nor acts as an investment adviser to a registered investment company. Each of these conditions must be satisfied separately.

Thus, if it is determined that the Investment Club is subject to the Investment Company Act, you would have to register under the Advisers Act. Even if the Investment Club is exempt from the Investment Company Act, you may be deemed to be holding yourself out to the public as an investment adviser if, for example, you maintain a listing as an investment adviser in a telephone directory or a business directory, or otherwise express a willingness to existing clients or others to accept new clients, or if you use a letterhead indicating any activity as an investment adviser. Also, if there are more than 14 members of the Club, you would have to comply with the Advisers Act. As a general rule, each Club member should be deemed to be a client, unless the circumstances otherwise indicate. In this connection, please advise us as to the part you played in organizing the Club. Of course, if you organize additional investment clubs and partnerships and manage their investments for compensation, you would probably be holding yourself out to the public as an investment adviser, if not acting as an investment adviser to investment companies subject to the Investment Company Act. Until you have furnished us the information specified above, however, we cannot make any definitive determination whether you may rely on the exemption in Section 203(b)(3) of the Advisers Act.

I have enclosed our compilation of materials on the registration and regulation of investment companies and investment advisers. Unfortunately, we do not have copies of the federal securities statutes available for public distribution, but you may purchase them at the Government Printing Office, Washington, D. C. 20402 (Investment Company Act \$1, Investment Advisers Act, \$.45 Securities Act, \$.55).

Alan Rosenblat, Chief Counsel  
Division of Investment Management Regulation  
by Peter M. Sullivan, Attorney

Enclosures:  
2A Pack  
File fee release 34-9465  
Securities Act Release No. 5336

**INQUIRY-1:**  
February 26, 1973

Securities and Exchange Commission  
Washington, D.C.

Dear Sirs,

During the past four years I have been a member of an Investment club. Last month I was elected to the position of "Operations Partner". As the Operations Partner I make all of the investment decisions for the club. The Operations Partner receives some compensation for his work. Furthermore, I am presently giving serious consideration to starting other investment clubs and partnerships in which I would be responsible for the investment decisions.

In speaking to a friend of mine who is a tax attorney, some question arose as to whether it was necessary for me to become a registered "Investment Advisor".

I would appreciate it if you could send me information which is relevant to the above subject. If you have printed information on the Investment Advisors Act please send it to me. Any other information in the way of rules, regulations and forms that I may need, would also be greatly appreciated.

Please indicate in your reply if there is any charge for the documentation that you send. Thank you for your prompt response in this matter.

Sincerely yours,

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