PUBLIC

12 OCT 1994

Our Ref. No. 94-570-CC
Dana Investment
Advisors, Inc.
File No. 801-14828

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter of October 12, 1994 requests assurance that we would not recommend enforcement action to the Commission if Washington Hospital Services, Inc. ("WHS") proceeds as described in your letter without WHS or its employees registering as investment advisers under section 203 of the Investment Advisers Act of 1940 ("Advisers Act") or proceeding under rule 206(4)-3 thereunder. You also request assurance from the Division of Market Regulation that it would not recommend enforcement action to the Commission under section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if WHS proceeds as described in your letter without WHS or its employees registering as broker-dealers under section 15(b) of the Exchange Act.

Dana Investment Advisors, Incorporated ("Dana"), a registered investment adviser, intends to organize a private investment fund (the "Partnership") that will be structured as a limited partnership under Wisconsin law. The Partnership will not be registered under the Investment Company Act of 1940 ("Investment Company Act") in reliance on section 3(c)(1) thereunder.[1] Dana will be the Fund's general partner and investment adviser.

Limited partnership interests ("Units") in the Partnership will be offered only to private hospitals that are members of the Washington State Hospital Association, a not-for-profit corporation (the "Association") and certain qualifying affiliates (the hospitals and their affiliates are collectively referred to as the "Qualifying Hospitals"). Units will be offered and sold in private transactions pursuant to Regulation D under the Securities Act of 1933 ("1933 Act") and rule 506 thereunder.[2]

The Association, through its wholly-owned subsidiary WHS, proposes to enter into an agreement (the "Agreement") with the Partnership under which WHS will disseminate information about the Partnership's existence to members of the Association eligible to invest in the Partnership, and introduce Dana to such members. WHS will:

(1) provide Dana with certain public financial information about the Qualifying Hospitals,

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[1] Section 3(c)(1) generally provides that any issuer whose outstanding securities are owned by not more than one hundred persons and which is not making and does not presently propose to make a public offering of its securities is excepted from the definition of an investment company.

[2] You have not asked, and we express no opinion on, whether the dissemination of information as proposed is consistent with the requirements of Regulation D under the 1933 Act, rule 506 thereunder, or the "no public offering" prohibition of section 3(c)(1) of the Investment Company Act.

(2) request that Qualifying Hospitals fill out questionnaires eliciting basic financial information,

(3) provide the Partnership with the names and addresses of Qualifying Hospitals,

(4) personally introduce the appropriate officer of each Qualifying Hospital to representatives of Dana,

(5) disseminate to Qualifying Hospitals general information about the existence of the Partnership through direct mailings, announcements in periodic newsletters, and brochures, and

(6) permit representatives of Dana who will be offering and selling Units to rent a booth at the exhibit hall at the Association's annual meeting to distribute the Partnership's offering memorandum and sales literature and to discuss the Partnership with Qualifying Hospitals.

The Partnership will pay WHS a fee (the "Fee") of up to .07% per annum of Partnership assets for WHS' services.

Investment Adviser Registration:

Section 202(a)(11) of the Advisers Act defines an investment adviser as one who, for compensation, engages in the business of advising others, either directly or through publications or writings, 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. You state that WHS and its employees will not be acting as investment advisers. Specifically, you represent that the Agreement prohibits WHS and its employees from, among other things:

(1) discussing with any person the advantages or disadvantages of investments in general or of any particular investment, including an investment in the Partnership,

(2) valuing, advising or recommending any investment, including an investment in the Partnership,

(3) providing investment analyses, investment formulas or investment guidelines,

(4) holding themselves out as investment advisers or persons who provide investment advice,

(5) describing, recommending or endorsing Dana's services as general partner of the Partnership or as the Partnership's investment adviser, or

(6) otherwise giving investment advice.

Furthermore, you state that WHS will not endorse or recommend participation in the Partnership, will not perform any services with respect to actual investment by Qualifying Hospitals, and will have no role in advising the Partnership.

Based on the facts and representations in your letter, we would not recommend enforcement action to the Commission if WHS or its employees engage in the proposed arrangement without registering as investment advisers under section 203 of the Advisers Act. Any different facts or representations may require a different conclusion. Moreover, this response expresses the Division's position on enforcement action only and does not express any legal conclusions on the issues presented.

Rule 206(4)-3:

You also request assurance that we would not recommend enforcement action to the Commission if WHS or its employees proceed under the Agreement without complying with rule 206(4)-3 under the Advisers Act. Rule 206(4)-3 prohibits any investment adviser from paying a cash fee, directly or indirectly, to a "solicitor" with respect to solicitation activities unless certain disclosures regarding the solicitor's relationship with the investment adviser are made. "Solicitor" is defined under rule 206(4)-3 to mean "any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser."

You state that Dana will act as investment adviser to the Partnership under an agreement with the Partnership, and that Dana's advisory client will be the Partnership, rather than the Qualifying Hospitals. You maintain that, as a result, WHS will not be "soliciting" clients for Dana by introducing Dana or bringing the existence of the Partnership to the attention of Qualifying Hospitals. You also point out that WHS will be paid by the Partnership rather than directly by Dana. Therefore, you conclude that no policy would be served by deeming WHS a solicitor.

In our view, the proposed arrangement raises precisely the type of concerns that rule 206(4)-3 was designed to address. WHS has an interest in the successful distribution of the Partnership, and notice of that interest, together with sufficient information to evaluate the interest, should be given to Qualifying Hospitals at the time they are solicited.[3]

Section 208(d) of the Advisers Act prohibits any person, indirectly, or through or by any other person, from doing any act or thing which it would be unlawful to do directly under the

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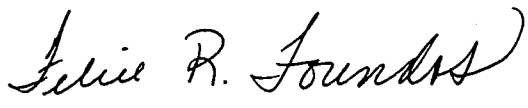
[3] Our view is not changed by the fact that the Partnership will be paying the Fee. As investment adviser to, and general partner of, the Partnership, Dana has substantial influence over the Partnership's business affairs, including the ability to direct that the Fee be paid to WHS.

Advisers Act or any rule thereunder. Since it would be unlawful for WHS to directly solicit clients for Dana without compliance with rule 206(4)-3, solicitation of Qualifying Hospitals to invest in the Partnership would be prohibited by section 208(d).[4]

Therefore, we are unable to assure you that we would not recommend enforcement action against Dana and WHS under section 206 if they participate in the proposed arrangement without complying with rule 206(4)-3.

Section 15(a) of the Exchange Act:

The staff of the Division of Market Regulation has asked us to inform you that they would not recommend enforcement action to the Commission under section 15(a)(1) of the Exchange Act if WHS or its employees engage in the activities set forth in your letter without registering as a broker-dealer pursuant to section 15(b) of the Exchange Act. You have not requested, and the staff of the Division of Market Regulation is not expressing any opinion, on the application of section 15(a) to the activities of Dana and its employees.



Felice R. Foundos
Attorney

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[4] The proposed arrangement is distinguishable from arrangements whereby service or distribution fees are paid by a registered investment company pursuant to rule 12b-1 under the Investment Company Act. This response is not intended to suggest that such arrangements would be subject to rule 206(4)-3. See Letter to Alan Rosenblat (pub. avail. Dec. 4, 1990); Stein Roe & Farnham Incorporated (pub. avail. June 29, 1990).

Firstar Plaza
P.O. Box 2113
Madison, Wisconsin 53701-2113
608/251-5000
FAX 608/251-9166

Attorneys at Law in
Milwaukee and Madison, Wisconsin
West Palm Beach and Naples, Florida
Phoenix, Arizona

Investment Advisers Act of 1940/
§ 203(a); Rule 206(4)-3

October 12, 1994

ACT IAA-40
SECTION 203(a)
RULE
PUBLIC AVAILABILITY 10/12/94

Ms. Dorothy Donahue, Acting Chief Counsel
Division of Investment Management
Securities and Exchange Commission
Mail Stop 10-6
450 Fifth Street, N.W.
Washington, D.C. 20549

Ms. Caite McGuire, Chief Counsel
Division of Market Regulation
Securities and Exchange Commission
Mail Stop 5-1
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Dana Investment Advisors, Inc.

Dear Ms. McGuire and Ms. Donahue:

We represent Dana Investment Advisors, Incorporated ("Dana"), a Wisconsin corporation registered as an investment adviser under the Investment Advisers Act of 1940, as amended ("Advisers Act") and under the laws of several states, including the States of Wisconsin and Washington. Dana is organizing a private investment fund ("Fund") in which investment will be limited to private hospitals that are members of the Washington State Hospital Association ("Association") and qualifying affiliates. The Fund will be structured as a limited partnership under Wisconsin law. Dana will be the general partner of the Fund and will enter into an investment advisory agreement with the Fund to serve as the Fund's investment adviser.

Units of limited partnership interests in the Fund ("Units") will be offered and sold on behalf of the Fund by employees of Dana, as corporate general partner. The general partner will not receive any commissions or other compensation for its services in offering and selling Units. The Units will be offered and sold in private transactions pursuant to Regulation D under the Securities Act of 1933, as amended (the "Securities Act") and Rule 506 thereunder, and pursuant to the Uniform Limited Offering Exemption, Sections 460-44A-500 et seq. of the Securities Act of Washington (the "Washington Act"). The Fund will not be registered under the Investment Company Act of 1940, as amended, in reliance on Section 3(c)(1) thereof.

The Association, through its wholly-owned subsidiary, Washington Hospital Services, Inc. ("WHS"), proposes to enter into an agreement ("Agreement") with the Fund under which WHS will receive a fee for its services in disseminating information about the existence of the Fund to members of the Association eligible to invest in the Fund and introducing the Fund's general partner to such members. This letter seeks the concurrence of the staff that implementation of the Agreement will not constitute WHS or its employees "brokers" or "dealers" within the meaning of § 3(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act"), subject to registration under § 15(a) thereof, "investment advisers" within the meaning of § 202(a) of the Advisers Act, subject to registration under § 203(a) thereof, or solicitors under Rule 206(4)-3 under the Advisers Act.

Specifically, we respectfully request the following relief:

1. That the staff of the Division of Market Regulation advise us that it would not recommend enforcement action to theCommission if the proposed Agreement is implemented without WHS or its employees registering as broker-dealers under § 15(a) of the Exchange Act.

2. That the staff of the Division of Investment Management advise us that it would not recommend enforcement action to the Commission if the proposed Agreement is implemented without WHS or its employees registering as "investment advisers" under § 203(a) of the Advisers Act or proceeding under Rule 206(4)-3 thereunder.

We are submitting the following information in support of this request:

Section I below provides background information about the parties and the Fund.

Section II below describes the provisions of the proposed Agreement between WHS and the Fund.

Section III below discusses the issues raised by this request for no-action relief and precedent applicable thereto.

Attached hereto for the convenience of the staff is the principal no-action letter on which this request relies: ***National School Boards Association*** (available Feb. 13, 1984 with respect to Exchange Act issues and Feb. 17, 1984 with respect to Advisers Act issues).

I. BACKGROUND INFORMATION

A. The Association

The Association is a not-for-profit corporation whose voting members consist of 54 private hospitals, 39 statutory district hospitals and two federal hospitals located in the State of Washington. The Association has served as a trade association for its member hospitals for more than 60 years. It is organized under the laws of the State of Washington and, except for a tax on political activities, qualifies as a tax-exempt organization under Section 501(c)(6) of the Internal Revenue Code, as amended (the "Code").

B. WHS

WHS is a wholly-owned, for-profit subsidiary of the Association incorporated effective January 1, 1988. It is governed by a board of directors consisting of the Chairman-Elect of the Association, the Vice President for Internal Operations for the Association, and five directors elected at large by the Association, as shareholder.

C. The Association's Services for Members

The Association performs a wide variety of services for its member hospitals, including serving as an advocate for members' interests in connection with public issues affecting health care, sponsoring member meetings, presenting educational programs for hospital personnel, and making technical advisory services relating to organization, financing and health care delivery available to member hospitals. In addition, through its subsidiary, WHS, the Association (1) administers three state-authorized self-insurance trusts for member hospitals,[1] and (2) facilitates the development and availability of third-party services meeting the common service needs of member hospitals.[2] In fulfilling this facilitating function, WHS works to identify and investigate hospital service needs that could be met by a common provider, to analyze the products, performance and service costs of third-party providers of such services, and to assist the providers it approves (and with whom, in some cases, it has negotiated special price terms for member hospitals) in marketing their services to member hospitals and other health care providers. All fees earned by WHS inure to the benefit of member hospitals, either directly, through the funding of WHS's services for members, or indirectly, in the form of dividends available to the Association, WHS's not-for-profit parent.

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[1] These trusts, formed pursuant to Washington statute, include the Public Hospital District Unemployment Compensation Trust, the Public Hospital District Workers' Compensation Trust, and the Washington Hospitals Workers' Compensation Trust. Dana serves as investment adviser for these trusts pursuant to an investment advisory agreement with each trust. Dana also provides investment advisory services under separate agreements with the Washington Hospitals Insurance Trust (a health and welfare trust) and the Washington State Hospital Association Education & Research Foundation and manages a cash reserve fund for the Association under an investment advisory agreement with the Association.

[2] Services and programs developed in response to member needs have included, among others, electronic billing services, Medicaid eligibility verification services, patient data reports, computer-based clinical nursing information, medical waste treatment and disposal services, medical records review services, medical equipment financing services, telemedicine services, physician recruitment and *locum tenens* services, and compensation, insurance and retirement benefits services for hospital employees.

D. Entities Entitled to Invest in the Fund

Investment in the Fund will be limited to (i) the 54 private hospital members of the Association (collectively, the "Qualifying Hospitals"), and (ii) private clinics, nursing homes, hospices and other health care providers that directly, or indirectly through one or more intermediaries, control, are controlled by, or are under common control with a Qualifying Hospital (collectively, the "Affiliates"). Each Qualifying Hospital is located in and licensed by the State of Washington and is a voting member of the Association. Forty-two of the Qualifying Hospitals are not-for-profit organizations exempt from federal income taxation under Section 501(c)(3) of the Code, and the remainder are for-profit entities.

E. The Fund

Hospitals and their affiliates frequently are faced with the need to invest funds held in reserve accounts for expenditure within a one- to five-year period. The amount of funds available within a single entity's reserve accounts may make it impractical for the entity to maintain and manage an individual investment portfolio. The purpose of the Fund is to permit Qualifying Hospitals and Affiliates to maximize their investment returns by pooling their funds available for investment in a managed investment primarily in mortgage securities issued by United States government agencies.[3]

The Fund will be structured as a limited partnership under Wisconsin law. Dana will be the general partner of the Fund and will enter into an investment advisory agreement with the Fund to manage the Fund's investments. For its services as investment adviser, Dana will receive a fee of .50% (.0050) per annum of the asset value of the Fund.[4] Investors' interests in the Fund will be represented by "Units" of the Fund, which will be offered and sold to Qualifying Hospitals and Affiliates by the general partner in private transactions pursuant to Regulation D under the Securities

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[3] The Fund will invest primarily in intermediate-term mortgage securities issued by United States government agencies. However, the Fund also will be permitted to purchase intermediate-term, high grade corporate mortgage securities.

[4] Dana will not receive any fees as general partner, but it may pay and be reimbursed for legal fees, accounting and audit fees and general administrative expenses (such as postage, long distance telephone and copying expenses) incurred on behalf of the Fund.

Act and Sections 460-44A-500 et seq. under the Washington Act. Units will not be transferable, but investors will be permitted to purchase or redeem Units on a monthly basis. The general partner will not receive any commissions or other compensation for sales or redemptions of Units.

Fund assets will be held by a non-affiliated custodial bank, and non-affiliated registered broker-dealers will effect all purchases and sales of the Fund's portfolio securities. The Fund will be audited annually by an independent certified public accounting firm.

II. THE PROPOSED AGREEMENT

The proposed Agreement contains the provisions described below. These provisions have been structured in light of provisions with respect to which the staffs of the Division of Market Regulation and the Division of Investment Management previously have taken no-action positions, as will be discussed in greater detail in Section III below.

A. Provisions Regarding Services

The Agreement provides for WHS to perform the following services for the Fund:

(1) Provide the general partner of the Fund with certain public financial information about Qualifying Hospitals and Affiliates.

(2) Ask Qualifying Hospitals and Affiliates to fill out questionnaires designed to elicit basic financial information pertinent to investment in the Fund and provide the completed questionnaires to the general partner.

(3) Provide the Fund with the names and addresses of Qualifying Hospitals and Affiliates, and with respect to each such entity, provide the name and title of the officer to whom information about the Fund should be directed.

(4) Personally introduce to the appropriate officer of each Qualifying Hospital and Affiliate, at a meeting at the officer's office scheduled by WHS, the representatives of the general partner who will be offering and selling Units.

(5) Disseminate to Qualifying Hospitals and Affiliates general information about the existence of the Fund

(which information would include the telephone number of the general partner and a response card for requesting information about the Fund from the general partner) through any combination of the following:

(a) Direct mailings to Qualifying Hospitals and Affiliates.

(b) Announcements in WHS's periodic newsletters to Association members.

(c) Brochures to be made available at WHS's offices and at the booths and tables that WHS sets up at various meetings of the Association and of subgroups of Association members.[5]

(6) Permit those representatives of the general partner who will be offering and selling Units to rent a booth at the exhibit hall at the Association's annual meeting to distribute the Offering Memorandum and sales literature and to discuss the Fund directly with Qualifying Hospitals and Affiliates.

B. Provisions Regarding Compensation

The proposed Agreement provides for WHS to be compensated by the Fund for its services in an amount not to exceed .07% (.0007) per annum of Fund assets, payable quarterly. Neither WHS nor the two WHS employees who will carry out the services called for by the Agreement will receive any fee or other form of compensation based on sales of Partnership Units.

C. Provisions Regarding Explicitly Prohibited Activities

The proposed Agreement prohibits WHS and its employees from engaging in any of the following activities:

(1) Discussing with any person the advantages or disadvantages of investments in general or of any particular investment, including an investment in the Fund.

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[5] The information contained in the mailings, announcements and brochures will be very limited. It will consist of a general announcement about the creation and purpose of the Fund, a statement of the address and telephone number of the general partner from which information about the Fund may be obtained, and a return card that can be sent to the general partner to request information about the Fund.

(2) Valuing, advising or recommending any investment, including an investment in the Fund; providing analyses, investment formulas or investment guidelines; or in any way giving investment advice.

(3) Taking part in face-to-face negotiations between the general partner and any Qualifying Hospital or Affiliate with respect to the offer and sale of Units.

(4) Assisting any Qualifying Hospital or Affiliate in making a decision whether to purchase Units.

(5) Delivering the Offering Memorandum for the Fund or in any way holding themselves out as providing services involving sales of Units or other transactions in securities.

(6) Holding themselves out as investment advisers or persons who provide investment advice.

(7) Describing, recommending or endorsing Dana's services as general partner of the Fund or as the Fund's investment adviser.

(8) Receiving or handling any investor's Subscription Agreement or any funds to be used by an investor in purchasing Units.

(9) Having any discretion with respect to the general partner's acceptance or rejection of any Qualifying Hospital or Affiliate as an investor in the Fund.

D. <u>Provisions Regarding Explicitly Mandated Activities</u>

The proposed Agreement requires WHS and its employees to:

(1) Refer all questions concerning participation in the Fund to the general partner.

(2) Send all requests for information (other than for the basic written information WHS is permitted to deliver under the Agreement) directly to the general partner.

(3) In connection with personal introductions of representatives of the general partner to representatives of Qualifying Hospitals and Affiliates:

(a) Make clear to the Qualifying Hospital and Affiliate that the introduction is being made pursuant to an agreement between WHS and the Fund, under which agreement WHS is entitled to compensation.

(b) Make clear to the Qualifying Hospital and Affiliate that Dana, and not WHS or the Association, will be the provider of any securities services.

(c) Leave the room after the introduction and take no further part in the conversation or in any further conversations between the parties.

E. Required Disclosures

The proposed Agreement:

(1) Requires the Offering Memorandum for the Fund to disclose (a) the terms of the Agreement between WHS and the Fund (including its compensation provisions), (b) the fact that Dana (and not WHS or the Association) will be the provider of any securities services, and (c) the fact that neither WHS nor the Association are registered broker-dealers or registered investment advisers.

(2) Requires literature describing the Fund to disclose the terms of the Agreement between WHS and the Fund (including its compensation provisions).

F. Additional Representations

(1) WHS does not endorse or otherwise recommend participation in the Fund. This will be made clear in the Offering Memorandum and other literature about the Fund.

(2) WHS will perform no services with respect to actual investment by Qualifying Hospitals and Affiliates and has no role in advising the Fund.

III. DISCUSSION

We believe that the activities called for by the proposed Agreement are not such as to bring WHS or its employees within the definitions of "broker" or "dealer" under the Exchange Act or "investment adviser" under the Advisers Act or to constitute them "solicitors" under Rule 206(4)-3. Further, because the Association and WHS have no mission apart from their mission to serve the needs of Association members, we believe that registration under either Act would serve no purpose. Our discussion of these points is organized as follows:

Paragraph A-1 discusses the definitions of "broker" and "dealer" under the Exchange Act and the reasons we believe that WHS's proposed services do not meet these definitions.

Paragraph A-2 discusses the definition of "investment adviser" under the Advisers Act and the reasons we believe that WHS's proposed services do not meet that definition.

Paragraph B-1 applies "finders agreement" no-action letters previously issued by the staff to the issues raised herein under § 15(a) of the Exchange Act.

Paragraph B-2 applies "membership organization" no-action letter previously issued by the staff to the issues raised herein under § 15(a) of the Exchange Act and § 203(a) of the Advisers Act and Rule 206(4)-3 thereunder.

A. Definitions

1. Definitions of "Broker" and "Dealer" Under Exchange Act

Section 3(a)(5) of the Exchange Act defines "dealer" as any person, other than a bank, "engaged in the business of buying and selling securities for his own account...." WHS and its employees clearly will not be acting as "dealers" under the Agreement because neither they nor the Association are eligible to purchase Units in the Fund.

Section 3(a)(4) of the Exchange Act defines "broker" to mean any person, other than a bank, "engaged in the business of effecting transactions in securities for the account of others." WHS and its employees will not be acting as "brokers" under the Agreement because they neither will be "effecting transactions" in securities nor receiving transaction-based compensation.

In order to "effect transactions" in securities, one must "become involved in the negotiations...[or] undertake an advisory, evaluative or decision-making function."[6] One who undertakes none of these activities but, rather, merely provides information concerning potential investors to an

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[6] ***Financial Charters & Acquisitions, Incorporated*** (available Nov. 25, 1984), at 5, citing to the staff's statement in ***F. Willard Griffith, II*** (available Oct. 7, 1974).

issuer or a broker-dealer and facilitates interaction between them is a "finder" and not a "broker."[7]

As Section II-C (pp. 7-8) of this letter points out, the Agreement prohibits WHS and its employees from taking part in any negotiations regarding purchases and sales of Partnership Units and from undertaking any advisory, evaluative or decision-making functions. Instead, WHS merely will, like the finders in ***Colonial Equities Corp.***[8] and the membership organizations in ***National School Boards Association***[9] and ***American Medical Association***[10], provide basic informational and introductory services to a person who is offering an ivestment opportunity and, like the membership organizations in ***National School Boards Association, American Medical Association*** and ***Indiana Hospital Assn. Investment Funds,***[11] assist in bringing the existence of the investment opportunity to the attention of members.

Another element in determining whether a person is a "broker" is whether the person receives transaction-based compensation. As Section II-B (p. 7) of this letter points out, neither WHS nor its employees will receive any fee or other form of compensation based on sales of Partnership Units. Instead, like the membership organizations in the no-action letters cited above, WHS will receive compensation measured solely by assets under management in the Fund.

2. Definition of "Investment Adviser" Under the Advisers Act

Under § 202(a)(11) of the Advisers Act, an "investment adviser" is one who, for compensation (1) engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or, alternatively (2) issues or promulgates analyses or reports concerning securities as part of a regular business.

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[7] See *id.* and no-action letters cited below.

[8] Available June 28, 1988; discussed in ¶ B-1, p. 13 below.

[9] *See* Feb. 17, 1984 letter, discussed in ¶ B-2, beginning at p. 14 below.

[10] Available Oct. 11, 1977; discussed in ¶ B-2, pp. 15-16 below.

[11] Available Oct. 15, 1993; discussed in note 19 below.

WHS and its employees will not be acting as "investment advisers" because (1) they will not provide and will not be "engaged in the business" of providing advice as to the value of securities or as to the advisability of investing in, purchasing or selling securities, and (2) they will not issue or promulgate and will not be "engaged in the business" of issuing or promulgating analyses or reports concerning securities.

As Section II-C (pp. 7-8) of this letter points out, the Agreement prohibits WHS and its employees from (i) discussing with any person the advantages or disadvantages of investments in general or of any particular investment, including an investment in the Fund; (ii) valuing, advising or recommending any investment, including an investment in the Fund; (iii) providing investment analyses, investment formulas or investment guidelines; (iv) holding themselves out as investment advisers or persons who provide investment advice; (v) describing, recommending or endorsing Dana's services as general partner of the Fund or as the Fund's investment adviser; or (vi) otherwise giving investment advice. Instead, WHS's services are restricted to finders' services, *i.e.*, to providing basic information about Qualifying Hospitals and Affiliates to the general partner and assisting in bringing the existence of the Fund to the attention of Qualifying Hospitals and Affiliates.

Because it will not in fact be providing investment advice or issuing analyses or reports concerning securities, WHS clearly will not be "engaged in the business" of providing investment advice or issuing analyses or reports concerning securities. To paraphrase from the request for no-action relief set forth in ***National School Boards Association*** (discussed under ¶ B-2 below), WHS is engaged in the business of representing the interests of hospital members of the Association, not "in the business" of providing investment advice, and its finder's services under the Agreement will constitute only a small part of the many services it provides to Association members.[12]

B. No-Action Letters

1. "Finders Agreement" No-Action Letters Respecting § 15(a) of the Exchange Act

The staff of the Division of Market Regulation has issued a series of no-action letters that support the proposition

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[12] *See* February 13, 1984 letter, at p. 8.

that one who merely provides information concerning potential investors to an issuer or a broker-dealer and facilitates interaction between them is a "finder" and not a "broker."[13]

For example, in ***H.C. Copeland and Associates Equities, Incorporated***,[14] the staff determined that it would not recommend action to the Commission if independent consultants provided a registered broker-dealer with demographic information about potential investors, and introduced the broker-dealer to these investors,[15] without first registering under § 15(a) of the Exchange Act. As will be the case with WHS under the instant Agreement, the independent consultants were prohibited from giving investment advice, distributing sales literature, or participating in negotiations with potential investors.

Similarly, in ***Financial Charters & Acquisitions, Incorporated***, the staff granted no-action relief under § 15(a) of the Exchange Act to independent consultants who proposed to enter into finders agreements with a broker-dealer engaged in marketing hedging strategies for securities trading to financial institutions. Under the agreements, the consultants were to set up initial meetings between the broker-dealer and financial institutions and to attend such meetings solely for the purpose of introducing the parties.[16] As will be the case with WHS under the instant Agreement, the consultants were prohibited from discussing, evaluating or recommending the proposed investment, from taking any part in negotiations respecting the proposed investment, and, following their introduction of parties, from taking any further part in the initial meeting (and from taking part in any subsequent meetings) between the parties.

In ***Colonial Equities Corp.***, the staff took a no-action position with respect to the applicability of § 15(a) to services of independent insurance agencies under proposed finders agreements with a registered broker-dealer selling

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[13] The services performed by a "finder" generally are characterized as "clerical and ministerial" in nature. See, *e.g.*, ***Retirement System Distributors, Incorporated*** (available February 7, 1992) and no-action letters cited at pp. 11-12 therein.

[14] Available April 8, 1982.

[15] Such services are like the services of WHS described in Section II-A (1) and (4) (p. 6) of this letter.

[16] Such services are like the services of WHS described in Section II-A (4) (p. 6) of this letter.

interests in partnerships being syndicated by an affiliate. The agreement provided for the agencies to ask clients to complete questionnaires designed to elicit information pertinent to suitability standards for investment in the partnerships, to provide the completed questionnaires to the broker-dealer, and to introduce clients identified as potential investors to the broker-dealer in person or by telephone.[17] As will be the case with WHS under the instant Agreement, the agreement provided that the agencies would not offer explanations, advice or recommendations regarding an investment in the partnerships, take part in negotiations between clients and the broker-dealer, assist clients in making investment decisions, or receive or handle any funds to be used in purchasing interests in the partnerships. Further (and again like WHS), agency personnel were required to leave the room or get off the telephone, as applicable, following the introduction of potential investors and to take no further part in the conversation (or in any subsequent conversations) between the parties.

We believe that these "finders agreement" no-action letters support our contention that WHS will not be acting as a "broker" within the meaning of § 3(a)(4) of the Exchange Act.

2. <u>"Membership Organization" No-Action Letters Respecting § 15(a) of the Exchange Act and § 203(a) of the Advisers Act and Rule 206(4)-3 Thereunder</u>

In the "finders agreement" no-action letters, entities with interests independent of the interests of potential investors acted to bring investment opportunities to the attention of such investors. By contrast, the no-action letters discussed below focus on the activities of membership organizations in bringing investment opportunities to the attention of the members whose interests they were created to serve. These no-action letters are pertinent to the issues raised in the instant case under § 15(a) of the Exchange Act and § 203(a) of the Advisers Act and Rule 206(4)-3 thereunder.

(a) <u>Facts of *National School Boards Association*</u>

The no-action letter most pertinent to the instant Agreement (although it involved services more expansive than the services WHS will perform) is ***National School Boards Association***. In this no-action letter, the staffs of the

[17] Such services are like the services of WHS described in Section II-A (2)-(4) (page 6) of this letter.

Division of Market Regulation and the Division of Investment Management took respective no-action positions concerning the applicability of § 15(a) of the Exchange Act, § 203(a) of the Advisers Act and Rule 206(4)-3 under the Advisers Act to services to be performed under a consulting agreement (the "NSBA Agreement") between E. F. Hutton & Company ("Hutton") and the National School Boards Association ("NSBA"), a not-for-profit organization whose members consist of state school board associations, local school boards and districts, and other public educational entities.

The NSBA Agreement grew out of a decision by the NSBA, as a service to its members, to work with Hutton to organize liquid asset trusts on a state-by-state basis tailored exclusively for investment by local school districts (collectively, the "Trusts"). Hutton was to serve as the administrator, investment adviser and distributor for the Trusts. The NSBA Agreement provided for the NSBA to serve as a consultant to Hutton at two stages of the development of the Trusts: feasibility and operation.

At the feasibility stage, the NSBA was to consult with Hutton regarding local markets, applicable local laws, competing products, and whether Hutton should pursue development of a Trust in the area. In addition, the NSBA was to arrange for Hutton to meet with appropriate state and local school district officials to discuss local finances and the purpose of the Trusts. At the operational stage, the NSBA was to: (a) schedule and announce through NSBA publications informational meetings and seminars at which Hutton representatives would discuss the Trusts and related matters, (b) consult with Hutton and the state school board associations about local facilities (such as custodial banks) to be used in connection with the Trusts, (c) assist in the preparation and dissemination of information with respect to the existence of the Trusts, (d) allow the use of NSBA publications to give information on how to obtain Trust materials, (e) consult as to operational or coordinating difficulties that might arise between the Trusts and school districts, (f) provide Hutton with mailing lists of NSBA members, and (g) allow the Trusts to use the NSBA logo in informational materials.

The NSBA Agreement provided that the NSBA would *not*: (i) take part in face-to-face solicitations with respect to participation in the Trusts, (ii) recommend participation in the Trusts, (iii) answer specific questions about the Trusts, or (iv) give investment recommendations, analyses, formulas, guidelines or advice. In addition, Hutton, not the NSBA, would distribute the Information Statement about a Trust to potential settlors of the Trust (i.e., to the individual school districts), and Hutton would be responsible for the

contents of all communications describing the Trusts. If a School District decided to become a settlor of a Trust, it would submit its registration form directly to the Trust, not to the NSBA. The NSBA would have no responsibility for funds and no discretion whether to accept or reject registration forms, and would be required to send all requests for information (except for preprinted materials) directly to Hutton for appropriate action. Further, the agreement between the NSBA and Hutton was to be disclosed in the Information Statement.

The NSBA's compensation under the NSBA Agreement was a fee of 20% of administration and investment advisory fees received by Hutton (anticipated to be no more than .5% of assets under management), plus reimbursement for out-of-pocket expenses. Neither the NSBA nor its employees were to be separately compensated for the offer or sale of shares of the Trusts.

(b) The NSBA's Contentions With Respect to Registration under § 15(a) of the Exchange Act; Applicability in the Instant Case

The NSBA cited both precedent and policy in support of its request for no-action relief under § 15(a) of the Exchange Act.

(1) Precedent

With respect to precedent, the NSBA pointed to the similarities between its services and those at issue in ***H. C. Copeland and Associates Equities*** (described above) and ***American Medical Association***, in which the staff of the Division of Market Regulation had granted no-action relief under § 15(a) in connection with services to be provided by the American Medical Association ("AMA") as administrator to the AMA Tax Exempt Income Fund. In connection with that fund the AMA was to: (i) handle inquiries, except those concerning shareholder accounts and sales, (ii) permit the use of the AMA name and provide access to its membership list and mailings, (iii) provide advertising and sales materials and space in AMA publications for publishing the prospectus and tombstone type announcements, and (iv) provide a booth (to be manned by personnel of the distributor) at AMA conventions and meetings to distribute prospectuses and sales literature and to answer questions. The AMA was prohibited from taking part in any face-to-face negotiations between the distributor and potential investors (*i.e.*, members of the AMA or affiliated medical associations) and from answering inquiries with

respect to shareholder accounts and sales of fund shares.[18]

We believe that ***National School Boards Association*** and the precedents it cites support our view that WHS and its employees will not be acting as "brokers" as defined by § 3(a)(4) of the Exchange Act. The services at issue in ***H.C. Copeland and Associates Equities*** are described at page 12 above. With respect to those at issue in ***National School Boards Association and American Medical Association***, we believe that the instant Agreement presents an even stronger argument for no action than the NSBA and AMA agreements because (1) the instant Agreement calls for less expansive services than did the other two agreements, and yet (2) the instant Agreement includes all of the prohibitions against "brokers' services" included in the other two agreements. Thus, for example, WHS will not engage (as did the NSBA) in "feasibility stage" consulting with respect to local markets, local laws, competing products and Trust feasibility, or in "operational stage" consulting with respect to facilities (such as custodial banks) or the operational and coordinating difficulties encountered by the distributor. Moreover, WHS (unlike the NSBA and AMA) will not permit use of the Association's logo in connection with the Fund and will not (as did the AMA) provide space in its publications for publishing the offering document for the Fund. At the same time, WHS (like the NSBA and AMA) will be prohibited from: (i) taking part in any face-to-face negotiations or solicitations, (ii) answering specific questions about the Fund, (iii) advising, valuing or recommending investments in the Fund, (iv) delivering the offering document for the Fund, or receiving or handling investors' subscriptions or subscription funds, or (v) having any discretion with respect to the acceptance or rejection of qualifying members as investors. Further, WHS (like the NSBA and the AMA) will not receive any commissions or other compensation based on sales of beneficial interests in the Fund.[19]

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[18] *See* ***American Medical Association*** *supra* n. 10, at p. 2.

[19] We were unable to find a no-action letter subsequent to ***National School Boards Association*** addressing the same issues addressed therein. However, we believe that ***Indiana Hospital Assn. Investment Funds*** (available Oct. 15, 1993) also supports our contention that WHS will not be acting as "broker" under the instant Agreement and thus should not be subject to registration under § 15(a). In ***Indiana Hospital Assn. Investment Funds***, the staff of the Division of Market Regulation took a no-action position with respect to the applicability of § 15(a) to the services of the Indiana Hospital Association ("IHA"), a not-for-

(continued...)

(2) Policy

With respect to policy, the NSBA contended that no policy or purpose would be served by a requirement that it register under § 15(a) of the Exchange Act because (1) it was acting on behalf of its members in helping develop an investment medium available to members, and (2) the fees it earned would be used solely to fund its activities on behalf of its members.[20]

Similarly, WHS will be acting on behalf of Association members in bringing an investment opportunity available to members to the members' attention, and its activities under the Agreement will be fully disclosed. Moreover, the fees earned by WHS will inure to the benefit of the Association's members either directly, through the funding of WHS's services

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[19](...continued)
profit organization comprised of approximately 145 Indiana hospitals, in establishing and operating investment funds ("Funds") for investment by it and qualifying members and affiliates.

The facts of the letter, briefly summarized, were as follows: The IHA had proposed to establish a business trust ("Trust) for the purpose of administering the Funds. The IHA was to manage the Trust, as trustee, for which it was to receive compensation in the form of an asset-based fee. Neither the IHA nor its employees were to receive any commissions or other compensation based on sales of beneficial interests in the Trust. Trust assets were to be held by a custodian bank; a registered investment adviser (retained by the Trust) was to advise the trustee with respect to the investment of Trust assets; and a registered broker-dealer was to effect all transactions in portfolio securities and all offers and sales of beneficial interests in the Trust.

The activities of the IHA's officers, directors and employees in connection with offers and sales of beneficial interests in the Trust were described in the IHA's letter seeking no-action relief only as activities "permitted by Rule 3a4-1(a)(4)(iii) [under the Exchange Act]." The activities permitted by the Rule include, among others, "performing ministerial and clerical work involved in effecting any transaction." Although no detail is given in the letter requesting no-action relief, it seems likely, based on the stated facts, that the IHA's ministerial and clerical activities included bringing the existence of the Trust to its members' attention and introducing IHA members to the broker-dealer selling interests in the Trust.

[20] ***National School Boards Association*** (Feb. 17, 1984 letter), at p. 5.

for members, or indirectly, in the form of dividends available to the Association, WHS's not-for-profit parent. Accordingly, we believe that no policy or purpose would be served by requiring WHS to register under § 15(a).

(c) The NSBA's Contentions With Respect to Registration Under Section 203(a) of the Advisers Act; Applicability in the Instant Case

(1) Definition of "Investment Adviser"

In support of its contention that its activities would not be those of an "investment adviser" as defined by § 202(a)(11) of the Advisers Act, the NSBA pointed out that while it would be facilitating meetings and information-sharing between its members and Hutton, informing its members of the availability of the Trusts, and providing its logo for use by the Trusts, it would not be advising members as to the desirability of investing in the Trusts and would not be providing recommendations, analyses, investment formulas or investment guidelines or otherwise giving investment advice. The NSBA stated that it was a long established not-for-profit association "in the business" of representing its members, not "in the business" of advising others as to investments, and that the development of the Trusts, which it had undertaken as a service to its members, was only one of many services it provided for its members."[21] "Essentially," said the NSBA, "a nonprofit organization is providing a service to its members to meet a perceived need....The NSBA will not be recommending that its members participate in the Trusts, but will be helping bring the opportunity to its members' attention. Every 'sponsor' of a private label fund does no less and to the best of our knowledge, the staff has not insisted on their registration as investment advisers."[22]

We believe that the same analysis is applicable in the instant case. In other words, for the reasons discussed in detail at page 11 of this letter, WHS will not be acting as an "investment adviser" as defined by § 202(a)(11) of the Advisers Act because it will not provide or be "in the business" of providing investment advice, and will not issue or be "in the business" of issuing analyses or reports concerning securities. WHS's services under the Agreement will be restricted to the services of a finder, and those

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[21] *See* Feb. 13, 1984 letter, at p. 8.

[22] *Id.*, at p. 9.

services will constitute only a small part of the services WHS performs for members of the Association.

(2) Policy

The NSBA also stressed that no policy would be served by requiring that it register under § 203(a) of the Advisers Act, stating:

> "The NSBA--an association of which the investor is a member and whose interests it represents--is receiving compensation, which will be fully disclosed....A registered investment adviser and broker-dealer are responsible for explaining the investment aspects of the [Trust]....The trustees of the Trust are public officials. All aspects of the Trust and its relation to Hutton and the NSBA will be fully disclosed. It is difficult to imagine how the "investor" would be benefitted by requiring registration of the NSBA as an adviser."[23]

Similarly, we believe that no policy or purpose would be served by a requirement that WHS register as an investment adviser. WHS--a wholly-owned subsidiary of a not-for-profit association that has represented the interests of Washington hospitals for more than 60 years--itself was formed to serve the interests of Washington hospitals. In bringing to the attention of Qualifying Hospitals and Affiliates the existence of a vehicle for investing their funds held in reserve accounts, WHS will be serving that mission. Moreover, the Agreement under which WHS will be acting, and its compensation thereunder, will be fully disclosed. Shares of interest in the Fund will be offered and sold by the general partner pursuant to Regulation D under the Securities Act and Sections 460-44A-500 et seq. of the Washington Act, and the decision to purchase Shares will be made in each case by persons standing a fiduciary relationship with the hospital making the investment. Furthermore, a registered investment adviser will manage the invested funds. We do not believe that Qualifying Hospitals or Affiliates would be benefitted by a requirement that WHS register as an investment adviser.

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[23] *Id.*, at p. 11.

(d) <u>The NSBA's Contentions With Respect to Rule 206(4)-3 Under the Advisers Act; Applicability in the Instant Case</u>

With respect to Rule 206(4)-3, the NSBA stated:

> "We recognize that Rule 206(4)-3...deals specifically with payments by an investment adviser to third parties for client solicitation, and that it could be argued that the NSBA is `soliciting' clients for Hutton, a registered investment adviser....[However, the Rule] clearly contemplates a direct contractual relationship between the adviser and the `client.' Hutton is the adviser in this case, but the `client' of the adviser is the Trust, not the individual settlor School Districts. Although the Trust in this case will not be a registered investment company, it nevertheless is a legal entity that will enter into an advisory contract with Hutton. The Trust is not a device to evade Rule 206(4)-3; it is an entity formed for a legitimate purpose.
>
> "Thus, in bringing the existence of the Trust to the attention of its members, the NSBA is not soliciting `clients' for Hutton, the adviser. Although the investors in an investment company could arguably be considered to be indirect `clients' of the adviser, just as the School Districts could be in this case, we have seen no indication that the Commission intended Rule 206(4)-3 to be applied in that context.[24]

We believe that the same analysis is applicable in the instant case. Dana will be acting as an investment adviser to the Fund under an investment advisory agreement with the Fund, and its investment advisory client will be the Fund, *not* the individual limited partners. Like the Trust in ***National School Boards Association***, the Fund is a legal entity formed for a legitimate purpose, not a device to evade Rule 206(4)-3. Accordingly, in bringing the existence of the Fund to the attention of Qualifying Hospitals and Affiliates, WHS will not be soliciting "clients" for Dana, the investment adviser.

In addition, we believe that no policy would be served by a decision that WHS should be viewed as a "solicitor" within

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[24] *Id.*, at p. 10.

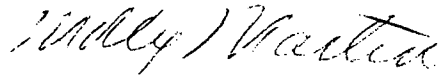
the meaning of Rule 206(4)-3 under the Advisers Act. The purpose of Rule 206(4)-3 is to "provide prospective investment advisory clients with notice of the solicitor's bias and sufficient information to evaluate that bias."[25] WHS has no "bias" (*i.e.*, no adverse interest) with respect to members of the Association because (1) it has no mission apart from its mission to serve their interests, and (2) because all fees earned by WHS inure to the benefit of members.

For all of the foregoing reasons, we respectfully request: (1) that the staff of the Division of Market Regulation advise us that it would not recommend enforcement action to the Commission if the proposed Agreement is implemented without WHS or its employees registering as broker-dealers under § 15(a) of the Exchange Act; and (2) that the staff of the Division of Investment Management advise us that it would not recommend enforcement action to the Commission if the proposed Agreement is implemented without WHS or its employees registering as "investment advisers" under § 203(a) of the Advisers Act or proceeding under Rule 206(4)-3 thereunder.

If you have any questions, or if you need further information, please contact the undersigned at (608)251-5000. We would appreciate it if you would notify us orally if it appears that you will not be able to respond positively to our request so that we can discuss it further.

Very truly yours,

QUARLES & BRADY



Molly K. Martin

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[25] Statement by the staff in ***Dechert Price and Rhoads*** (available Dec. 4, 1990), at p. 7.