



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

**PUBLIC**

MAY 2 1996

DIVISION OF  
INVESTMENT MANAGEMENT

May 2, 1996

Mr. Russell H. Smith  
2956 S. Drawbridge Way  
West Valley City, Utah 84120-6681

Act	IAA-40
Section	202(a)(11)
Date	
Public Availability	5/2/96

Dear Mr. Smith:

Your recent letter to the Office of Filings and Information Services has been referred to the Division of Investment Management, which is responsible for the regulation of investment advisers, for response. In your letter, you state that you are interested in providing investment advice to persons on an e-mail address list you would maintain. You state that you would not charge any fees, but would ask for a voluntary commission based on profits derived from purchasing and selling the stocks you recommend. You also state that this activity would be a hobby and not your primary business. The following discussion addresses generally the status under the Investment Advisers Act of 1940 ("Advisers Act") of a program such as the one you propose to offer.

The Commission regulates investment advisers primarily under the Advisers Act. Section 202(a)(11) of the Advisers Act generally 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. Section 203(a) of the Advisers Act generally requires an investment adviser to register with the Commission.

A person who provides advice about securities in the manner you describe may fall within the definition of investment adviser. Section 202(a)(11) applies to any person who is in the business of providing investment advice for compensation.<sup>1</sup> The stock recommendations you propose to make clearly constitute "investment advice." Your status under the Advisers Act, therefore, depends upon whether you provide that advice for compensation, and whether you are "in the business" of providing such advice.

A person is considered to receive compensation for providing investment advice if the person receives any economic benefit, whether in the form of an advisory fee or some other fee relating to the total services rendered, commissions, or a combination of the foregoing. The definition's compensation requirement would be met even if a person receives compensation on a totally voluntary basis.<sup>2</sup>

<sup>1</sup>Investment Advisers Act Rel. No. 1092 (Oct. 8, 1987) ("Release 1092").

<sup>2</sup>The Advisers Act does not prohibit an adviser from allowing his clients to pay on a voluntary basis. However, the antifraud provisions of the Advisers Act might be violated if, for example, an investment adviser represents to clients that payment is totally voluntary,

With respect to the "in the business" standard, the fact that you intend to operate your investment advisory service as a hobby would not necessarily mean that you would not be in the business of providing investment advice. The giving of investment advice need not constitute an adviser's principal business activity. Rather, it need only be done on such a basis that it constitutes a business activity occurring with some regularity. In any event, determining whether a person is in the business of providing investment advice requires an analysis of all the relevant facts and circumstances, not just the frequency with which a person provides advice.<sup>3</sup>

Even if you meet the definition of investment adviser, you may be excepted from the definition and thus from regulation under the Advisers Act by section 202(a)(11)(D) of the Act. Section 202(a)(11)(D) excepts from the definition of investment adviser the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation. In Lowe v. SEC, the United States Supreme Court interpreted this "publisher's exclusion" to include publications that offer impersonal investment advice to the general public on a regular basis.<sup>4</sup> To qualify for the section 202(a)(11)(D) exclusion under Lowe the publication must be:

- (1) of a general and impersonal nature, in that the advice provided is not adapted to any specific portfolio or any client's particular needs;
- (2) bona fide or genuine, in that it contains disinterested commentary and analysis as opposed to promotional material; and
- (3) of general and regular circulation, in that it is not timed to specific market activity or to events affecting, or having the ability to affect, the securities industry.

A person who provides advice about securities through electronic mail could qualify for the section 202(a)(11)(D) exclusion, provided the three criteria listed above are met. The Commission staff generally declines to express an opinion whether a particular person qualifies for the exclusion because of the fact-specific analysis required to make this determination. We note, however, that your letter indicates that you intend to make recommendations only in response to specific market activity, and not on a general and regular basis (e.g., weekly, monthly). This could place your activities outside the publisher's exclusion as set forth in Lowe.

---

but the adviser requires this "voluntary" payment as a pre-condition of his rendering any advisory services beyond introductory services.

<sup>3</sup>Release 1092. The Commission staff considers a person to be in the business of providing investment advice if the person (i) holds himself out as an investment adviser or as one who provides investment advice, (ii) receives any separate or additional compensation that represents a clearly definable charge for providing advice about securities, regardless of whether the compensation is separate from or included within any overall compensation, or receives transaction-based compensation if the client implements the investment advice, or (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice. *Id.*

<sup>4</sup>Lowe v. SEC, 472 U.S. 181 (1985).

Russell H. Smith  
Page 3

If you meet the definition of investment adviser and do not qualify for the publisher's exclusion, for any other exclusion from the definition of investment adviser, or for an exemption from registration under section 203(b),<sup>5</sup> you must register with the Commission as an investment adviser and comply with all the provisions of the Advisers Act and the rules thereunder. For example, section 205(a)(1) of the Advisers Act generally prohibits an investment adviser from receiving compensation based on a share of capital gains upon, or capital appreciation of, a client's funds. While there are exceptions to this prohibition on performance-based fees, these exceptions generally apply only when the advice is being provided to clients with substantial wealth or amounts under management. Thus, if you register or are required to register as an investment adviser, you likely will not be able to receive compensation based on client profits in the manner you propose.

You may wish to consult with legal counsel familiar with the Advisers Act in determining your status under the Act. In addition, you should contact the appropriate state authorities to determine what, if any, state requirements may apply with respect to your proposal. The names and addresses of these state officials can be obtained by contacting the North American Securities Administrators Association, Inc., One Massachusetts Ave. N.W., Suite 410, Washington, D.C. 20001, (202) 737-0900.

I have enclosed a copy of the Commission's Investment Adviser Registration Package, which contains a copy of the Advisers Act, the rules under the Act and other materials.<sup>6</sup> I hope you find this information helpful. Please contact this office at (202) 942-0659 if we can be of further assistance.

Sincerely,



Rochelle Kauffman Plesset  
Senior Counsel  
Office of Chief Counsel

Enclosure

---

<sup>5</sup>See, e.g., section 203(b)(3), which exempts from registration under the Advisers Act an investment adviser that has fewer than fifteen clients and does not hold himself out to the public generally as an investment adviser.

<sup>6</sup>Release 1092 is included in these materials.

e-1

Russell H. Smith  
2956 S. Drawbridge Way  
West Valley City, Utah 84120-6681  
(801) 967-6683  
75137,37@compuserve.com

1 January 96

Office of Filings and Information Services  
Branch of Registrations and Examinations  
United States Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549



To Whom It May Concern:

I would like to extend a hobby of mine into the a small profit making concern, but keep it a hobby. I have been a chartist stock investor for a few years now and have been doing pretty well. I am primarily an airline pilot.

What I had in mind is to maintain an e-mail address list. Then when I feel a stock is a good buy based on my own chartist interpretation, send a buy recommendation to everyone on the list. As any stock I recommended makes the appropriate rise, send a sell message to everyone on the list. I plan to open no accounts, gather no client information, charge no fees, make no effort to collect commissions (I would have no way of knowing who bought which stocks anyway), but I would ask a 10%, entirely voluntary commission on only the profits of stocks I recommend. I would continue as an airline pilot and would not wish to spend a great deal of time on the project. For income tax reporting, I would register as a sole proprietorship in my home state.

So, my question is, what registration requirements if any will I need to comply with to insure I am legal to operate in the manner described above.

Sincerely,

Russell H. Smith