

MARCIA WEEKS
CHAIRMAN
RENZ D. JENNINGS
COMMISSIONER
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ARIZONA CORPORATION COMMISSION

JAMES MATTHEWS
EXECUTIVE SECRETARY

SECURITIES DIVISION
1300 West Washington
Third Floor
TELEPHONE: (602) 542-4242
FAX: (602) 542-3583

October 6, 1994

I. Douglas Dunipace, Esq.
Jennings, Strouss & Salmon, P.L.C.
Attorneys at Law
One Renaissance Square
Two North Central Avenue
Phoenix, AZ 85004-2393

RE: Baptist Foundation of Arizona/No-action Request
A.R.S. § 44-3101

Dear Mr. Dunipace:

On the basis of the facts set forth in your letters of July 21, August 26, and October 3, 1994, and in reliance upon your opinion as counsel, the Division will not recommend enforcement action if the Baptist Foundation of Arizona (the "Foundation") and its employees are not licensed as investment advisers or investment adviser representatives in the state of Arizona. The Division's position is based upon the fact that the described activities of the Foundation involve only its own securities and the securities of New Church Ventures ("Ventures"). The Division does not deem the Foundation or its bona fide employees to be investment advisers with respect to activities involving the Foundation's own securities. With regard to Ventures, the Division has considered the special relationship between the Foundation and Ventures, including the historical, structural, and managerial aspects of that relationship. In view of the relationship, in addition to the fact that Ventures was created solely due to the Foundation's need under federal law for a separate entity to conduct certain business activities, the Division considers the activities of the Foundation that involve Ventures' securities to be the equivalent of the activities of the Foundation that involve its own securities for purposes of the Arizona Investment Management Act (the "Act"). However, should the relationship between the Foundation and Ventures be modified, then the Foundation and its employees may be required to become licensed under the Act before engaging further in activities involving Ventures' securities. Please note that the Division does not express any opinion with respect to your analysis of the "compensation" issue discussed in your letter dated July 21, 1994.

As this position is premised upon the facts set forth in your letters, it should not be relied upon for any other set of facts or by any other person. To the extent that the activities of the Foundation do not take place as set forth in your letter or a material change in circumstances causes your client to be deemed to be an "investment adviser" for purposes of the act, then the anti-fraud provisions will be applicable ab initio.

Baptist Foundation of Arizona
October 6, 1994
Page 2

We have attached a photocopy of your letters. By doing this we are able to avoid having to recite or summarize the facts set forth therein.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Dee R. Harris".

Dee R. Harris
Director of Securities

Enclosure

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I. DOUGLAS DUNIFACE



Jennings Strauss & Salmon

October 3, 1994

Via Hand Delivery

Jean Berry
Securities Division
Arizona Corporation Commission
1300 West Washington, Third Floor
Phoenix, AZ 85007

Re: Baptist Foundation of Arizona
Request for No Action Letter

Dear Jean:

This letter is a supplement to the request for no action letter submitted on behalf of the Baptist Foundation of Arizona ("BFA") on July 21, 1994 and supplemented by my letter of August 26, 1994. The primary purpose of this letter is to respond to questions raised by the Securities Division staff in our meeting on September 22, 1994 relating to the relationship of various entities mentioned in our previous correspondence.

BAPTIST FOUNDATION OF ARIZONA

As we have previously indicated, BFA is an Arizona non-profit corporation recognized as a 501(c)(3) charitable organization by the Internal Revenue Service. The purpose of BFA is to assist Southern Baptist causes through programs of financial stewardship that encourage church constituents to include Southern Baptist causes in their estate planning and to invest in various debt obligations of BFA. BFA, in turn, invests the funds it receives from the offering of its debt obligations in real property, mortgage loans and other investments which generate a higher rate of return than the interest rates on its debt obligations. BFA was created almost 50 years ago by the Arizona Southern Baptist Convention (the "Convention") and the members of the board of directors of BFA are elected by the Convention. BFA has a number of subsidiary entities which provide various services in connection with the overall BFA mission. These include Foundation Administrative Services, Inc. ("FAS") and The Foundation Companies, Inc. (formerly known as Foundation Development Corporation of "FDC").

As an additional stewardship service to its clients, BFA also serves as passive custodian of self-directed IRA accounts pursuant to a designation received from appropriate federal authorities in March 1983. Many of the IRA clients would like to assist Southern Baptist causes through their IRA investments just as they are able to do so with their direct investments with BFA. However, because BFA is serving as

custodian of these IRA accounts it is prohibited from holding BFA obligations in those accounts. Consequently, there was a need to find similar investment opportunities from a separate source. BFA explored the possibility that funds for the establishment of new Southern Baptist churches could be raised by encouraging Southern Baptists to invest their IRA funds in the securities of an entity that would then loan these funds for the establishment of new churches.

ARIZONA SOUTHERN BAPTIST NEW CHURCH VENTURES

As a result of the need identified above, Arizona Southern Baptist New Church Ventures, Inc. ("New Church Ventures") was incorporated in December 1984 as an Arizona nonprofit corporation. Its stated purpose from the outset has been to develop funds for the establishment of new churches. Since 1984, New Church Ventures has assisted new churches with loans for acquiring and developing church sites and buildings. This effort has supported the Metro/Genesis Church Project (the "Project") which was established by the Convention as a vehicle for assisting newly established local Southern Baptist churches to finance land acquisitions, buildings and other capital improvements. The Convention, not New Church Ventures, determines the criteria for participation by churches in the Project and no Project church may receive a loan from New Church Ventures without the concurrence of the Convention. Each borrowing church is required to demonstrate to the satisfaction of both the Convention and New Church Ventures that it has adequate resources to repay the loan or that it has access to permanent financing such as may be available through the Home Mission Board of the Southern Baptist Convention.

The Board of Directors of New Church Ventures is self perpetuating. None of the current six board members is directly associated with BFA although some have been members of the Board of Directors of BFA in the past. New Church Ventures has no staff of its own. The day to day activities of New Church Ventures are conducted by the staff of FAS pursuant to a Management Services Agreement. The availability of New Church Ventures debt obligations as possible IRA investments is made known primarily within the Southern Baptist community through direct mailings by New Church Ventures and by BFA. If a client of BFA directs that his IRA funds be invested in New Church Ventures debt obligations, a BFA Financial Services Representative will handle the paperwork to carry out that direction.

The Management Service Agreement for New Church Ventures was initially entered into with FDC. Later FAS was added to provide certain services. Today, all services are provided by FAS alone. The Management Service Agreement requires FAS to perform general management services for New Church Ventures, to provide marketing services for fund raising, to administer the church loan program and to render regular financial and other reports. Either party may terminate the Management Service Agreement upon 30 days written notice.


The Management Service Agreement between New Church Ventures and FAS was negotiated and is performed at arm's length. This is required because, as a wholly owned subsidiary of BFA, FAS is a "disqualified person" with respect to the self-directed IRAs for which BFA acts as passive custodian. Further, BFA has obtained an opinion that structuring the management arrangement in this fashion will avoid characterizing the investment by IRA holders in New Church Ventures debt securities as prohibited transaction under applicable federal laws.

Please note that in my letter to you of August 26, 1994, I erroneously described New Church Ventures as an "affiliate" of BFA. As you can see from the foregoing, there are a number of relationships involving both BFA (or one of its subsidiaries) and New Church Ventures, but BFA is not in a position to control New Church Ventures in the traditional securities law sense of an "affiliate."

I hope this further explanation will allow the Securities Division staff to recommend that neither BFA nor its Financial Services Representatives should be required to become licensed as investments advisers or investment adviser representatives. Please give me a call if you need anything else for the No Action Committee meeting on October 5.

Very truly yours,

JENNINGS, STROUSS & SALMON, P.L.C.

By 
I. Douglas Dunipace

xc: Baptist Foundation of Arizona

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I. DOUGLAS DUNIFACE



Jennings Strauss & Salmon

August 26, 1994

Jean Berry
Securities Division
Arizona Corporation Commission
1300 West Washington, Third Floor
Phoenix, AZ 85007

Re: Baptist Foundation of Arizona
Request for No Action Letter

Dear Jean:

I am responding to the matters raised in our telephone conversation earlier this week regarding the request for no action letter submitted on behalf of the Baptist Foundation of Arizona ("BFA") on July 21, 1994.

Before addressing the specific questions you asked, I need to clarify and amplify something which I simply overlooked when the initial request was submitted to the Securities Division. This oversight was my failure to point out that BFA has a religious non-profit affiliate, known as Arizona Southern Baptist New Church Ventures ("New Church Ventures"), which also issues debt securities (very similar to some of those offered by BFA) to raise funds for various Southern Baptist purposes including land acquisition and construction loans to Southern Baptist Churches. The primary difference in the "markets" for the securities of BFA and New Church Ventures is that the purchasers of New Church Ventures products are almost exclusively self-directed Individual Retirement Accounts. The activities of New Church Ventures and its relationship to BFA has been disclosed to the Securities Division staff in connection with other matters over the past several years but I neglected to mention it in my letter of July 21.

The potential significance of New Church Ventures to the issues now being considered by the staff is the fact that New Church Ventures has no employed staff and the availability of its debt securities is made known to potential investors through the BFA Financial Services Representatives. Neither BFA nor its Financial Services Representatives receives any commissions from the placement of New

Church Ventures debt securities. I believe that, after you have had an opportunity to review the supplemental materials enclosed with this letter, you will agree that the participation of BFA Financial Services Representatives in connection with sales of New Church Ventures securities does not material impact the essential facts upon which the request for no action is based.

Turning now to the questions you raised on the telephone:

(1) You are correct that I made a mistake in the third full paragraph on page 3 of the July 21 letter. The reference to "Investment Company Act" should be "Investment Advisers Act."

(2) I have confirmed that a substantial majority of the time of the Financial Services Representatives is devoted to following up on inquiries received by BFA (and New Church Ventures) with respect to the debt securities being offered.

(3) Enclosed are specimen packs of information typically sent in response to inquiries:

(a) Enclosure A, including the brochures, is a response to either a telephone call, a letter or a preprinted inquiry card.

(b) Enclosure B, including the brochures and reports, is a response to an inquiry generated from *DIVIDENDS* magazine which is published periodically by BFA.

(c) Enclosure C, including the brochures, is a response to an inquiry generated from the metroVISION newsletter which is published periodically by New Church Ventures.

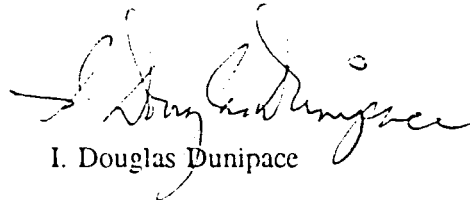
Also enclosed are samples of the current Offering Circulars, including supplements to some of the older Circulars, of both BFA and New Church Ventures which are sent in response to requests for specific information about a particular product. The Offering Circulars dated September 1, 1993 will be superseded by new Offering Circulars on or about September 1.

I hope this additional information is sufficient to answer all of your outstanding questions. If, however, there is anything else you need before the meeting of the No Action Committee in September, please give me a call.

Very truly yours,

JENNINGS, STROUSS & SALMON, P.L.C.

By



I. Douglas Dunipace

xc: Baptist Foundation of Arizona

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Jennings Strauss & Salmon

July 21, 1994

Richard M. Weinroth, General Counsel
Securities Division
Arizona Corporation Commission
1300 West Washington, Third Floor
Phoenix, AZ 85007

Re: Request for No Action Letter

Dear Richard:

At the suggestion of Matt Neubert, Assistant Director for Trading and Markets, I am submitting this letter requesting that the staff of the Securities Division concur with our opinions that (1) our client, Baptist Foundation of Arizona, an Arizona non-profit corporation ("BFA"), is not required to be licensed as an investment adviser under the Investment Management Act (the "Act") contained in Title 44, Chapter 13 of Arizona Revised Statutes ("ARS"), (2) certain employees of BFA are not required to be licensed as investment adviser representatives under the Act, and (3) those employees are not required to be licensed as investment advisers under the Act. Our opinions are based primarily upon the definitions contained in ARS § 44-3101 and also upon federal interpretations of similar provisions.

Factual Background

BFA is an Arizona non-profit corporation recognized as a 501(c)(3) charitable organization by the Internal Revenue Service. The purpose of BFA is to assist Southern Baptist causes through programs of financial stewardship that encourage church constituents to include Southern Baptist causes in their estate planning and to invest in various debt obligations of BFA. BFA, in turn, invests the funds it receives from the offering of its debt obligations in real property, mortgage loans (to Southern Baptist churches and others) and other investments which generate for it a higher rate of return than the interest rates on its debt obligations. After the payment of administrative expenses of BFA, funds representing proceeds of its investments are distributed by BFA to Southern Baptist related organizations such as Arizona Baptist Childrens' Services and Grand Canyon University. BFA has been in operation for almost 50 years.

The debt obligations issued by BFA vary as to interest rate, maturity date, presence or absence of collateral security, and availability of funds to the investor prior to maturity. The obligations are issued pursuant to offering circulars, copies of which are routinely provided to the staff of the Securities Division on an informational basis. Notice of each new offering of BFA debt obligations is filed with the Securities Division in compliance with ARS § 44-1843 B.

The availability of BFA debt obligation investments is made known to the Southern Baptist community by means of direct mail from BFA. Many of these mailed pieces provide a response card through which a person interested in more information is encouraged to contact BFA. A typical response card is enclosed as Exhibit A to this letter. As you can see, the response card does not suggest that any investment advice will be given by BFA.

When an inquiry is received by mail, it typically asks only that information regarding a certain investment product be sent. The requested information is mailed by one of the operational employees of BFA without any accompanying analysis or offer of investment advice. On a number of occasions, the prospective client will ask that a Financial Services Representative call or visit to explain the details of one or more of the BFA debt obligations. One of the several Financial Services Representatives will then respond to that request. Typically, if the person is still interested in the BFA obligations, the next communication to BFA is a letter and check from the client. BFA then processes the subscription and sends a confirmation to the investor. No step in this exchange of communications involves investment advice.

If an inquiry comes in by telephone, it is handled in one of the following ways depending on the nature of the inquiry. If the inquiry is simply asking for materials to be sent, the operational person receiving the call will assemble and send the requested materials. If the caller is asking for information such as current interest rates or differences in maturities of the BFA debt obligations, the operational person receiving the call will provide the requested information. If the caller wants a more detailed information about the BFA debt obligations, the operational person will refer the inquiry to one of the Financial Services Representatives for follow up. The Financial Services Representative contacts the person (usually by telephone), answers questions about the various debt obligations, and, if warranted by the conversation, causes a copy of one or more of the offering circulars to be sent to the person. At no time do the Financial Services Representatives attempt to give investment advice to anyone though they frequently are asked about the specific features of the various BFA debt obligations. Typically, if BFA has not heard back from a person within a few days after requested materials are sent or after a telephone call from a Financial Services Representative, one of the Financial Services Representatives will call the person to make certain the materials were received and to see if there are any other questions about the BFA debt obligations. If, at that time, the person appears to be interested in investing in one of the BFA obligations, the Financial Services Representative will encourage the person to act

upon that interest. In this respect, the responsibilities of the Financial Services Representative are very similar to those of a securities salesperson in a brokerage firm.

BFA necessarily keeps a record of the maturity dates of its outstanding obligations and the Financial Services Representatives do contact the holders of those obligations to remind them when the maturity is approaching and to see if they may wish to reinvest in BFA debt obligations. As with initial investments in BFA debt obligations, the Financial Services Representatives provide information about the types of obligations then available.

No commissions are charged or paid by anyone in connection with the offer and sale of the BFA debt obligations. Nor does the investor pay anything to BFA for any type of advice. The operational personnel and the Financial Services Representatives are all compensated by salary which is not tied, either directly or indirectly, to the number or amount of debt obligation investments by persons contacted. Rather, differentials in compensation are based upon such factors as time of service with BFA, quality of service provided to clients and the extent of supervisory and other duties with BFA. In other words, there is no transaction based compensation paid to the Financial Services Representatives or anyone else.

Neither BFA nor any of the Financial Services Representatives is currently registered as an investment advisor under the Investment Company Act of 1940. None of the Financial Services Representatives has recently taken a Series 2, 7 or 65 securities examination and none has a current registration as a securities salesman.

We have previously given our opinion to BFA and to the Securities Division staff that the debt obligations of BFA are securities but are exempt from the registration requirements of the Arizona Securities Act by virtue of the provisions of ARS § 44-1843 A(6). We have similarly rendered our opinion that BFA and the employees of BFA who are involved in the offer or sale of the BFA debt obligations, such as the Financial Services Representatives, are exempt from registration as dealers or salesmen under the Arizona Securities Act by virtue of the same provisions of ARS § 44-1843 A(6).

Discussion of Applicable Law

(1) BFA is not an investment adviser.

The Arizona definition of an "investment adviser" is found in ARS § 44-3101, as follows:

44-3101. Definitions

In this chapter, unless the context otherwise requires:

* * *

2. "Investment adviser" means any person who, for compensation, engages in the business of advising others * * * 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. Investment adviser includes * * * persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation [emphasis added].

As stated above, BFA receives no fee, commission or other compensation from either the clients who invest in BFA debt obligations nor from any third party source. Under the plain language of the definition, even if BFA were deemed to be providing some type of investment advisory services, there is no compensation involved and, therefore, BFA falls outside the definition of an investment advisor.

I perceive no basis for subjecting BFA to the licensing requirements of the Investment Management Act.

(2) Financial Services Representatives and other BFA employees are not investment adviser representatives.

The Arizona definition of an "investment adviser representative" is found in ARS § 44-3101 as follows:

44-3101. Definitions

In this chapter, unless the context otherwise requires:

* * *

3. "Investment adviser representative" means any * * * individual who is employed by or associated with an investment adviser * * * [emphasis added].

The Financial Services Representatives and operational personnel are employed by BFA. As established above, BFA does not fall within the definition of an investment adviser. Therefore, the Financial Services Representatives and other employees, no matter what activities they carry on, cannot be investment adviser representatives.

(3) Financial Services Representatives are not investment advisers.

As set forth under (1) above, the definition of an investment adviser in ARS § 44-3101 contains at least two elements, which are (i) engaging in or holding yourself out as engaging in the business of providing investment advisory services, and (ii) being compensated for such services. If either of these elements is absent, there is no investment adviser.

The Act itself does not provide a great deal of guidance on what constitute investment advisory services or what constitutes providing such services for compensation. The definitions are, however, virtually identical to the definitions contained in Section 202(a) of the federal Investment Advisers Act of 1940 (the "1940 Act"), and ARS § 44-3102 authorizes the use of federal interpretations of the 1940 Act to assist in interpreting the meaning of terms and phrases used in the Act. Much of the remaining legal analysis will be based upon such federal interpretations, especially SEC Investment Advisers Act, Release 1092 (Oct. 8, 1987).

(a) Business of investment advisory services.

The Act and the 1940 Act both include the following categories of activities within the concept of investment advisory services:

- (i) Advising others as to the value of securities;
- (ii) Advising others as to the advisability of investing in, purchasing or selling securities; or
- (iii) Issuing analyses or reports concerning securities.

Advising others as to the value of securities would seem to entail several possibilities such as an analysis of whether specific securities have a value equivalent to their market price, whether a securities market or market segment is likely to realize a gain or loss during a given period, and even whether a person would be better served by investing in some non-securities product such as insurance or real estate. See part II A 1 of Release 1092 cited above. The BFA Financial Services Representatives are not called upon nor do they provide any of these services. Therefore, their activities do not fall within category (i) above.

Clearly, nothing that the Financial Services Representatives do can be construed as issuing analyses or reports concerning securities so category (iii) is also not applicable in this context.

This leaves for consideration the question of whether the activities of the Financial Services Representatives may be deemed to constitute advising others as to the

advisability of investing in, purchasing or selling securities as contemplated by category (ii) above. It is the position of BFA that its Financial Services Representatives do not give any advice to clients or prospective clients as to whether they should buy, sell or otherwise invest in any securities, including the BFA debt obligations. We recognize, however, that "advice" is a less than precise word and that, under certain circumstances, someone may argue that simply describing the differences between the various BFA debt obligations could be stretched to constitute advice. Obviously BFA would dispute that conclusion, but we need to consider it a possibility.

Even if the type of activity engaged in by the Financial Services Representatives could be construed to include the giving of investment advice, we do not believe that the facts would support a finding that they are "engaged in the business" of providing investment advisory services. The SEC has acknowledged that whether someone is in the business of giving advice about securities depends on the specific facts. Under part II A 2 of Release 1092 cited above, those facts will be measured by a three part test as follows:

A person will be deemed to be "in the business" of providing advice if the person:

- (i) holds himself out as an investment adviser or one who provides investment advice; or
- (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 advice; or
- (iii) on anything other than rare, isolated and non-periodic instances, provides specific investment advice.

Applying the test to the Financial Services Representatives, the conclusion to be reached is that they are not "in the business" of providing investment advice. They do not hold themselves out as being investment advisers or as providing investment advice. They do not receive any separate or additional compensation representing a charge for providing advice about securities and they certainly do not receive transaction-based compensation. They do not provide specific investment advice.

(b) Compensation for investment advisory services.

While I trust that the foregoing arguments are sufficient to remove the Financial Services Representatives from the definition of investment advisers, I would be remiss if I did not also address the issue of compensation. Clearly, even if some of

Richard M. Weinroth, General Counsel

July 21, 1994

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the communications with clients and prospective clients could arguably be considered investment advice, the client pays nothing for that information. That cannot, therefore, be the source of any compensation to the Financial Services Representatives.

Release 1092 does state, in part II A 3, that it is not necessary for compensation to come from the person receiving advice, but only that the person giving the advice receive compensation from some source for that service. The release then gives some examples of third party payments, all of which are related to and directly measured by the purchase of a product (e.g. life insurance or securities) by the person receiving the advice. The BFA Financial Services Representatives are paid a salary which does not fluctuate based upon whether clients or prospective clients of BFA invest in BFA debt obligations. The Financial Services Representative is paid for dealing with all inquiries, whether or not they result in investments. Therefore, it is impossible to allocate, in any meaningful way, a portion of their compensation to any incidental investment advice.

Conclusion

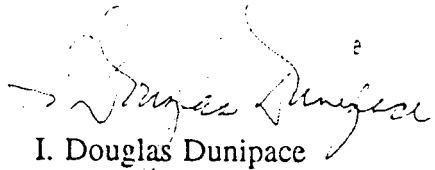
Based upon the language of the Act and the interpretations of the SEC related to the 1940 Act, it is our opinion that neither BFA nor its employees, including the Financial Services Representatives, are subject to the licensing requirements of the Act. We ask that the Securities Division concur in our opinions and analyses set forth in this letter and confirm that you will neither take nor recommend any enforcement action against either BFA nor any of its employees if they continue their present activities as described above.

Enclosed with this letter is a check for \$200 representing the Securities Division's fee for considering this request. Should you wish to discuss this letter prior to issuing your response or if you need additional information, please contact me at the address or telephone number indicated at the top of this letter.

Very truly yours,

JENNINGS, STROUSS & SALMON, P.L.C.

By


I. Douglas Dunipace

xc: Baptist Foundation of Arizona
Matthew J. Neubert