



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

DIVISION OF  
MARKET REGULATION

August 5, 1996

Bruce D. Stuart, Esq.  
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Beverly Hills, CA 90211

Act	IAA
Section	§ 202(a)(11)
File	
Public Availability	8-5-96

Re: PerfectData Corporation

Dear Mr. Stuart:

On the basis of the facts presented in your letter dated August 5, 1996 ("Letter"), the Division of Market Regulation will not recommend an enforcement action to the Commission under Sections 5, 6, or 15 of the Securities Exchange Act of 1934 ("Exchange Act") if PerfectData Corporation ("PERF") operates its trading system (the "System") in the manner described in that Letter without registration as a national securities exchange under Section 6 or as a broker-dealer under Section 15 of the Exchange Act. This is a position of the Division of Market Regulation regarding enforcement action under Sections 5, 6, and 15 of the Exchange Act only, and does not express any legal conclusions regarding the applicability of Sections 5, 6, or 15 of the Exchange Act or other statutory or regulatory provisions of the federal securities laws. This no-action position is subject to changes in current law, regulation, and interpretations governing issuer-based bulletin boards; any change may require the Division of Market Regulation to reevaluate and revoke or modify this no-action position.

In reaching this position, the Division of Market Regulation notes the following: (1) PERF will provide the described notices regarding operation of and participation on the System that will be set forth or contained on the screens and/or hard copy by which System information is provided; (2) PERF is a Section 12 registrant that will retain that status or, if it should cease to be a Section 12 registrant, otherwise undertake to make publicly available the information required by Section 13(a) of the Exchange Act in the same manner that Participants will obtain access to the System (e.g., electronic mail, facsimile, mail, PERF's World-Wide Web site, etc.); (3) PERF will keep records of all quotes entered into the System and make those records available to the Commission and the National Association of Securities Dealers, Inc. (or any other regulated market on which PERF securities are listed); (4) PERF's advertising will comply with the representations set forth in your Letter; (5) neither PERF nor any affiliate of PERF will use the System, directly or indirectly, to offer to buy or sell securities, except in compliance with the securities laws, including any applicable registration requirements (absent an available exemption therefrom); and (6) neither PERF nor any affiliate of PERF will (i) receive any compensation for creating or maintaining the System; (ii) receive any compensation for the use of the System; (iii) be involved in any purchase or sale negotiations arising from the System; (iv) provide information regarding the advisability of buying or selling PERF common stock or

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any other securities; or (v) receive, transfer, or hold funds or securities as an incident of operating the System.

The Division of Corporation Finance has asked us to inform you of its view that, based on the facts presented in your Letter, the activities of PERF in connection with the establishment and maintenance of the System would not require that offers or sales made through the System be registered under the Securities Act of 1933.

The Division of Investment Management has asked us to inform you that PERF may engage in the activities described in your Letter without becoming an investment adviser as defined in the Investment Advisers Act of 1940 ("Advisers Act"). The position of the Division of Investment Management is particularly based upon your representations that neither PERF nor any affiliate will: (1) receive compensation for creating or maintaining the System or for the use of the System; (2) be involved in any purchase or sale negotiations arising from the System; or (3) give advice regarding the merits or shortcomings of any particular trade. Having stated their views with respect to the status under the Advisers Act of an issuer that creates an electronic bulletin board to facilitate trading of its securities,<sup>1</sup> the staff of the Division of Investment Management will no longer respond to letters raising this question unless a novel or unique issue is presented.

Because these positions are based on the representations made to the Divisions, any different facts or conditions might require different conclusions.

Sincerely,



Catherine McGuire  
Chief Counsel

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<sup>1</sup> See Real Goods Trading Corp. (pub. avail. June 24, 1996); see also Farmland Industries, Inc. (pub. avail. Aug. 26, 1991).

LAW OFFICES OF  
BRUCE D. STUART

SECURITIES AND EXCHANGE COMMISSION  
RECEIVED

AUG 9 1996

DIVISION OF MARKET REGULATION

August 5, 1996

VIA FAX & U.S. MAIL

Catherine McGuire  
Associate Director/Chief Counsel  
Division of Market Regulation  
Securities and Exchange Commission  
450 Fifth Street, NW, Mail Stop 5-10  
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VIA FAX & U.S. MAIL

Martin P. Dunn  
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Division of Corporate Finance  
Securities and Exchange Commission  
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VIA FAX & U.S. MAIL

Jack W. Murphy  
Associate Director/Chief Counsel  
Division of Investment Management  
Securities and Exchange Commission  
450 Fifth Street, NW, Mail Stop 10-6  
Washington, D.C. 20549

Re: **PerfectData Corporation**  
Securities Act of 1934 (Sections 5, 6 and 15);  
Investment Advisers Act of 1940 (Section 204(a));  
Securities Act of 1933 (Section 5)

Dear Ms. McGuire, Mr. Murphy and Mr. Dunn:

I am counsel to PerfectData Corporation ("PERF"), a California Corporation. Its stock is traded on NASDAQ Small Cap and is registered under Section 12 of the Securities Exchange Act of 1934, as Amended (the "Exchange Act"). PERF sells computer cleaning products and accessories.

8501

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## I. BACKGROUND

On July 12, 1983, PERF went public through an S-1 offering under the Securities Act of 1933. The offering was fully subscribed. It's shares have been traded on NASDAQ Small Cap since that time. The shares of PERF Common Stock became registered under Section 12 of the Exchange Act at that time. Wells Fargo Bank is the transfer agent of the Common Stock.

Trading in the Common Stock was approximately 2,000 - 5,000 shares per day until May, 1996. Since that time, the volume has increased significantly, to approximately 10,000 to 600,000 shares per day.

PERF now proposes to establish an "off the grid" trading system (the "System") for the Common Stock. The System would function as a passive "bulletin board" providing information to prospective sellers and buyers of Common Stock ("Participants"). The information to be listed on the System would include: (i) the names, address and telephone numbers (or other contact mechanisms, such as electronic mail addresses) of interested buyers and sellers; (ii) the number of shares of Common Stock that are offered for sale or desired to be purchased; (iii) the price at which the Common Stock is offered for sale or desire to be purchased; and (iv) the date on which the information was entered into the System. Participants would transmit the above information either (i) by direct interface using PERF's World Wide Web site or (ii) by telephone, facsimile, mail or electronic mail directed to PERF, which would enter the data into the System. The information would remain in the System until such time as a Participant indicates that a transaction was completed or the Participant no longer is interested in buying or selling, although PERF also may put a time limit on how long the information will be posted. PERF anticipates that Participants will obtain access to the System primarily by electronic mail, although information may also be relayed by telephone, facsimile, mail or any other method, including via PERF's World Wide Web site.

No transactions would be effected by the System itself, and PERF will have no role in effecting transactions between Participants; rather all transactions would be effected only by direct contact between the Participants. Although PERF would have no transactions records, it will retain records of the quotations listed for not less than three years and make them available to the staff of the Securities and Exchange Commission (the "Commission")

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and to the NASDAQ Stock Exchange (or any other regulated market on which the shares are listed) on reasonable request thereof. Each Participant would be required to rely on its own exemption under the Securities Act including, without limitation, Section 4(1) thereof. PERF proposes to advertise to shareholders and other members of the public the availability and possible benefits of the System. The System may be free standing or may be integrated into PERF's World Wide Web site or both.

Neither PERF nor any affiliate of PERF will (i) receive any compensation for creating or maintaining the System; (ii) receive any compensation for the use of the System; (iii) be involved in any purchase or sale negotiations arising from the System; (iv) give advice regarding the merits or shortcomings of any particular trade; (v) use the System, directly or indirectly, to offer to buy or sell securities, except in compliance with the securities laws, including any applicable registration requirements (absent an available exemption therefrom)<sup>1</sup>; or (vi) receive, transfer or hold funds or securities as an incident of operating the System.

The screens and hard copy by which the System data is provided to Participants will include the following information:

- Identification of the national securities exchange or other regulated securities market that lists PERF Common Stock;
- PERF is not a registered national securities exchange, securities information processor, broker, dealer or investment adviser;
- The information set forth on the System does not consist of firm quotes, but rather is merely a list of the names, addresses and telephone numbers of interested sellers and buyers, the number of shares of Common Stock offered or

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<sup>1</sup> Offers and sales of nonrestricted securities by persons other than PERF or affiliates of PERF could be made in reliance upon the exemptions from registration provided by Sections 4(1), 4(3), or 4(4), as appropriate. Offers and sales of controlled or restricted securities may be made through a registered offering or in reliance upon an exemption from registration, such as the Section 4(1) exemption, if the requirements of Rule 144 are satisfied. In this regard, it is recognized that the "manner of sale" requirements of Rule 144 would be applicable to such transactions. Offers or sales of securities by PERF may be made either in registered transactions or in accordance with an available exemption, such as Regulation A or Rule 504 of Regulation D under the Securities Act.

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desired to be purchased, and the price at which the proposed transaction would occur. PERF does not assure that any particular transaction will occur as to any particular number of shares or at any particular price. All transactions between Participants must be executed by the Participants independent of PERF or any of its affiliates;

- All applicable state and federal securities laws (including the anti-fraud and anti-manipulation provisions) apply to any offer made or transaction consummated using the System;
- The name, address and telephone number of PERF's transfer agent;
- Any person that is a broker-dealer, an associated person of a broker-dealer, or who has a state securities license is responsible for identifying that fact;
- "Two sided quotes" in which a person indicates a bid to buy at one price and an offer to sell at a higher price are prohibited. <sup>2</sup>
- The registration requirements of the federal securities laws apply to all offers and sales through the System, absent an available exemption. Offers and sales of controlled or restricted securities may be made in reliance upon the Section 4(1) exemption if the requirements of Rule 144, including the "manner of sale" requirements, are satisfied. Please note that the public information, volume, manner of sale and notification requirements of Rule 144 do not apply to transactions that satisfy the requirements of Rule 144(k).

PERF may make announcements relating to, and advertise or otherwise publicize, the existence and availability of the System and provide information about the use and benefits of the System.

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<sup>2</sup> PERF may in the future permit two-sided quotes. If PERF chooses to permit two-sided quotes, the screens and hard copy by which the System data is provided to Participants will include a statement that: Any person providing "two-sided-quotes" in which a person indicates a bid to buy at one price and an offer to sell at a higher price, may in certain circumstances, be considered a dealer who is required to register with the SEC and comply with applicable provisions of the federal securities laws.

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PERF may use any mechanism for providing information about the System. In its communications with the public PERF will not characterize itself or the System as being a "broker", a "dealer", or an "exchange." To the same extent as required of any company whose securities are traded on a national securities exchange or NASDAQ, PERF will be mindful of the statutory provisions relating to solicitations of any offer to buy. If PERF provides information about PERF or the System during an offering of its securities that is registered with the Commission, PERF also will be sensitive to and abide by the general limitations of the federal securities laws regarding publicity by a company that is "in registration." Of course, all information provided by PERF regarding either the System or PERF will be consistent with the antifraud and antimanipulation requirements of the federal securities laws.

We respectfully request that the staff (the "Staff") of the Commission concur with our view that PERF may establish and operate the System as described herein without (i) PERF registering as an "investment adviser" under Section 203(a) of the Investment Advisers Act of 1940, as amended (the "Advisers Act"); (ii) PERF, or any of its personnel who will manage and operate the System, registering as a "broker" and/or "dealer" under Section 15(a) of the Exchange Act; (iii) the registration of the System as a "national securities exchange" under Section 6 of the Exchange Act; or (iv) the registration of offers and sales made through the System under the Securities Act.

## II. REGISTRATION ISSUES

### Broker and Dealer

Subject to certain exceptions, Section 15(a) of the Exchange Act requires registration of any broker or dealer. Section 3(a)(5) of the Exchange Act defines a "dealer" as "any person engaged in the business of buying and selling securities for his own account." Section (3)(a)(4) defines a "broker" "any person engaged in the business of effecting transactions in securities for the accounts of others . . ." PERF will not be engaging in any activities requiring it to register as a broker or dealer under Section 15(a). This conclusion is consistent with the Staff's determination regarding a system similar to the System in *Farmland Industries, Inc.* (August 26, 1991).

Requiring PERF to register as a broker-dealer would not provide the Participants with any additional protection. Because

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PERF will not handle or hold funds or shares of Common Stock of any Participant, a minimum capital requirement is unnecessary. Any financial failure of PERF would result only in the loss of the Participants' access to the System, and not a loss of their funds. Furthermore, the costs of compliance with the record keeping and periodic reporting requirements would far outweigh any benefits.

#### **National Securities Exchange**

Section 5 of the Exchange Act provides that it is unlawful for an exchange to effect any transaction in a security unless such exchange is registered as a national securities exchange under Section 6 of the Exchange Act or is exempted from such a registration upon application to the Commission.

Section 3(a)(1) of the Exchange Act defines "exchange" as:

any organization, association or group of persons, whether incorporated or unincorporated, which constitutes, maintains, or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange as that term is generally understood, and includes the market place and the market facilities maintained by such exchange.

Based on the law and the foregoing facts, we are of the opinion that the System would not be an "exchange" within the meaning of the Exchange Act. In addition, PERF notes that it is a Section 12 registrant and will retain that status or, if it should cease to be a Section 12 registrant, otherwise undertake to make publicly available the information required by Section 13(a) of the Exchange Act in the same manner that Participants will obtain access to the System (e.g. electronic mail, facsimile, mail, PERF's World Wide Web site, etc). Consequently, there are no issues raised regarding the necessity of providing information to System Participants.

#### **Investment Adviser**

Subject to certain exceptions, Section 203(a) of the Advisers Act requires the registration of an investment adviser. Section 202(a)(11) of the Adverse Act defines an "investment adviser" as:

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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 . . .

As indicated above, neither PERF nor the System will provide information regarding the advisability of buying or selling Common Stock or any other securities. Similarly, PERF will not receive any compensation for operating the System. The System will merely provide a passive medium for Participants to obtain information regarding other Participants who are interested in buying or selling Common Stock. Thus, PERF will not be engaging in any activities requiring registration as an investment adviser under the Advisers Act. This conclusion is consistent with the Staff's determination regarding a system similar to the System in *Farmland Industries, Inc., supra*.

### Securities Act of 1933

Section 5 of the Securities Act makes it unlawful for any person to offer, sell, or solicit an offer to purchase any security unless a registration statement has been filed with respect to that security, absent an available exemption. In view of the manner in which the System will be established and operated, PERF believes that the operation of the System does not constitute an offer to sell or the solicitation of an offer to buy PERF Common Stock on the part of PERF. As such, PERF activities in connection with the establishment and maintenance of the System would not require Securities Act registration of offers or sales made through the System.

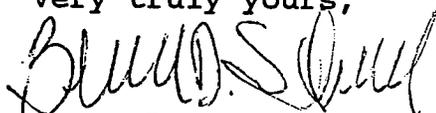
### III. CONCLUSION

For the foregoing reasons, we request that the Staff concur with our view that PERF may establish and operate the System without (i) PERF registering as an "investment adviser" under Section 203(a) of the Advisers Act, (ii) PERF, or any of its personnel who will manage and operate the System, registering as a "broker" and/or "dealer" under Section 15(a) of the Exchange Act; (iii) the registration of the System as a "national securities exchange" under Section 6 of the Exchange Act; or (iv) registering offers and sales made through the System under the Securities Act.

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In the event that the Staff does not concur with any of our views, we kindly request an opportunity to discuss the matter prior to any final decision thereon. If you have any questions or wish to receive any further information, please contact me at 310-358-2330.

Very truly yours,

  
Bruce D. Stuart

BDS:lw