



DIVISION OF
INVESTMENT MANAGEMENT

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

ACT Advisers Act
SECTION IAA 202(a)(11)
RULE _____
PUBLIC _____
AVAILABILITY 11-14-95

November 14, 1995

Sunil Bajaj
Harish Mysoré
InTouch Global, LLC
600 Harbor Boulevard, Suite 822
Weehawken, NJ 07087

Dear Messrs. Bajaj and Mysoré:

We have reviewed your letter of September 26, 1995 in which you ask for an opinion as to the legality of certain activities to be conducted by your company, InTouch Global, LLC ("InTouch"). The Commission staff, as a matter of policy, does not issue legal opinions. We can, however, provide you with general guidance with respect to how the federal securities laws may apply to InTouch's proposed activities.

You propose to provide advice to both U.S. and foreign clients as to the value of U.S. securities, U.S. mutual funds, and American Depositary Receipts, and to publish a newsletter, available for a flat subscription fee, containing business and economic information on India, including closing stock prices for Indian stocks and buy/sell/hold recommendations for Indian stocks.

Section 203(a) of the Investment Advisers Act of 1940 (the "Advisers Act") requires a person or entity that meets the definition of "investment adviser," and that makes use of the U.S. mails or any means or instrumentality of interstate commerce in connection with its business as an investment adviser, to register under the Advisers Act, unless an exemption from registration is available.¹ Section 202(a)(11) of the Advisers Act defines "investment adviser" to include, among others, any person who, for compensation, engages in the business of advising others as to the value of securities or as to the advisability of

¹ A domestic adviser that provides advice to foreign clients must register if it uses any U.S. jurisdictional means in connection with its advisory business. See Gim-Seong Seow (pub. avail. Nov. 30, 1987).

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investing in, purchasing, or selling securities, or who issues or promulgates analyses or reports concerning securities.²

Based on the proposed activities described in your letter, it appears that InTouch would fall within the definition of "investment adviser" and would be required to register under the Advisers Act.³ Our position is based particularly on InTouch's activities with respect to advising clients as to the value of securities or as to the advisability of investing in securities.⁴

We note that there are circumstances under which publication of a newsletter, in and of itself, would not be sufficient to require investment adviser registration. Section 202(a)(11)(D) excludes from the definition of investment adviser any publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation ("publisher's exclusion"). To qualify for this exclusion, the publication must:

- (1) offer only general and impersonalized advice, i.e., advice not tailored to the individual needs of a specific client or group of clients;

² Section 203(b) provides certain limited exemptions from registration. For example, Section 203(b)(3) exempts investment advisers who, during the course of the preceding 12 months, had fewer than 15 clients and who do not hold themselves out generally to the public as investment advisers.

³ You should also note that many states impose their own requirements on investment advisers that do business within the state, including registration. You may obtain the names and addresses of state regulators from the North American Securities Administrators Association, Inc., One Massachusetts Avenue, N.W., Washington, D.C. 20001, Tel: (202) 737-0900.

⁴ Although not expressly stated in your letter, we assume that InTouch would be advising clients for compensation and, therefore, would meet the first part of the definition in Section 202(a)(11).

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- (2) be bona fide or genuine (in the sense that it contains disinterested commentary and analysis as opposed to promotional material); and
- (3) be of general and regular circulation, *i.e.*, not timed to specific market activity or to events affecting or having the ability to affect the securities industry.⁵

Because of the fact-specific nature of the analysis required to determine the availability of the publisher's exclusion, we cannot advise you with respect to whether the service you describe would meet the requirements of the exclusion.

The Division of Market Regulation has asked us to inform you that your proposed activities as a "purchasers' representative" may require you to register as a broker-dealer under the Securities Exchange Act of 1934 ("Exchange Act"). Section 15(a) of the Exchange Act generally provides that a "broker" or "dealer" who uses the mails or any means of interstate commerce to effect transactions in, or to induce or attempt to induce the purchase or sale of, any security must register with the Commission, unless an exemption applies.

Section 3(a)(4) of the Exchange Act generally defines a "broker" as any person who is in the business of effecting transactions in securities for the account of others. Section 3(a)(5) of the Exchange Act defines a "dealer" as any person who is in the business of buying and selling securities for his own account, whether through a broker or otherwise. However, a person who buys or sells securities for his own account, either individually or as a fiduciary, is not considered to be a "dealer" if he does not do so as part of a regular business.

A number of factors are considered in determining whether a person is a broker-dealer, including the type of and basis for any compensation received, the extent to which the person holds the funds or securities of others, the extent of contact with the public, and whether the person is "engaged in the business," as that term is used in the above definitions. These are all questions of fact which are resolved by taking into account all relevant circumstances. You should be aware that nothing in the above definitions would warrant a conclusion that a person is not "engaged in the business" merely because his securities

⁵ See SEC v. Lowe, 472 U.S. 181 (1985).

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activities are only a small part of his total business activities, or merely because his income from such activities is only a small portion of his total income. On the contrary, if the securities activities are engaged in for commissions or other compensation with sufficient recurrence to justify the inference that the activities are part of the person's business, he will be deemed to be "engaged in the business."

The staff has considered the issue of whether registered investment advisers must also register as broker-dealers in a number of specific circumstances. For example, in Letter re: First Atlantic Advisory Corp. (February 20, 1974), the staff took a no-action position with respect to broker-dealer registration of a registered investment adviser that proposed to transmit orders for securities to registered broker-dealers, banks, or trustees for execution when the investment adviser did not hold client funds or securities and did not receive any compensation specifically for this activity from any person.⁶ On the other hand, the staff has declined to take a no-action position with respect to broker-dealer registration for a registered investment adviser that proposed to assist a broker-dealer with solicitation and receive transaction-related compensation.⁷ Moreover, even in the absence of commissions or other transaction-related fees, the staff has declined to take a no-action position regarding the broker-dealer registration of an investment adviser that proposed to locate issuers, solicit new clients, and act as a customers' agent in structuring or negotiating transactions.⁸

You also should be aware that if you are deemed to be acting on behalf of the foreign issuers or foreign broker-dealers, your activities could subject those entities to U.S. broker-dealer registration, as well. The Commission generally believes that if a transaction with a person in the U.S. is solicited, the person performing the solicitation must be registered as a U.S. broker-dealer. "Solicitation" includes any affirmative effort by a

⁶ See also Letter re: McGovern Advisory Group, Inc. (August 7, 1984) (adviser would not receive compensation based on the trading activities of its clients; compensation would not be determined, directly or indirectly, based on transactions or the volume of transactions in securities).

⁷ See Letter re: Boston Advisory Group (September 2, 1980).

⁸ Letter re: PRA Securities Advisers, L.P. (March 3, 1993).

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broker or dealer intended to induce transactional business for a broker-dealer or its affiliates. Moreover, disseminating a broker-dealer's quotations for a security in the United States typically would be considered to be a form of solicitation.⁹

With respect to your question on Regulation D, the Division of Corporation Finance has asked us to advise you as follows. Your letter raises the issue of whether the restrictions on resale set forth in Rule 502(d) of Regulation D of the Securities Act of 1933 ("Securities Act") would apply to resales of securities outside of the United States. Rule 904 of Regulation S under the Securities Act provides a safe harbor for resales of securities outside of the United States by persons other than the issuer, distributor or any of their respective affiliates. However, in Release No. 33-7190 (June 27, 1995), the Commission noted that troubling issues have arisen under the resale safe harbor provisions of Rule 904. Rule 904 cannot be used for the purpose of "washing off" resale restrictions, such as the holding period requirement for restricted securities in Rule 144. Likewise, the restricted status of securities is not affected by a prearranged transaction by or on behalf of the seller conducted offshore. If a person with restricted securities sold the securities in an offshore transaction and replaced them with a repurchase of fungible unrestricted securities, the replacement securities would be subject to the same restrictions as those replaced.

* * * * *

The foregoing discussion is intended solely to provide general guidance with respect to how the Advisers Act, the Exchange Act and the Securities Act may apply to your proposed activities. We suggest that you consult with legal counsel familiar with the federal securities laws before engaging in the activities described in your letter. In addition, you should also consider the legal and regulatory requirements of India and other countries that may apply to your business activities in such countries.

I have enclosed for your information an *investment adviser registration package*, which contains information on the

⁹ For a discussion of solicitation and U.S. broker-dealer regulation generally, see Securities Exchange Act Release No. 27017 (July 11, 1989), 54 FR 30013 (July 18, 1989).

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regulation of registered investment advisers, and a *broker-dealer registration package*, which contains information on the regulation of registered broker-dealers. If we can be of further assistance, you may write or call this office at (202) 942-0659.

Sincerely,


Natalie S. Bej
Attorney
Office of Chief Counsel

Enclosures

InTouch Global, LLC

600 Harbor Boulevard, Suite 822

Weehawken, NJ 07087 (USA)

Voice: 201.271.1197

Fax: 201.271.1285

September 26, 1995

VIA FACSIMILE

Mr. Jack Murphy, Esq.
Chief Counsel
Securities and Exchange Commission
450 5th Street NW
Washington D.C. 20549

Dear Mr. Murphy:

We recently talked to Mr. Robert Anthony from the SEC office in New York City regarding obtaining an opinion on the legality of certain activities our firm proposes to conduct. Mr. Anthony stated that you were responsible for rendering such opinions. Accordingly, we are writing to you to obtain such an opinion.

InTouch Global LLC ("InTouch"), a limited liability company, whose principals are US citizens, proposes to set up an investment advisory firm in the USA. The firm would comply with all NASD, SEC, and blue-sky requirements. InTouch's clients would include the following:

1. Permanent residents and citizens of the United States ("US Persons");
2. Temporary residents of the United States, i.e. those present in the United States on non-immigrant visas (students, tourists, persons with work permits, etc.) ("Temporary US Persons"); and
3. Persons who are neither present in nor residing in the United States ("Non-US Persons").

InTouch proposes to conduct the following activities:

- a) Advise clients on managing their portfolio by investing in US securities, foreign securities that have been registered in the US (such as ADRs), US mutual funds, etc.;

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b) Disseminate information regarding emerging markets, with particular emphasis on India; and

c) Act as a "Purchasers' Representative" to buy/sell securities on behalf of clients (who may not be accredited investors) in the US. InTouch anticipates that it would be aiding in the purchase of securities that will be marketed by Indian issuers under Regulation D.

We need an opinion from the Division of Investment Management of the Securities and Exchange Commission of the US regarding the permissibility of b) and c).

With respect to b), InTouch only plans to provide closing stock prices for Indian stocks and Indian economic and business news, including buy/sell/hold recommendations. The sources of the information would include: business newspapers and publications from India, news wires and the Internet. In essence, the information would be similar to that provided by the Financial Times with respect to UK stocks and businesses, or the Wall Street Journal with respect to US stocks and businesses.

If any InTouch clients became interested in buying any Indian security, InTouch would refer them to "local" brokers in India. InTouch would not solicit any trades from its clients. InTouch would not get compensated for any trades which are made by its clients through Indian brokers. InTouch would not directly advise any of its clients in the US regarding the purchase or sale of securities in India, except for the general buy/sell/hold recommendation provided in its newsletter (very similar to what one would expect to see in publications such as Barrons, Financial World etc). InTouch would not send its clients any advertising materials or prospectuses.

InTouch's only compensation for providing the above-mentioned information would be a flat subscription fee which is collected from its subscribers.

With respect to c), InTouch plans to act as "Purchasers Representative" to aid its clients in purchasing securities offered pursuant to an exemption such as Regulation D.

With respect to such activities, InTouch has two questions:

(i) May a Purchasers' Representative be compensated by the issuer if such fact is fully disclosed to the purchaser? If the answer to this question is no, then, who may the Purchasers' Representative be compensated by?

(ii) Does the resale limitation in Regulation D also apply to resales of securities outside of the United States? That is, if an InTouch client who is a US Person or Temporary US Person acquires securities issued by

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an Indian issuer pursuant to Regulation D, may such person resell the security to a Non-US person?

We would appreciate a prompt response to items b) and c) as your reply would be critical to the formulation of InTouch's business strategy. If you have any questions, please do not hesitate to call me at (201) 271-1197.

Sincerely,

SB

HM

Sunil Bajaj, JD
Harish Mysoré, MBA

cc: Robert Anthony

David Parkinson, Ph.D.

5424 - 176 Street
Edmonton, Alberta
T6M 1C6
Canada

ACT IAA
SECTION 202(a)(1); 203(b)(3)
RULE _____
PUBLIC AVAILABILITY 10-19-95

August 17, 1995

Division of Investment Management
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C.
20549

Dear Sirs,

For several years I have been running on my own behalf a bond market timing system. I am now interested in offering my market timing advice to others.

I plan to offer the advice on a subscription basis to Registered Investment Advisors in the United States. Is it necessary for me to register as an investment advisor in order to do this?

Specifically, if I limit the availability of the advice to Registered Investment Advisors, and do not distribute it to the general public, is it possible that I don't need to register?

I look forward to your early response.

Sincerely,


David Parkinson



UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
INVESTMENT MANAGEMENT

October 19, 1995

David Parkinson, Ph.D.
5424 - 176 Street
Edmonton, Alberta
T6M 1C6
Canada

Dear Dr. Parkinson:

Your letter of August 17, 1995, has been referred to the Office of Chief Counsel for response. In your letter, you state that you plan to offer bond market timing advice on a subscription basis to registered investment advisers in the United States. You ask whether you must register as an investment adviser if you limit the availability of the advice to registered investment advisers, and do not distribute it to the general public.

Section 203(a) of the Investment Advisers Act of 1940 (the "Advisers Act") requires a person or entity that meets the definition of "investment adviser," and that makes use of the U.S. mails or any means or instrumentality of interstate commerce in connection with its business as an investment adviser, to register under the Advisers Act, unless an exemption from registration is available. Section 202(a)(11) defines "investment adviser" to include, among others, any person who, for compensation, engages in the business of advising others as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who issues or promulgates analyses or reports concerning securities.

We believe that one who offers market timing advice for compensation would fall within this definition.¹ The fact that you propose to limit your advice to registered investment advisers does not change this analysis, because the definition of investment adviser is not limited to persons who offer advice to the general public.

We note, however, that Section 202(a)(11)(D) excludes from the definition of investment adviser any publisher of a bona fide newspaper, news magazine, or business or financial publication of

¹ See, e.g., Donald F. Pooley (pub. avail. Feb. 6, 1985); The Maratta Advisory Inc. (pub. avail. Jul. 16, 1981).

David Parkinson, Ph.D.
October 19, 1995
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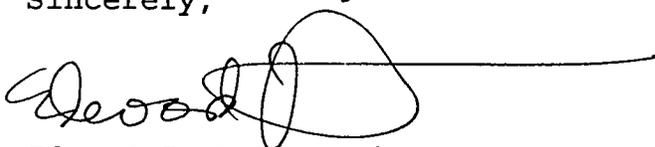
general and regular circulation. To qualify for this exclusion, the publication must:

- (1) offer only impersonalized advice, i.e., advice not tailored to the individual needs of a specific client or group of clients;
- (2) be bona fide; and
- (3) be of general and regular circulation, i.e., not timed to specific market activity or to events affecting or having the ability to affect the securities industry.²

Because of the fact-specific nature of the analysis required to determine the availability of the publisher's exclusion, we are unable to determine whether the service you describe meets the requirements of the exclusion. You may wish to consult counsel familiar with the U.S. federal securities laws.

I have enclosed for your information an investment adviser registration package, which contains information on the regulation of registered investment advisers.³ If we can be of further assistance, do not hesitate to contact this office at (202) 942-0659.

Sincerely,



Edward J. Rubenstein
Senior Counsel

enclosure

² See SEC v. Lowe, 472 U.S. 181 (1985).

³ Many states impose their own requirements on investment advisers that do business within the state, including registration. You may obtain the names and addresses of state regulators from the North American Securities Administrators Association, Inc., One Massachusetts Ave., N.W., Washington, D.C. 20001, (202) 737-0900.