



DIVISION OF  
TRADING AND MARKETS

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC 20549

May 14, 2010

Mr. Ernest E. Badway  
Fox Rothschild LLP  
100 Park Avenue, Suite 1500  
New York, NY 10017

**Re: Grant of No-Action to The Investment Archive, LLC**

Dear Mr. Badway:

In your letter dated November 24, 2009, on behalf of The Investment Archive, LLC ("TIALLC"), you request assurance that the staff of the Division of Trading and Markets ("Division") would not recommend enforcement action to the Securities and Exchange Commission ("Commission") under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if TIALLC engages in the activities described in your letter without registering as a broker-dealer in accordance with Section 15(b) of the Exchange Act.

Based on the facts and representations set forth in your letter and without necessarily concurring in your analysis, the staff of the Division will not recommend enforcement action to the Commission under Section 15(a) of the Exchange Act if TIALLC engages in the activities described in your letter without registering as a broker-dealer under Section 15(b) of the Exchange Act. In particular, we note that you represent that, among other things, TIALLC will not: (i) advise or comment upon any possible or proposed transaction; (ii) solicit securities transactions; (iii) participate in negotiations between the parties to a transaction; (iv) assist investors with the closing of a transaction; (v) handle, receive, or direct any funds or securities involved in a transaction; or (vi) hold itself out as providing any securities-related services other than as expressly set forth in your letter.

Because this position is based on the facts presented and the representations you have made, any different facts or conditions might require a different response. Furthermore, this response expresses the Division's position on enforcement action only, and does not purport to express any legal conclusions on the question presented. Moreover, the staff expresses no view with respect to any other questions the proposed activities may raise and the applicability of other federal and state laws or rules of any self-regulatory organization to, the proposed activities.

Sincerely,

  
Paula R. Jenson  
Deputy Chief Counsel



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November 24, 2009

**VIA FEDEX**

James Eastman, Esq.  
Office of Chief Counsel  
Division of Trading and Markets  
Securities and Exchange Commission  
100 F Street NE  
Washington, D.C. 20549

**Re: Status of Online Service Provider to Broker-Dealers**

Dear Mr. Eastman:

We represent The Investment Archive, LLC ("TIALLC"). We now write to request assurance that the staff of the Division of Trading and Markets ("Division") will not recommend enforcement action to the Securities and Exchange Commission ("Commission") under Section 15(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act") against TIALLC for providing an internet-based, cost-basis calculator to registered broker-dealers and their customers.

**Factual Background**

TIALLC will provide a website that provides a calculation to investors of their cost-basis in the securities they own ("Service"). TIALLC will enter into service agreements with various broker-dealers, whereby such broker-dealers will pay a fee to TIALLC in exchange for the right to provide the Service to its customers. Such customers will be able to obtain the Service through a hyperlink on the broker-dealer's website. While TIALLC will initially focus on providing the Service through broker-dealers, it may expand its target market in the future to other opportunities, such as trust companies, university endowments and pension funds.

Each broker-dealer will pay a flat fee that will cover a specific number of initial transactions for its clients. After the initial transaction threshold is reached, each broker-dealer will pay a "per transaction" fee each time its client uses the Service.

The Service will work in the following manner. Each brokerage customer must link to TIALLC's website through his or her broker-dealer's website. Once at TIALLC's website, each

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California Delaware Florida Nevada New Jersey New York Pennsylvania



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brokerage customer must submit his or her investment information through the calculator interface. The calculator will then use such information to calculate such customer's cost-basis in his or her securities, and will provide such customer with a calculation summary, which he or she may print, email or export to another software program. The summary page will include the cost-basis calculations, along with a legal disclaimer and a representation to be signed by the customer regarding the accuracy of the information entered into the cost-basis calculator. TIALLC's website will include a warning that indicates that: (i) TIALLC is not registered with the Commission and is not a member of the Financial Industry Regulatory Authority, also known as FINRA; (ii) TIALLC is not affiliated with the customer's brokerage firm; (iii) the cost-basis calculations are not based on information that the customer's brokerage firm has provided to TIALLC; (iv) the customer's brokerage firm will not review any information provided to TIALLC by the customer or any calculations prepared by TIALLC; and (v) the cost-basis calculations may or may not reflect the customer's actual cost-basis depending upon the information provided by the customer.

TIALLC may display advertisements while the calculator is compiling information. These advertisements will relate solely to incidentals, such as wine, jewelry, art, and horses. At no time will the advertisements relate to any securities or securities-related products.

### Legal Analysis

#### Definition of "Broker" and "Dealer"

Section 3(a)(4) of the Exchange Act defines the term "broker," in relevant part, as "any person engaged in the business of effecting transactions in securities for the account of others." Section 3(a)(5) of the Exchange Act defines the term "dealer," in relevant part, as "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise." In interpreting Sections 3(a)(4) and 3(a)(5), the Commission and the Division have considered the receipt of transaction-based compensation as a key factor in considering whether a person is "engaged in the business" of transacting securities, and therefore subject to broker-dealer registration. The Commission and the Division have further provided that "[r]egistration helps to ensure that persons who have a 'salesman's stake' in a securities transaction operate in a manner that is consistent with customer protection standards governing broker-dealers and their associated persons."<sup>1</sup>

In providing guidance on the definition of a "broker," the Commission and the Division have stated that a person effects transactions in securities "if he or she participates in such

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<sup>1</sup> Herbruck Alder & Co., SEC Staff No-Action Letter (available June 4, 2002). *See also* Birchtree Financial Services, Inc., SEC Staff No-Action Letter (available September 22, 1998; 1<sup>st</sup> Global, Inc., SEC Staff No-Action Letter (available May 7, 2001).



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transactions ‘at key points in the chain of distribution.’” Such participation includes “assisting an issuer to structure prospective securities transactions, helping an issuer to identify potential purchasers of securities, soliciting securities transactions, and participating in the order taking or order routing process.” In its clarification of what constitutes being “engaged in the business,” the Commission and the Division have listed various factors, such as receiving transaction-related compensation, holding oneself out as a broker, and participating in the securities business with some degree of regularity.<sup>2</sup>

#### Prior Division Treatment of Third-Party Service Providers

Although the Division has not granted specific no-action relief regarding a third-party, internet based cost-basis calculator, it has previously granted no action relief to third-party service providers to broker-dealers. For example, the Division has ruled that broker-dealer registration was not required for providers of an electronic communications systems that linked investors to broker-dealers.<sup>3</sup> Additionally, the Commission has stated that registration was not necessary for employee leasing companies providing services to broker-dealers where, among other things, the services provided to the broker-dealers were not securities-related and the fee charged to such broker-dealers was not based on any brokerage commissions earned by the broker-dealer or its employees.<sup>4</sup>

#### Application to TIALLC

We recognize that a service provider to broker-dealers could, depending on the circumstances, be required to register as a broker dealer under Section 15 of the Exchange Act. However, we believe that TIALLC is not required to register because, since it will not engage in the purchase of securities for its own account or for the account of others, TIALLC does not fall under the definition of a “broker.” Also, we believe that, although the Service is unique from third-party services described under previous no-action guidance, the Commission’s reasoning in granting no-action relief in such cases should also apply to the Service for the reasons described below.

TIALLC will not be engaged in any of the traditional roles of a broker or dealer in a securities transaction, nor will it participate in any securities transactions at any point in the chain of distribution. More specifically, TIALLC will not: (i) advise or comment upon any possible or proposed transaction; (ii) solicit securities transactions, (iii) participate in negotiations between the parties to a transaction; (iv) assist investors with the closing of a transaction; (v) handle, receive, or

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<sup>2</sup> Bondglobe, Inc., SEC Staff No-Action Letter (available February 6, 2001).

<sup>3</sup> Charles Schwab & Co., Inc., SEC Staff No-Action Letter (available November 27, 1996). *See also* Quick America Corporation, SEC Staff No-Action Letter (available June 18, 1993).

<sup>4</sup> Staff Management, Inc., SEC Staff No-Action Letter (available February 27, 2000). *See also* TTC Illinois, SEC Staff No-Action Letter (available February 1, 1999).



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direct any funds or securities involved in a transaction; or (vi) hold itself out as providing any securities-related services other than the provision of an online, cost-basis calculator.

All of TIALLC's promotional activities, including any promotional material that TIALLC distributes, will relate solely to the Service and will not in any way relate to brokerage activities. TIALLC will also not identify or promote any broker-dealer in its promotional activities or materials.

TIALLC will not receive compensation in the form of "commissions" tied to the size or value of any securities transactions. Instead, fees paid to TIALLC will be predetermined flat subscription or usage fees that will compensate TIALLC for the Service.

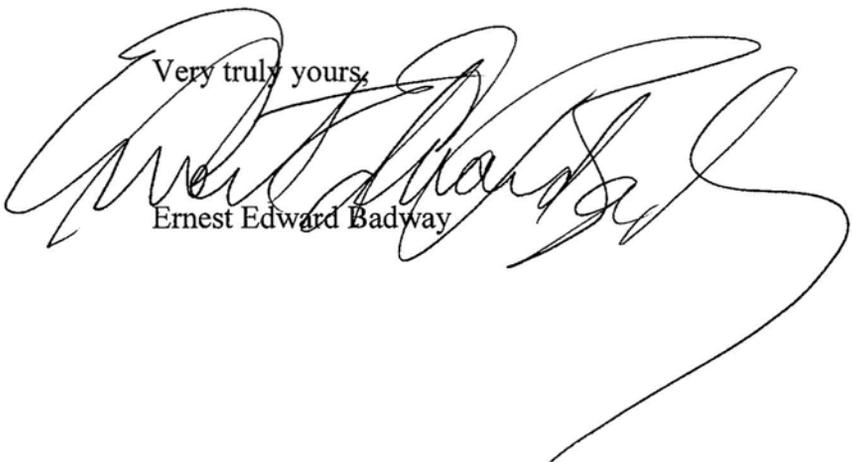
Each brokerage client will be responsible for the accuracy of all information entered into the cost-basis calculator. TIALLC and its employees will not have any input into the information entered into the cost-basis calculator. Further, TIALLC and its employees will not recommend or endorse specific securities. At no time will TIALLC have a "salesman's stake" in any securities transaction. Other than providing the Service, neither TIALLC nor its employees will take part in the services offered by any broker, including the opening, maintenance, administration, or closing of brokerage accounts, or the solicitation of trades, nor will they provide assistance in resolving problems, discrepancies or disputes involving brokerage accounts or related securities transactions. TIALLC will not answer any questions or engage in negotiations involving brokerage accounts or related securities transactions. TIALLC will not handle customer funds or securities related to securities orders transmitted by brokers or effect clearance and settlement of customer trades.

### Conclusion

On the basis of the foregoing, we respectfully request that you advise us that the Staff will not recommend that the Commission take any enforcement action if TIALLC enters into arrangements with broker-dealers to provide the Service without registering with the Commission under Section 15 of the Exchange Act.

On behalf of TIALLC, we appreciate your consideration of this request. If you have any questions regarding this request or need any additional information, please do not hesitate to contact me.

Very truly yours,

  
Ernest Edward Badway