



NOV 29 1993

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 93-491-CC
Stephen R. Kelly
File No. 132-3

Your letter dated August 10, 1993 requests our assurance that we would not recommend enforcement action to the Commission under the Investment Advisers Act of 1940 (the "Advisers Act") if Stephen R. Kelly operates a listing service for land contracts or mortgages ("encumbrances"), as described in your letter, without registering as an investment adviser.

Mr. Kelly proposes to publish a newsletter that will list real estate encumbrances that are available for sale. 1/ All encumbrances that meet certain minimum criteria with respect to value, return, and location will be eligible for listing. 2/ Owners of the encumbrances will submit a representation sheet (the "Owner's Representation Sheet") describing the underlying property and the encumbrance in detail, which Mr. Kelly will summarize for alphabetical listing in the newsletter. 3/ Mr. Kelly will charge subscribers an annual fee. He will receive a fee from the encumbrance owner only if the encumbrance is sold.

The newsletter will state that the subscribers may contact Mr. Kelly for additional information. Mr. Kelly will respond to requests for additional information only by forwarding the Owner's Representation Sheet. Mr. Kelly will neither discuss the terms of the encumbrance with a prospective purchaser, nor provide any advice regarding the value or advisability of purchasing or selling a particular encumbrance. Subscribers will negotiate transactions directly with the encumbrance owner without Mr. Kelly's assistance.

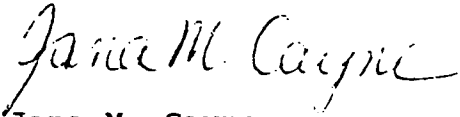
Section 202(a)(11) of the Advisers Act includes in the definition of an investment adviser any person who, for

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- 1/ Mr. Kelly also proposes to prepare and distribute a booklet describing general due diligence procedures to evaluate encumbrances that will not recommend specific encumbrances.
 - 2/ Encumbrances must have a minimum value of \$50,000, bear a minimum interest rate of three points above the prime rate, and relate to property primarily in Michigan. Telephone conversation between Hugh H. Makens and Jana M. Cayne, November 3, 1993.
 - 3/ Telephone conversation between Hugh H. Makens and Jana M. Cayne, November 3, 1993. Mr. Kelly also may establish a pre-recorded "hotline" telephone service that would operate in the same manner as the newsletter to provide information about listings that become available for sale between newsletter publications.

compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. 4/ The Division takes the position that the presentation of securities data or information to subscribers does not constitute an analysis or report within the meaning of Section 202(a)(11) if (1) the information is readily available to the public in its raw state; (2) the categories of information are not highly selective; and (3) the information is not organized or presented in a manner that suggests the purchase, holding or sale of any securities. 5/

We would not recommend enforcement action to the Commission under the Advisers Act if Mr. Kelly operates the listing service as described in your letter. This position is based on the facts and representations in your letter and the telephone conversation, particularly that: (1) the encumbrances are recorded with county officials and therefore are part of the public record; (2) the listings in the newsletter will not be highly selective because all encumbrances that meet certain minimum criteria are eligible for listing; and (3) the listings will be displayed alphabetically and therefore will not be organized or presented in a manner that would favor the selection of any particular encumbrance.

You should note that this expresses the Division's position on enforcement action only and does not express any legal conclusion on the question presented.


Jana M. Cayne
Attorney

4/ Section 202(a)(11)(D) of the Advisers Act provides an exclusion for any publisher of a bona fide newspaper, news magazine or business publication of general and regular circulation. We express no opinion as to whether this exclusion is available to Mr. Kelly in connection with the publication of his book or the newsletter. See Independent Drug Wholesalers Group, Inc. (pub. avail. Apr. 16, 1992) (because of the fact-specific nature of the analysis required to determine the availability of the publisher's exclusion to a specific publication, the staff generally will not express an opinion on whether a publisher must register under the Act).

5/ See, e.g., Investex Investment Exchange, Inc. (pub. avail. Apr. 9, 1990); Petroleum Information Corporation (pub. avail. Nov. 18, 1989); Real Estate Financing Partnership (pub. avail. Apr. 4, 1989).

PUBLIC

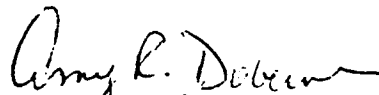
28 JUL 1994

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 94-461-CC
Stephen R. Kelly
File No. 132-3

By letter dated July 21, 1994, you request that we modify the no-action relief we granted in Stephen R. Kelly (pub. avail. Nov. 29, 1993). In connection with your original letter, you represented that Mr. Kelly would select for his listing service all encumbrances in an amount greater than \$50,000 bearing a interest rate of at least three points above prime. You now state that, because of changing market conditions, applying this minimum interest rate criteria is untenable. You therefore propose to substitute in its place the representation that Mr. Kelly will list all encumbrances in an amount greater than \$50,000 regardless of interest rate, except those submitted by persons disqualified by Rule 262 under the Securities Act of 1933, persons who have failed to make payments in accordance with the contract for participation in the listing service, and those who, in the past, have made listings that were not bona fide. 1/

We would not recommend enforcement action to the Commission if Mr. Kelly proceeds with the listing service in accordance with the representations made as part of your original request, as modified by letter dated July 21, 1994.


Amy R. Doberman
Special Counsel

1/ Persons in the last group would be identified by their failure to accept qualified bids over a sustained period of time. You state that a person might engage in this conduct to secure the names of subscribers.

WARNER, NORCROSS & JUDD

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July 21, 1994

Ms. Dorothy M. Donohue
Assistant Chief Counsel
Division of Investment Management
United States Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

ACT TAA of 1940
SECTION 202CAJ(C11)
RULE _____
PUBLIC _____
AVAILABILITY 7-28-94

Re: Stephen R. Kelly - Ref. No. 93-491-File No. 132-3

Dear Ms. Donohue:

On November 29, 1993, the Office of Chief Counsel of the Division of Investment Management issued a no-action letter relating to Mr. Kelly's proposed listing service for land contracts and mortgages. During the course of conversations relating to structuring an acceptable proposal, the staff raised the concern that there must not be an improper or biased process for selecting which encumbrances were advertised and which were not permitted to advertise. Footnote 2 of that letter reflects a condition that the mortgage bear a minimum interest rate of three points above the prime rate. At the time it seemed like a good idea. On reflection, it does not work!

Mr. Kelly collected data on all the 263 land contracts filed in Michigan's three largest counties for the month of May 1994. These contracts were then screened to eliminate all contracts not meeting the requirement prohibiting listing of encumbrances without a minimum value of \$50,000, and 55 contracts were eligible. When Mr. Kelly applied the second screen, eliminating all contracts without an interest rate of three points above the prime rate, the number of remaining mortgages was three. This was clearly an unintended consequence by both the staff and ourselves. In a rising market, the test does not work.


Ms. Dorothy M. Donohue
July 21, 1994
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Accordingly, we seek relief from the condition that all encumbrances must bear a minimum interest rate of three points above the prime rate. We ask that the requirement be deleted. Alternatively, to address the concern about openness of the listing service, we propose to accept all eligible encumbrances over \$50,000 regardless of interest rate, except those known to be submitted by persons disqualified under Section 262 of Regulation A (those with "bad boy" disqualifiers), those who have failed to make payments in accordance with the contract for participation in the listing service or those who have not made bona fide listings on the service, but rather listed for the apparent reason of securing the names of subscribers. This latter group would be identified by the failure to accept what are perceived to be qualifying bids over a sustained period of times. We believe that this plan would assure the openness of the service sought by the staff, while at the same time providing a reasonable number of encumbrances in the listing service.

As additional background, we advise you that Mr. Kelly has incorporated his service under the name OysterCom, Inc., that that firm is now registered as an investment adviser under the Michigan Uniform Securities Act, and that the newsletter for the listing service has been designated the Land Contract & Mortgage Marketplace. He has not commenced publication for the reasons stated above.

Your assistance in modifying the requirements of the November 29, 1993, no action letter would be greatly appreciated. If we can provide any further information, please advise.

Sincerely


Hugh H. Makens

aj

cc: Amy Doberman
Steven R. Kelly

WARNER, NORCROSS & JUDD

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August 10, 1993

Mr. Thomas S. Harman
Chief Counsel
c/o Jana Cayne
Division of Investment Management
United States Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549

Re: Stephen R. Kelly

Dear Mr. Harman:

Reference is made to our prior correspondence and telephone conversations in this matter. This letter will supersede our letter of June 24, 1993. The purpose of this letter is to request the concurrence of the Division of Investment Management (the "Division") with our opinion that as the result of operations described below, Mr. Stephen R. Kelly will not be deemed an investment adviser within the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940 (the "Advisers Act") and your determination that the Division would not recommend enforcement action under the Advisers Act if Mr. Kelly were to operate in the manner described below without registering as an investment adviser under the Advisers Act.

We represent Stephen R. Kelly. Mr. Kelly is a professional appraiser of commercial real estate for various institutional and corporate clients. Mr. Kelly is also a licensed real estate broker. During the course of his employment and through professional acquaintances and friends, he frequently learns of transactions involving the sale of real estate

Mr. Thomas S. Harman
August 10, 1992
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which are structured with a partial cash payment with the residual indebtedness for the property evidenced by a land contract or a mortgage (the "encumbrance"). From time to time he has approached the holder of such land contracts and mortgages, inquiring as to their desire to sell the encumbrances at a discount. Upon finding willing sellers he has contemplated purchasing certain encumbrances for his personal account.

Recently friends of Mr. Kelly have inquired about these investments. He has contemplated introducing these friends to encumbrance holders. As word of mouth circulates regarding these investments, more inquiries have been received and Mr. Kelly is now considering establishing a business which would involve the following:

Mr. Kelly would contact encumbrance owners offering to list their encumbrances, fitting certain predetermined criteria as to value, return, and location in a newsletter. Encumbrances must not be in default and must have an outstanding balance of at least \$50,000. To enter a listing, an encumbrance owner would complete an Owner's Representation Sheet, making representations regarding the property underlying the encumbrance and describing the terms on which the encumbrance was available for sale. Owners would then pay a fee for the listing. Presently, it is contemplated that the fee would be a fixed amount based either on a fee for thousand dollars of listing value or simply a flat amount, and would be contingent upon the sale of the encumbrance. Mr. Kelly would conduct no independent investigation of the underlying real estate nor of the encumbrance documentation. The listing would be for a specific time period, and is done on an exclusive basis only. Thus, any sales of the encumbrance during the listing period would require payment of the fee. The fee is payable upon receipt of a firm offer by the encumbrance holder. A triple fee penalty would apply to any "off the record" sales.

Mr. Kelly will then circulate a newsletter to a clientele of subscribers. Subscriptions to this newsletter will be on an annual flat fee basis. The frequency of circulation has not been established, but it is anticipated to be monthly or bi-monthly. The letter will contain general information about real estate activities or news in Michigan, and a section with summaries of the Owners Representation Sheets. In this newsletter Mr. Kelly will offer no advice about any specific encumbrance, and will advise the subscribers that they are responsible for performing due diligence about each encumbrance in which they might have an interest, and that the subscriber negotiate directly with the encumbrance owner without assistance from Mr. Kelly. It is also contemplated that a booklet may be prepared for subscribers, advising them on typical due diligence procedures used to evaluate encumbrances. This booklet would be prepared solely to help the subscriber to independently evaluate an encumbrance and not with a view toward encouraging purchase or favoring one encumbrance over another.

While not presently contemplated, it is possible that a "hotline" telephone service may be established to provide additional listings between newsletter publications. This service would be included within the cost of the newsletter or would require a flat fee enhancement of the original newsletter cost.

If a subscriber has an interest in a specific encumbrance, the subscriber will contact Mr. Kelly and receive the Owners Representation Sheet which will contain more detailed data and the name and means of contact of the encumbrance owner.

Mr. Kelly will not combine or group subscribers to purchase any specific encumbrance, nor recommend that they do so. He will not form nor assist in forming a pool for such subscribers in conjunction with the newsletter services. Mr. Kelly will not assist subscribers in negotiating or concluding transactions, nor engage in clearing or transferring encumbrances. He will not handle or assist others in handling encumbrances or funds of subscribers, nor original or service encumbrances. He will not offer advice or recommendations on specific encumbrances.

If a subscriber purchases an encumbrance, the subscriber and the encumbrance owner will have agreed by contract to report the transaction to Mr. Kelly. He would then receive payment from the seller.

The communications between Mr. Kelly and his subscribers would remain impersonal and would not develop into person to person relationships as part of the subscription process. Mr. Kelly represents that the publication will be a genuine newsletter, intended for broad circulation, and that its circulation will occur at least monthly or bi-monthly. Commentary will relate only to the real estate market in general, and not to specific encumbrances. Mr. Kelly will not trade in any encumbrances purchased by his subscribers. He will not personalize investment advice. The hotline service will parallel the information offered in the newsletter without any recommendations.

The encumbrances are a matter of public record. To preserve the security interest of the holder, encumbrances are recorded with county officials in the county in which the property is located. These records are readily available to any interested person.

The categories of information provided about the encumbrances are not highly selective, but rather represent basic information designed to identify the encumbrance, the underlying property and the terms of the encumbrances. Virtually all this information is available in the public record.

Mr. Thomas S. Harman

August 10, 1992

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Finally, the information will be presented without recommendation, and no effort will be made to favor or give priority to one listing over another based on any investment criteria. The system is a listing service only, with all information about specific encumbrances provided by encumbrance holders within the limitations of a prescribed format. Mr. Kelly will not give advice as to any specific encumbrance.

The encumbrances did not originate in transactions involving the sale of a security, but rather in the context of a security interest in conjunction with the sale of real estate. Only the secondary marketing raises securities issues.

Except for limitations imposed by state real estate licensing and state and federal securities laws and practical limitations imposed by financing and staffing available to a start-up organization, it is not intended that there will be restrictions based on geographical location, type of real property or encumbrance, or price of encumbrances to be listed. Listings will be made geographically, chronologically, by type of encumbrance, or some similar means.

It is not anticipated that other than isolated secondary purchases or sales would be made using the newsletter. Rather, Mr. Kelly believes that most purchasers will be buying with an investment intent, though no such condition would be imposed on transactions initiated through the newsletter.

For the purposes of this letter we ask that the Division assume that the encumbrances described herein are securities.

ISSUE

Would the foregoing activities of Mr. Kelly require registration as an investment adviser personally or for any entity formed for the purpose of conducting the business as described above?

STATEMENT OF APPLICABLE LAW

Section 202(a)(11) of the Investment Advisers Act of 1940 (the "1940 Act") defines an investment adviser as any person who, for compensation, engages in the business of advising others, either directly or through publications or writing, as to the value of securities or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities.

Mr. Thomas S. Harman
August 10, 1992
Page 5

The Division has issued a series of letters addressing situations with some characteristics similar to those presented in this letter. The system described herein has been developed after consideration of the letters issued to Investex Investment Exchange, Inc. (April 9, 1990), EJV Partners, L.P., UniVu System (August 7, 1992), and Datastream International, Inc. (March 15, 1993). These letters address far more complex and wide-reaching systems than those described above. Nonetheless, some essential principals are common to all situations.

The Division generally has taken the position that information relating to securities does not constitute an analysis or report if three tests are met.

1. The information provided is readily available to the public in its ^{new} state;
2. The categories of information are not highly selective; and,
3. The information is not organized or presented in a manner that suggests purchase, holding or sale of any securities.

Based on the facts stated above, we believe Mr. Kelly's system would now meet all of these criteria.

The foregoing newsletter does not advise as to the value of the securities. It is simply a listing service, and will counsel that an investment not be made without due diligence by the purchaser and price negotiation. The material that is published will not constitute analyses and probably is not a report, though that term is not defined.

Based on the foregoing, it would appear that registration is not required of Mr. Kelly or any affiliated entities acting in the capacities set forth above. We ask your concurrence in this conclusion.

A request for an interpretive opinion has been filed concurrently with the Division of Market Regulation, inquiring whether the foregoing activities would require registration as a broker-dealer. A copy of that letter has been previously furnished for your information.

Very truly yours,



Hugh H. Makens

aj

cc: Mr. Stephen K. Kelly