

Investment Advisers Act of 1940 – Section 206(4) and Rule 206(4)-3
Emanuel J. Friedman; EJF Capital LLC

January 16, 2007

Our Ref. No.:

200612181447

EJF Capital, Inc.

Mr. Emanuel J. Friedman

File No. 801-65725

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

We would not recommend enforcement action to the United States Securities and Exchange Commission ("Commission") under Section 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-3 thereunder if any investment adviser that is required to be registered pursuant to Section 203 of the Advisers Act pays to Mr. Emanuel J. Friedman, or EJF Capital, Inc. ("EJF"), a cash solicitation fee, directly or indirectly, for the solicitation of advisory clients in accordance with Rule 206(4)-3,¹ notwithstanding an injunctive order issued by the United States District Court for the District of Columbia² (the "Disqualifying Order") that otherwise would preclude such an investment adviser from paying such a fee, directly or indirectly, to Mr. Friedman.³

Our position is based on the facts and representations in your letter dated January 16, 2007,⁴ particularly the representations of Mr. Friedman and EJF that:

1. they will conduct any cash solicitation arrangement entered into with any investment adviser required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 except for the

¹ Rule 206(4)-3 prohibits any investment adviser that is required to be registered under the Advisers Act from paying a cash fee, directly or indirectly, to any solicitor with respect to solicitation activities if, among other things, the solicitor is subject to an order, judgment, or decree described in Section 203(e)(4) of the Advisers Act.

² *Securities and Exchange Commission v. Friedman, Billings, Ramsey Inc.*, No. 06-CV-02160 (D. D.C. Dec. 22, 2006).

³ You note that Mr. Friedman is also subject to an administrative order that bars him from serving with any broker-dealer in a supervisory position. See *In re Emanuel J. Friedman*, SEC Rel. No. 34-55104 (Jan. 12, 2007). As a consequence, Mr. Friedman is unable to avail himself of the no-action position set forth in *Dougherty & Co.* (pub. avail. July 3, 2003).

⁴ As supplemented by the telephone conversation between Eric S. Purple of the staff and Kevin P. McEnery of Wilmer Cutler Pickering Hale and Dorr LLP, counsel to Emanuel J. Friedman, on January 16, 2007.

investment adviser's payment of cash solicitation fees, directly or indirectly, to Mr. Friedman, who is subject to the Disqualifying Order;

2. Mr. Friedman will comply with the terms of the Disqualifying Order, including, but not limited to, the payment of civil money penalties;
3. for ten years from the date of the entry of the Disqualifying Order, Mr. Friedman, EJF, or any investment adviser with whom either of them has a solicitation arrangement subject to Rule 206(4)-3 will disclose the Disqualifying Order in a written document that is delivered to each person whom Mr. Friedman or EJF solicits (a) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser or (b) at the time the person enters into such a contract, if the person has the right to terminate such contract without penalty within 5 business days after entering into the contract.

Our position also is based on your representation that neither Mr. Friedman, nor EJF, is currently engaged in any cash solicitation activities that are subject to Rule 206(4)-3. This position applies only to the Disqualifying Order and not to any other basis for disqualification under Rule 206(4)-3 that may exist or arise with respect to Mr. Friedman or EJF.

Eric S. Purple
Senior Counsel

INCOMING LETTER:

January 16, 2007

By E-mail and First Class Mail

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Friedman, Billings, Ramsey & Company, Inc. (P-00966-A)

Dear Mr. Scheidt:

We submit this letter on behalf of our clients, Emanuel J. Friedman and EJV Capital LLC ("EJV Capital"), in connection with a settlement agreement (the "Settlement") by Mr. Friedman arising out of the above referenced investigation by the Securities and Exchange Commission (the "Commission") of the following allegations: That broker-dealer Friedman, Billings, Ramsey & Co., Inc. ("FBR"), in connection with a PIPE offering by CompuDyne Corporation, failed to establish, maintain and enforce policies and procedures reasonably designed to prevent the use of material, nonpublic information and, in violation of the antifraud provisions of the federal securities laws, improperly traded CompuDyne stock in its market-making account while aware of material, nonpublic information concerning the CompuDyne PIPE offering. The Complaint also alleged that FBR engaged in unregistered sales of CompuDyne securities. The Complaint further alleged that Mr. Friedman engaged in unregistered sales of securities in violation of Securities Act Section 5 and his other violations flowed from his controlling person status. Mr. Friedman currently is the chief executive officer and the majority shareholder of EJV Capital, an investment adviser registered with the Commission because it has assets under management of \$25 million or more.

Mr. Friedman and EJV Capital seek the assurance of the staff of the Division of Investment Management ("Staff") that it would not recommend any enforcement action to the Commission under Section 206(4) of the Advisers Act, or Rule 206(4)-3 thereunder (the "Rule"), if an investment adviser pays Mr. Friedman or EJV Capital a cash payment for the solicitation of advisory clients, notwithstanding the existence of the Final Judgment (as defined below) entered against Mr. Friedman. While the Final Judgment does not operate to prohibit or suspend Mr. Friedman or any associated person from acting as or being associated with an investment adviser and does not relate to solicitation activities on behalf of any investment adviser, the Final Judgment may affect the ability of Mr. Friedman and EJV Capital to receive such payments. The Staff in other instances has granted no-action relief under the Rule in similar circumstances.

BACKGROUND

The Commission Staff engaged in settlement discussions with Mr. Friedman in connection with the above-described investigation. The discussions resulted in an agreed upon settlement, and the Commission filed a complaint (the "Complaint") against Mr. Friedman, along with several other defendants, in the United States District Court for the District of Columbia (the "District Court") in a civil action captioned Securities and Exchange Commission v. Friedman, Billings, Ramsey & Co., Inc., et al., Civil Action No. 06-CV-02160 (D.D.C.) (the "Action"). Mr. Friedman executed a Consent of Defendant Emanuel J. Friedman (the "Consent"), in which Mr. Friedman neither admitted nor denied the allegations in the Complaint, except as to personal and subject matter jurisdiction, which he admitted, and consented to the entry of a final judgment against him by the District Court (the "Final Judgment"). As negotiated by the parties, the Final Judgment, among other things, enjoined Mr. Friedman from violating

Securities Act Section 5 and, as a controlling person, from violating Exchange Act Sections 15(f) and 10(b), and Rule 10b-5 thereunder. Additionally, the Final Judgment required that Mr. Friedman pay civil penalties pursuant to Section 20(d) of the Securities Act and Sections 21(d) and 21A of the Exchange Act.⁵ Mr. Friedman and EJV Capital currently are not engaged in any cash solicitation activities that are subject to Rule 206(4)-3.

EFFECT OF RULE 206(4)-3

The Rule prohibits an investment adviser from paying a cash fee to any solicitor that has been temporarily or permanently enjoined by an order, judgment, or decree of a court of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security. Entry of the Final Judgment could cause Mr. Friedman or EJV Capital to be disqualified under the Rule, and accordingly, absent no-action relief, Mr. Friedman and EJV Capital may be unable to receive cash payments for the solicitation of advisory clients.

DISCUSSION

In the release adopting the Rule, the Commission stated that it “would entertain, and be prepared to grant in appropriate circumstances, requests for permission to engage as a solicitor a person subject to a statutory bar.”⁶ We respectfully submit that the circumstances present in this case are precisely the sort that warrant a grant of no-action relief.

The Rule’s proposing and adopting releases explain the Commission’s purpose in including the disqualification provisions in the Rule. The purpose was to prevent an investment adviser from hiring as a solicitor a person whom the adviser was not permitted to hire as an employee, thus doing indirectly what the adviser could not do directly. In the proposing release, the Commission stated that:

[b]ecause it would be inappropriate for an investment adviser to be permitted to employ indirectly, as a solicitor, someone whom it might not be able to hire as an employee, the Rule prohibits payment of a referral fee to someone who . . . has engaged in any of the conduct set forth in Section 203(e) of the [Advisers] Act . . . and therefore could be the subject of a Commission order barring or suspending the right of such person to be associated with an investment adviser.⁷

The Final Judgment formally does not bar, suspend, or limit Mr. Friedman or any person currently associated with him from acting in any capacity relating to advisory activities under the federal securities laws.⁸ Mr. Friedman has

⁵ As part of the overall settlement, Mr. Friedman also submitted an Offer of Settlement of Emanuel J. Friedman (the “Offer”) that was presented to the Commission. In the Offer, solely for the purposes of proceedings brought by or on behalf of the Commission or in which the Commission is a party, Mr. Friedman consented to the entry of an Order Instituting Administrative Proceedings Pursuant to Section 15(b)(6) of the Securities Exchange Act of 1934, Making Findings, and Imposing Remedial Sanctions (the “Order”) and admitted to the jurisdiction of the Commission, without admitting or denying the findings contained in the Order (other than those relating to the entry of the Final Judgment pursuant to Mr. Friedman’s consent). The Order was issued on January 12, 2007. In the Matter of Emanuel J. Friedman, Admin. Proc. File No. 3-12537. Based on the findings, the Order barred Mr. Friedman from association in a supervisory capacity with any broker-dealer, with the right to reapply for such association after two years to the appropriate self-regulatory organization, or if there is none, to the Commission. The Order does not contain any finding by the Commission that Mr. Friedman has willfully violated, or has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of, any provision of the federal securities laws. As such, the Order does not disqualify Mr. Friedman or EJV Capital from receiving cash solicitation fees under Advisers Act Rule 206(4)-3(a)(1)(ii)(C), and thus Mr. Friedman and EJV Capital are not required to request no-action relief in this letter because of the Order.

⁶ See Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 688 (July 12, 1979), 17 S.E.C. Docket (CCH) 1293, 1295, at note 10.

⁷ See Requirements Governing Payments of Cash Referral Fees by Investment Advisers, Inv. Adv. Act Rel. No. 615 (Feb. 2, 1978), 14 S.E.C. Docket (CCH) 89, 91.

⁸ It is true that Section 9(a) of the Investment Company Act of 1940 provides, in pertinent part, that a person may not serve or act as, among other things, an investment adviser of any investment company registered under the Company Act or a principal underwriter for any registered open-end investment company if that person, by reason

(Footnote Continued...)

not been sanctioned for activities relating to conduct as an investment adviser or relating to solicitation of advisory clients.⁹ Mr. Friedman's conduct addressed in the Final Judgment does not pertain to advisory activities. Accordingly, consistent with the Commission's reasoning, there does not appear to be any reason to prohibit an adviser from paying Mr. Friedman or EJF Capital for engaging in solicitation activities under the Rule.

In addition, the need for the relief is not theoretical or speculative but instead is concrete. It is highly likely at some point in the near future that Mr. Friedman himself, or indirectly through EJF Capital, would solicit clients for other investment advisers.

The Staff previously has granted numerous requests for no-action relief from the disqualification provisions of the Rule to individuals and entities found by the Commission to have violated a wide range of federal securities laws and rules thereunder or permanently enjoined by courts of competent jurisdiction from engaging in or continuing any conduct or practice in connection with the purchase or sale of any security.¹⁰ The letters in which no-action relief was granted to Hickory Capital Management, Inc. and to Ramius Capital Management LLC are particularly on point.¹¹

of any misconduct, is permanently or temporarily enjoined from acting, among other things, as an underwriter, broker, dealer or investment adviser, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

The entry of the Final Judgment, absent the issuance of an order by the Commission pursuant to Section 9(c) of the Company Act that exempts Mr. Friedman from the provisions of Section 9(a) of the Company Act, effectively would prohibit Mr. Friedman and associated persons from serving or acting in any of the prohibited capacities. As of the date of this letter, neither Mr. Friedman nor any associated persons serve or act in any of the Section 9(a) prohibited capacities, and Mr. Friedman and associated persons will not do so unless and until the Commission issues an order pursuant to Section 9(c) of the Company Act that exempts Mr. Friedman from the provisions of Section 9(a) of the Investment Company Act as a result of the Final Judgment.

⁹ Mr. Friedman additionally notes that he has not violated, or aided and abetted another person in violating, the cash solicitation rule.

¹⁰ See, e.g., *Millenium Partners, L.P., et al.*, SEC No-Action Letter (pub. avail. Mar. 9, 2006) (no-action request and relief encompassed natural persons); *American International Group, Inc.*, SEC No-Action Letter (pub. avail. Feb. 21, 2006); *CIBC Mellon Trust Company*, SEC No-Action Letter (pub. avail. Feb. 24, 2005); *Goldman, Sachs & Co.*, SEC No-Action Letter (pub. avail. Feb. 23, 2005); *Morgan Stanley & Co. Incorporated*, SEC No-Action Letter (pub. avail. Feb. 4, 2005); *American International Group, Inc.*, SEC No-Action Letter (pub. avail. Dec. 8, 2004); *James DeYoung*, SEC No-Action Letter (pub. avail. Oct. 24, 2003) (relief given to natural person); *Stephens Inc.*, SEC No-Action Letter (pub. avail. Dec. 27, 2001); *Prime Advisors, Inc.*, SEC No-Action Letter (pub. avail. Nov. 8, 2001); *Legg Mason Wood Walker, Inc.*, SEC No-Action Letter (pub. avail. June 11, 2001); *Dreyfus Corp.*, SEC No-Action Letter (pub. avail. March 9, 2001); *Prudential Securities Inc.*, SEC No-Action Letter (pub. avail. Feb. 7, 2001); *Tucker Anthony Inc.*, SEC No-Action Letter (pub. avail. Dec. 21, 2000); *J.B. Hanauer & Co.*, SEC No-Action Letter (pub. avail. Dec. 12, 2000); *Founders Asset Management LLC*, SEC No-Action Letter (pub. avail. Nov. 8, 2000); *Credit Suisse First Boston Corp.*, SEC No-Action Letter (pub. avail. Aug. 24, 2000); *Janney Montgomery Scott LLC*, SEC No-Action Letter (pub. avail. July 18, 2000); *Aeltus Investment Management, Inc.*, SEC No-Action Letter (pub. avail. July 17, 2000); *Paul Laude, CFP*, SEC No-Action Letter (pub. avail. June 22, 2000) (relief given to natural person); *William R. Hough & Co.*, SEC No-Action Letter (pub. avail. Apr. 13, 2000); *In the Matter of Certain Municipal Bond Refundings*, SEC No-Action Letter (pub. avail. Apr. 13, 2000); *In the Matter of Certain Market Making Activities on Nasdaq*, SEC No-Action Letter (pub. avail. Jan. 11, 1999); *Paine Webber, Inc.*, SEC No-Action Letter (pub. avail. Dec. 22, 1998); *NationsBanc Investments, Inc.*, SEC No-Action Letter (pub. avail. May 6, 1998); *Morgan Keegan & Co., Inc.*, SEC No-Action Letter (pub. avail. Jan. 9, 1998); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, SEC No-Action Letter (pub. avail. Aug. 7, 1997); *Gruntal & Co.*, SEC No-Action Letter (pub. avail. July 17, 1996); *Salomon Brothers Inc.*, SEC No-Action Letter (pub. avail. Jan. 26, 1994); *BT Securities Corporation*, SEC No-Action Letter (pub. avail. Mar. 30, 1992); *Kidder Peabody & Co. Inc.*, SEC No-Action Letter (Oct. 11, 1990); *First City Capital Corp.*, SEC No-Action Letter (pub. avail. Feb. 9, 1990); *RNC Capital Management Co.*, SEC No-Action Letter (pub. avail. Feb. 7, 1989); and *Stein Roe & Farnham, Inc.*, SEC No-Action Letter (pub. avail. Aug. 25, 1988).

¹¹ *Ramius Capital Management, LLC*, SEC No-Action Letter (pub. Avail. Apr. 5, 1996); and *Hickory Capital Management Inc.*, SEC No-Action Letter (pub. Avail. Feb. 11, 1993)

UNDERTAKINGS

In connection with this request, Mr. Friedman and/or EJF Capital, as long as it continues to be associated with Mr. Friedman, undertake:

1. to conduct any cash solicitation arrangement entered into with any investment adviser required to be registered under Section 203 of the Advisers Act in compliance with the terms of Rule 206(4)-3 except for the investment adviser's payment of cash solicitation fees to Mr. Friedman who is subject to the Final Judgment;
2. to comply with the terms of the Final Judgment, including, but not limited to, the payment of civil penalties; and
3. that for ten years from the date of the entry of the Final Judgment, Mr. Friedman, EJF Capital, or any investment adviser with whom either of them have a solicitation arrangement subject to Rule 206(4)-3 will disclose the Final Judgment in a written document that is delivered to each person whom Mr. Friedman or EJF Capital solicit (a) not less than 48 hours before the person enters into a written or oral investment advisory contract with the investment adviser or (b) at the time the person enters into such a contract, if the person has the right to terminate such contract without penalty within 5 business days after entering into the contract.

CONCLUSION

We respectfully request the Staff to advise us that it will not recommend enforcement action to the Commission if an investment adviser that is required to be registered with the Commission pays Mr. Friedman or EJF Capital a cash payment for the solicitation of advisory clients, notwithstanding the Final Judgment.

Please do not hesitate to call me at (202) 663-6596 regarding this request.

Very truly yours,

Kevin McEnery