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

DIVISION OF
INVESTMENT MANAGEMENT

May 13, 1994

R. Bryan Stoker
Lifestyle Publishing
P.O. Box 355
Sykesville, MD 21784

IAA
Section 202(a)(11)(D) of IAA
Rule
Public
Availability 5/13/94

Dear Mr. Stoker:

Your letter dated April 2, 1994 has been forwarded to this Office for response. You state that you have authored and intend to publish a book that discusses general financial planning concepts and describes the different categories of mutual funds that are commonly available. You also plan to write a book about investing to plan for retirement. Finally, you state that you may become a certified financial planner. You ask whether any of these activities require that you register with the Commission under the Investment Advisers Act of 1940 ("Advisers Act").

Section 202(a)(11) of the Advisers Act 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 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." If a person's activities satisfy the elements of the definition, the person is required to register under the Advisers Act unless the person qualifies for an exception from the definition or is exempt from registration. 1/

First we address your plans to act as a publisher and author of the books you describe. Section 202(a)(11)(D) excludes from the definition of investment adviser, and thus from registration and regulation under the Advisers Act, the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation. In Lowe v. SEC, 2/ the United States Supreme Court interpreted the "publisher's exclusion" to include those persons whose publications offer impersonal investment advice to the general public on a regular basis. To qualify for the Section 202(a)(11)(D) exclusion, the Court stated that the publication must be:

1/ For example, Section 203(b) of the Advisers Act exempts from registration investment advisers who have fewer than 15 clients and do not hold themselves out to the public generally as investment advisers.

2/ 472 U.S. 181 (1985).

(1) of a general and impersonal nature, in that the advice provided is not attuned to any specific portfolio or any client's particular needs;

(2) "bona fide" or genuine; 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.

The staff generally declines to express an opinion on the availability of the publisher's exclusion because of the fact-specific analysis required to make this determination. 3/

The staff construes the definition of investment adviser not to include an author whose writings: (1) do not contain advisory information relating to specific securities or issuers; and (2) are not one of a series of publications that the author intends to update or supplement. 4/ The staff, as a general matter, declines to express an opinion on whether this exclusion is available to a particular author. 5/

Finally, you state that you may, in the future, become a certified financial planner. A financial planner generally meets the definition of investment adviser and thus is required to register under the Advisers Act, unless he or she is exempt from registration. In certain instances, however, financial planners can rely on the Act's exception for broker-dealers. 6/ Section 202(a)(11)(C) of the Advisers Act excepts from the definition of investment adviser any broker or dealer, including a registered representative of a broker-dealer, who performs investment advisory services that are incidental to the conduct of his or her broker-dealer business and who receives no special compensation for its advisory services. The broker-dealer exception is only available to a registered representative who provides investment advisory services to clients within the scope

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3/ <u>See</u>, <u>e.g.</u>, Independent Drug Wholesalers Group, Inc. (pub. avail. Apr. 16, 1992).

4/ <u>See</u> Investment Advisers Act Rel. No. 563 (Jan. 10, 1977).

5/ <u>See</u> Gilbert L. Delugach (pub. avail. Sept. 18, 1986).

6/ <u>See generally</u>, Advisers Act Rel. No. 1092 (Oct. 8, 1987) (discussing the applicability of the Advisers Act to financial planners) ("Release No. 1092").

of his or her employment with the broker-dealer. 7/ If a registered representative provides advice independent of, or separate from, his or her broker-dealer employer by establishing a separate financial planning service or otherwise, the person may not rely on the exception because his investment advisory business would not be subject to control by his or her broker-dealer employer. 8/ Therefore, if you act as a financial planner independently of your association with The Travelers, you may not rely on the broker-dealer exception.

I hope this information is helpful. If you have further questions, you may write or call this Office at (202) 942-8945.

Sincerely,

Jana M. Cayne

Jana M. Cayne
Attorney
Office of Chief Counsel

7/ See Nathan & Lewis Securities, Inc. (pub. avail. Apr. 3, 1988).

8/ Release No. 1092.

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Lifestyle Publishing P.O. Box 355, Sykesville, MD 21784

2 April 1994

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, DC 20549

SEC MAIL PROCESSING SECTION
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Subject: Request Guidance Regarding Investment Advisor Registration Applicability

Gentlemen:

This letter is a request for guidance regarding whether or not I have to become registered as an Investment Advisor. I have already reviewed your publications, *Investment Advisers Act of 1940* revised as of October 1991, and *Investment Adviser Registration Package* updated August 1993 and it is still not clear whether I need to register as an investment advisor in my particular situation.

I currently work full-time as a senior electronics engineer for the Defense Department of the U.S. Government. Recently, I also joined *Primerica Financial Services (PFS)* as a part-time representative. PFS is a subsidiary of *Primerica Corporation* (which recently changed its name to *The Travelers* upon buying the company previously holding that name). I have taken and passed the series 6 and 63 exams. My primary involvement with securities will be in assisting clients with personal financial management including recommending and selling mutual funds marketed by PFS. I understand that under this arrangement, I do not need to be registered as an Investment Advisor.

My question arises from the fact that prior to joining *Primerica Financial Services* (PFS), I started a sole proprietorship publishing company called *Lifestyle Publishing*; *Lifestyle Publishing* is, and will continue to be, completely separate from my activities with PFS. Therefore, I do not believe I am excluded as "any broker or dealer whose performance ... is solely incidental to the practice of his profession." I understand that the Investment Advisers Act of 1940 (IAA of 1940) excludes "publishers" from the definition of an Investment Adviser. However, I also authored the first book I intend to publish; this book is called *Financial Freedom*.

Financial Freedom is a non-periodical publication for which I will only receive the profit from the sale of the book (i.e., no additional advice will be provided, and no additional compensation will be received in connection with the book). *Financial Freedom* primarily discusses general financial planning concepts with no specific securities recommendations. The only part of the book that discusses securities or "the advisability of investing in securities" is a general discussion of the types of mutual funds (e.g., growth, aggressive growth, income, balanced, etc.), a brief discussion of what mutual funds are, and that the reader may want to investigate them further. I have attached the portion of the book that discusses mutual funds for your reference. Does this book fall under the "advisability of investing in securities" definition provided in the IAA of 1940? Considering that I do plan to write additional books in the future, does this book fall within the scope of "engaging in the business of advising others" as defined in the IAA of 1940? I do not intend to "hold myself out generally to the public as an investment adviser" in connection with *Lifestyle Publishing*; my only involvement with the public, other than to sell books, will be as a representative for *Primerica Financial Services*.

In the future, I plan to write another book that will discuss retirement and investing to prepare for retirement. This book will discuss investment strategies including asset allocation among mutual fund types as well as how to select those funds; no specific funds will be recommended. This book will also discuss investing in Keogh plans, IRAs, and pension plans. Do I need to be registered as an investment adviser for authoring and publishing such a book?

My first book, *Financial Freedom*, is about to go to printing and my official publication date is registered as June 1994. I do not really feel that I have to be registered as an investment adviser for my first book, *Financial Freedom*, under the intent of the IAA of 1940. However, if you decide that my first book does fall under the auspices of the IAA of 1940, I will have to hold up the printing and publication schedule until I become registered. However, if you decide that I should be registered due to the second book I intend to write, and not for the first book I have already written, please indicate this so I can go ahead with my current publication schedule.

Finally, I am also considering becoming a Certified Financial Planner or Chartered Financial Consultant a few years from now. If I do pursue one of the certifications and begin working in that capacity, will I need to be registered as an investment adviser at that time.

Thank you for time and interest.

Sincerely,

R. Bryan Stoker

R. Bryan Stoker

Encl. (1)

Extraction from Chapter 5:

Since there is a good chance you will never have to pull out more than one month's worth of expenses from your emergency reserves, you may want your money to work even harder for you by investing in other vehicles with potentially higher returns. A good example of this type of investment would be no-load mutual funds (discussed in appendix F). Whether you decide to go for higher returns or not depends on how comfortable you are with the slightly higher risk. Regardless of what you decide, you will probably want to put your first month's worth of emergency reserves in a money market account for safety and maximum liquidity.

Appendix F - Investing in Mutual Funds

This appendix is provided to give you an idea of what mutual funds are and the mechanics of purchasing shares in a mutual fund. This appendix will not go into depth on mutual funds and how to pick the right funds for you; entire books have been dedicated to that topic. In fact, three of them have been listed in the references in appendix M.

Before discussing how to invest in mutual funds, you need to know what a mutual fund is. When multiple investors pool their money together to invest in stocks, bonds, real estate, gold, etc. via an account managed by a professional investment manager, they have created a mutual fund. Investors buy shares in the securities owned by the fund just like buying stock shares of a company. The big difference between shares of stock and shares of a mutual fund is when you own a mutual fund share, you actually own a fraction of all the shares owned by the fund. For example, if you bought one share of a mutual fund that invested in McDonalds, IBM, and Centerior Energy, you would actually own a fraction of a share of stock in McDonalds, IBM, and Centerior Energy. Therefore, by the nature of mutual funds, you are automatically diversified when you own shares in a mutual fund.

You can buy and sell shares of a mutual fund at any time just like you can with stock. However, some funds have one or more of the following types of fees: sales loads, redemption loads, and *12b-1* fees. Some of these fees go as high as 8.5% of your initial investment. A sales load is effectively a commission you pay when you buy shares in a mutual fund. For example, if a fund has a 2% sales load and you invest $1,000, you will pay a fee of $20, and only $980 will be invested. A redemption fee is effectively a commission you pay when you sell shares in a mutual fund. For example, assume you bought $1,000 worth of shares in a mutual fund with a 4% redemption fee. If your $1,000 investment went up to $3,000 over the time you owned the shares, you would get back $2,880 if you sold your shares (i.e., all but $120). A fund that has a sales fee or redemption fee is considered to be a "Load Fund." "No Load" funds, legally speaking, do not have sales loads or redemption loads. However, some funds have 12b-1 fees to cover advertising costs, etc. 12b-1 fees are often called "hidden loads."

There are several categories of mutual funds in which you may invest. These categories are briefly discussed below. *The Individual Investor's Guide to No-Load Mutual Funds*, by the American Association of Individual Investors provides a much more detailed discussion of these categories as well as systematic methods of selecting funds.

* Aggressive Growth Funds:
  Objective - Aggressive growth funds typically invest in common stocks to achieve maximum capital gains. These funds may also engage in speculative leveraging and options.
  Risk - Aggressive growth funds are considered very high risk in the short term; large price swings are expected.

Profit Potential - If you can afford to remain invested for years, this type of fund generally provides the highest profit potential of all fund types.

* Growth Funds
  Objective - Growth funds typically invest in larger, growth-oriented companies to achieve long-term capital growth. These funds normally do not engage in speculative leveraging.
  Risk - Growth funds are generally considered medium to high risk, but not as high risk as aggressive growth funds.
  Profit Potential - The return for this type of fund typically tracks the overall market growth.

* Growth and Income Funds
  Objective - Growth and income funds typically invest in common stocks for growth as well as income-generating securities. There goal is to offer long-term growth along with current income.
  Risk - This type of fund is typically considered less risky than growth funds because of the current income feature.
  Profit Potential - The profit potential of growth and income funds is good, typically middle of the

  road. The decrease in long-term growth with respect to growth funds is offset by the short-term income.

* Balanced Funds
  Balanced funds are also called equity-income, income, and total-return funds.
  Objective - Balanced funds invest in both common stocks and bonds. Similar to growth and income funds, balanced funds have some potential for long-term growth and higher short-term income.
  Risk - Balanced funds are considered to have medium to low risk like "growth and income" funds.
  Profit Potential - Balanced funds have about the same profit potential as "growth and income" funds.

* Bond Funds
  Objective - Bond funds invest in bonds to generate current income. Tax-exempt bond funds also exist to generate tax-free income.
  Risk - Bond funds typically range from very low risk (for Government security bond funds) to high risk (for low-rated corporate and municipal bond funds; these funds typically have "high-yield" in their name).
  Profit Potential - Bond funds typically have lower profit potential than stock funds.

* International Funds
  Objective - International funds invest in foreign stocks and bonds to counteract slumps in the U.S. economy and to take advantage of booms in foreign economies.
  Risk - The risk level of international funds varies significantly from fund to fund depending on location, geographical diversity, strength of the American dollar, and foreign politics.
  Profit Potential - International funds have the potential for high gain as well as high loss.

* Other Funds
  Objective - There are many other types of funds including precious metal funds (e.g., gold funds, silver funds, etc.) and sector funds which invest in single areas of business (e.g., health companies, leisure companies, financial companies, and high technology companies).

Risk - The risk for such funds varies tremendously from fund to fund, but it is generally considered very high at least for sector funds.

Profit Potential - For sector funds, the profit potential is very high. You can make a lot of money if you happen to be invested in the right industry at the right time. Similarly, you can lose a lot of money or not earn anything at all in these types of funds over the short term.

How to Buy a Mutual Fund:

The mechanics of buying shares in a fund is fairly easy. There is no need to pay a broker a commission to buy one for you if you know which fund you want to buy. Just look at the advertisements or fund listings in the financial magazines such as *Money, Kiplinger's Personal Finance, Fortune,* or *Your Money.* These advertisements and listings usually list an "800" number for the fund. Just call the "800" number and ask for a "prospectus." The prospectus describes the objectives, rules, and past performance of the fund. When you receive the prospectus, read it carefully to verify that it corresponds to your personal goals and desired level of risk. Specifically, look for the following:

* Sales Loads
* Redemption Loads
* 12b-1 Fees
* Expense Ratios
* Investment Objectives
* Past performance results
* Minimum initial investment
* Automatic investment programs

As previously mentioned, it is recommended that you refer to some of the books listed in appendix M before investing in mutual funds. The following guidelines are presented to help you get started:

* Carefully consider the following types of fees:
    - Sales Load
    - Redemption Load
    - 12b-1 fees
    - Management fees

  If you are a short-term investor, the one-time fees will have more impact on your investment. If you are a long-term investor, the annual fees will typically have a larger impact on your investment.
* Look for a decent performance when annualized over the past three to five years. Consistent growth in performance over the past three to five years or more is considered excellent.
* You may also want to consider automatic monthly investing. Most funds offer this program. What the program allows you do to do is automatically invest $50 or $100 (or however much you want above the stated minimum) every month on the same day. Automatic investing makes use of a concept known as "dollar cost averaging," and it can increase your long-term return by a percentage point or so. The idea is as follows: one month, the share price may be high, so you will buy fewer shares with your $50 investment. The next month, the share price may be lower allowing your $50 to buy more shares. The net effect of this concept is that you automatically buy more shares when they are lower priced which is the basis of "Buy low, sell high."

Once you have decided which fund, or funds, you want to buy, simply complete the application (you will receive an application with the prospectus), and send it along with a check for the minimum initial investment or more to the company. That is all there is to it.

How to Select Mutual Funds:

The above guidelines discuss the mechanics of buying shares of a mutual fund. Proper selection of mutual funds is a topic that requires a book of its own. The best book I have found on the selection of mutual funds is *Mutual Fund Wealthbuilder* by Michael Hirsch. I

highly recommend that you refer to this book prior to investing a mutual fund for guidelines on desirable and undesirable features in a mutual funds.

If you do not want to research mutual fund investing, then you may want to consider selecting a money market account if you do not like risk. If you are willing to accept a bit more risk, then consider "Balanced Funds" with good performance over the last three years. Also, make sure the fund still has the same manager it had over each of the past three years. You can determine the three years of performance and the manager information by calling the fund's 800 number and asking them.