

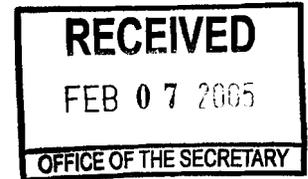
FOUNDATION FOR FIDUCIARY STUDIES

DEFINING PRACTICES THAT DETAIL A PRUDENT INVESTMENT PROCESS

S7-25-99

1747

February 4, 2005



Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549-0609

- Re: (1) Comment Letter on "Certain Broker-Dealers Deemed Not To Be Investment Advisers" File Number S7-25-99
Proposed rule 202(a)(11)-1 [17 CFR 275.202(a)(11)-1], and amendment to the instructions for Schedule I of Form ADV [17 CFR 279.1] of the Investment Advisers Act of 1940**
- (2) The Foundation's letter to the Securities and Exchange Commission; File Number S7-25-99; dated September 12, 2004**

Dear Mr. Katz:

The SEC's proposal does not go far enough to address the numerous problems and issues associated with the current "broker-dealer" exemption. In addition to our previously submitted comments (a copy of which is attached), we are greatly concerned about the following:

The ineffectiveness of disclosure requirements

Disclosure has proven time and again to be an ineffective means of regulating the investment industry and protecting the interests of the public. A case in point is the typical mutual fund prospectus. The information it contains is not intelligible, and obfuscates the information that is most critical to an investor's decisions.

"Incidental advice" is like being "half-pregnant"

Either the broker is providing advice, or is not. "Incidental" implies something in-between, a state of being which defies logic. A better definition would be to say that the demarcation between broker and adviser is the point at which *advice is comprehensive and continuous*.



The need for a new SEC division to oversee investment consultants

It's tough enough to define the demarcation between brokers and investment advisers. The additional challenge is to define the demarcation between advisers; specifically between money managers and investment consultants, both of which are being regulated by the Investment Management Division with the same rules and regulations. The lack of specific regulatory controls for investment consultants is creating additional problems.

Within the regulatory environment, the term "investment consultant" is not clearly defined—"investment adviser" is defined, but not investment consultant. When we examine the Division of Investment Management, we see a regulatory framework defined by the Investment Advisers Act of 1940, which was designed for the oversight of money managers.

But investment consultants are not money managers. They're *something else*, and it's in the public's best interests that this *something else* be defined so that, in turn, it can be properly regulated.

Evidence of the SEC's struggle in understanding the role of the investment consultant is its apparent inability to bring closure to its ongoing fifteen-month investigation into the investment consulting firms involved in "pay-to-play" schemes. The SEC didn't have any difficulty tagging brokerage firms with the inappropriate disclosure of payments money managers (mutual fund families) were making for preferential treatment by brokers. But when the exact same activity involves money managers and investment consultants, the SEC appears to be stymied.

Those brokers that are most subject to this debate resemble investment consultants. If the "broker-dealer" exemption is repealed or tightened, and more brokers are shifted to the purview of the SEC, we still can't assure the public that its interests will be protected.

However, the SEC is the logical regulatory body for the oversight of investment consultants. The Commission has long recognized the fiduciary standard of care that is owed to the public by its regulated entities. The term "investment consultant" explicitly implies independent, third-party objectivity—"trust me." And when the public extends that trust to an investment consultant, the consultant becomes a fiduciary.

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Unfortunately, few investment consultants have acknowledged their fiduciary status, let alone understanding the practices associated with such status. Why should they? With such weak regulatory oversight, they're able to charge professional fees without conforming to professional, fiduciary standards of care.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "D. Trone", followed by a horizontal line extending to the right.

Donald B. Trone, AIFA®
President