



DIVISION OF
TRADING AND MARKETS

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

November 30, 2010

Ernest E. Badway, Esq.
Fox Rothschild LLP
100 Park Avenue, Suite 1500
New York, NY 10017

Re: Denial of No-Action Request of Nemzoff & Company, LLC

Dear Mr. Badway:

In your letter dated April 20, 2010, you request assurance that the staff of the Division of Trading and Markets ("Staff") would not recommend enforcement action to the Securities and Exchange Commission ("Commission") under Section 15(a) of the Securities Exchange Act of 1934 ("Exchange Act") if Nemzoff & Company, LLC ("Nemzoff") provides financial consulting services to not-for-profit hospitals without registering with the Commission as a broker-dealer pursuant to Section 15(b) of the Exchange Act, in reliance on the exemption from broker-dealer registration available for charitable organizations under Section 3(e) of the Exchange Act

Based on your letter, I understand the facts to be as follows:

Nemzoff is a consulting company and business broker providing a range of financial consulting services to not-for-profit hospitals, including consulting services for business combinations. Nemzoff categorizes its operations into three areas: (i) Options Assessments; (ii) Divestiture Planning and Implementation; and (iii) Merger and Acquisition Services.

As explained in your letter, Options Assessments can consist of helping not-for-profit hospitals enter into joint ventures or business combinations with other not-for-profit hospitals. You indicate that Divestiture Planning encompasses providing assistance to hospitals before and throughout the sales process. As part of Divestiture Planning, Nemzoff creates plans for selling the hospital that includes, among other things, a confidential memorandum with key facts about the selling hospital and potential purchasers. Nemzoff's Merger and Acquisition Services include assisting not-for-profit hospitals throughout the merger process as well as providing valuations of potential acquisitions and issuing fairness opinions.

You indicate that during the business combination process, Nemzoff advises and may assist clients in such things as buying and selling membership interests of non-profit hospitals, mergers and membership substitutions, and in some instances, may participate in negotiations. In exchange for these services, Nemzoff proposes to be compensated by a fixed fee, an hourly

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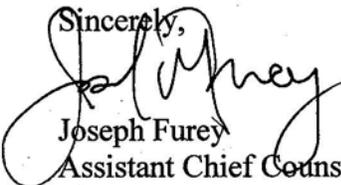
fee, a commission or any combination thereof. This proposed compensation may be based on the consideration received by the selling not-for-profit entity in a business combination.

In your letter, you cite to Section 3(e) of the Exchange Act, which provides a limited exemption for charitable organizations from the broker-dealer registration requirements of Section 15. In particular, Section 3(e) provides, in pertinent part, that a charitable organization or any trustee, director, officer, employee, or volunteer (collectively, the "Qualifying Persons") of such charitable organization acting within the scope of such person's employment or duties with such organization, shall not be deemed to be a broker or dealer if such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of such organization. Section 3(e)(2) provides that this limited exemption is available only if the person relying on it "is either a volunteer or is engaged in the overall fund raising activities of the charitable organization and receives no commissions or special compensation based on the number of donations collected for the fund." You request assurances that Nemzoff, as a consultant to not-for-profit hospitals, would not have to register as a broker-dealer in reliance on the exemption in Section 3(e) of the Exchange Act.

Response

Based on the facts and representations set forth in your letter, the Staff is unable to assure you that it would not recommend enforcement action to the Commission if Nemzoff engages in the activities described in your letter without registering as a broker-dealer under Section 15 of the Exchange Act. In particular, Nemzoff, as a consultant, would not be a Qualifying Person under Section 3(e). Moreover, Nemzoff's potential receipt of transaction-related compensation is inconsistent with the compensation limitation in Section 3(e)(2).

Sincerely,



Joseph Furey
Assistant Chief Counsel



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VIA FEDEX

James Eastman, Esq.
Office of Chief Counsel
Division of Trading and Markets
Securities and Exchange Commission
100 F Street NE
Washington, D.C. 20549

Re: Provision of Financial Consulting Services to Non-Profit Entities

Dear Mr. Eastman:

We represent Nemzoff & Company, LLC ("Nemzoff"). We now write to request assurance that the staff of the Division of Trading and Markets ("Division") will not recommend enforcement action to the Securities and Exchange Commission ("Commission") under Section 15(a) of the Securities Exchange Act of 1934, as amended ("Exchange Act") against Nemzoff for providing financial consulting services to non-profit entities.

FACTUAL BACKGROUND

Nemzoff is a consulting company and business broker that provides a range of financial consulting services to not-for-profit hospitals. Nemzoff provides advice to not-for-profit hospitals regarding business opportunities, including potential business combinations with other not-for-profit hospitals. Specifically, Nemzoff's services are categorized into three distinct areas: (i) Options Assessment; (ii) Divestiture Planning and Implementation; and (iii) Merger and Acquisition Services.

Options Assessment consists of providing an analysis of various options for not-for-profit hospitals to further their business, ranging from maintaining the *status quo* to entering into joint ventures or business combinations with other not-for-profit hospitals. Divestiture Planning and Implementation consists of providing assistance to hospitals before and throughout the sale process. Nemzoff creates a plan for the selling hospital, mainly focusing on confidentiality, rapid transaction closure, and minimal disruption of hospital operations. To further this plan, Nemzoff prepares a



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confidential memorandum detailing, among other things, key facts about the selling hospital and potential purchasers. Merger and Acquisition Services include assisting not-for-profit hospitals throughout the merger process and helping them through challenging issues, such as control of the post-merger entity. These services will also include valuation of potential hospitals for purchase as well as the issuance of fairness opinions.

During the business combination process, Nemzoff advises and may assist the non-profit client on every step of the transaction. This includes advising the client on various types of business combinations, such as (i) buying and selling assets of non-profit hospitals, (ii) buying and selling membership interests of non-profit hospitals, and (iii) mergers and membership substitutions of non-profit hospitals. This may also include assisting with the negotiations if requested by the client. However, notwithstanding any role that Nemzoff takes in negotiations, it does not have the power to bind the client regarding such business combination.

Each of the clients represented by Nemzoff is a going concern and not a "shell" entity. Although the potential business combinations may include the transfer of assets and/or membership interests of the client, Nemzoff will not advertise or otherwise promote the sale of securities. Any decision to effect the transfer of the non-profit business by means of a securities sale will be made solely by the purchaser and seller. Although Nemzoff may provide valuation services to the non-profit client, it will not assess the value of any securities sold, other than by valuing the assets of the client as a going concern. Nemzoff will not assist purchasers with obtaining financing to complete the business combination, other than providing introductions to third-party lenders (without compensation) and assistance with completing paperwork necessary to apply for financing.

In exchange for its services, Nemzoff will be compensated by a fixed fee, an hourly fee, a commission or any combination of the foregoing, and it may be based on the consideration received by the selling non-profit entity in the business combination. This compensation is payable in cash and will be determined prior to any decision as to the effect the sale of the non-profit hospital. The compensation will not vary depending on the type of transaction, such as a sale of securities versus a sale of assets.

LEGAL ANALYSIS

Definition of "Broker" and "Dealer"

Section 3(a)(4) of the Exchange Act defines the term "broker," in relevant part, as "any person engaged in the business of effecting transactions in securities for the account of others." Section 3(a)(5) of the Exchange Act defines the term "dealer," in relevant part, as "any person engaged in the business of buying and selling securities for such person's own account through a broker or otherwise." In interpreting Sections 3(a)(4) and 3(a)(5), the Commission and the Division



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have considered the receipt of transaction-based compensation as a key factor in considering whether a person is “engaged in the business” of transacting securities, and therefore subject to broker-dealer registration.

In providing guidance on the definition of a “broker,” the Commission and the Division have stated that a person effects transactions in securities “if he or she participates in such transactions ‘at key points in the chain of distribution.’” Such participation includes “assisting an issuer to structure prospective securities transactions, helping an issuer to identify potential purchasers of securities . . . and soliciting securities transactions.” In its clarification of what constitutes being “engaged in the business,” the Commission and the Division have listed various factors, such as receiving transaction-related compensation, holding oneself out as a broker, and participating in the securities business with some degree of regularity.¹

Notwithstanding the foregoing, subject to certain exceptions, Section 3(e) of the Exchange Act provides an exemption from the registration requirements for non-profit entities. More specifically, a charitable organization or any trustee, director, officer, employee, or volunteer of such charitable organization acting within the scope of such person’s employment or duties with such organization shall not be deemed to be a “broker” or “dealer” solely because such organization or person buys, holds, sells, or trades in securities for its own account in its capacity as trustee or administrator of, or otherwise on behalf of or for the account of such a charitable organization.

Application to Nemzoff

We recognize that a consultant for business combinations may, depending on the circumstances, be required to register as a broker dealer under Section 15 of the Exchange Act. However, we believe that Nemzoff is not required to register because, since it will *solely* provide consulting services to, and assist in the business combinations of non-profit hospitals, it is acting under the spirit of the exemption from registration provided by Section 3(e) of the Exchange Act. Although Section 3(e) of the Exchange Act does not specifically state that consultants are exempt, Nemzoff is acting in a similar capacity that an officer or employee of the non-profit entities would act, and, therefore, should be exempt from registration as a broker-dealer pursuant to Section 3(e) of the Exchange Act.

CONCLUSION

On the basis of the foregoing, we respectfully request that you advise us that the Staff will not recommend that the Commission take any enforcement action if Nemzoff provides consulting

¹ Bondglobe, Inc., SEC Staff No-Action Letter (available February 6, 2001).



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services to not-for-profit hospitals without registering with the Commission under Section 15 of the Exchange Act as a broker-dealer.

On behalf of Nemzoff, we appreciate your consideration of this request. If you have any questions regarding this request or need any additional information, please do not hesitate to contact me.

Very truly yours,

Ernest Edward Badway