Via Electronic Delivery

March 4, 2005

Jonathan G. Katz
Secretary, U. S. Securities and Exchange Commission
450 Fifth Street, NW
Washington, D.C. 20549-0609

Re: Certain Broker-Dealers Deemed Not To Be Investment Advisers
File No. S7-25-99

Dear Mr. Katz:

American Express Financial Advisers Inc. ("AEFA") appreciates the opportunity to submit these comments on reproposed rule 202(a)(11)(1) (the "Reproposed Rule"). AEFA is registered with the Securities and Exchange Commission (the "Commission" or "SEC") as both a broker-dealer[1] and as an investment adviser. AEFA supports the efforts of the Commission, as described in its recent reproposal regarding the application of the Investment Advisers Act of 1940 (the "Advisers Act") to broker-dealers offering certain types of brokerage programs,[2] to issue a final rule that will eliminate regulatory dis-incentives to the re-pricing of brokerage services. By issuing such a rule, we believe broker-dealers will be able to offer non-discretionary brokerage programs, such as fee-based brokerage account programs, that better align the interests of those broker-dealers and their customers.

With the hope of enhancing the SEC's efforts regarding the offering of such brokerage account programs, we offer below the following comments. Specifically, in Section I below we discuss the Reproposed Rule. In Section II we discuss the Commission's proposed statement of interpretive position and offer a suggestion regarding how we believe it could be modified to best address many of the investor protection concerns discussed in the Reproposal.

## I. Fee-based Brokerage Account Programs.

Under the Reproposed Rule, a broker-dealer providing nondiscretionary advice that is solely incidental to its brokerage business would be excepted from the Advisers Act regardless of whether it charges an asset-based or fixed fee (rather than commissions, mark-ups or mark downs) for its services. AEFA supports the Reproposed Rule for the following reasons. First, we believe that fee-based relationships with clients, such as fee-based brokerage account relationships[3] and fee-based investment advisory relationships[4] are among the account structures that help align the interests of broker-

[1] AEFA is a National Association of Securities Dealers, Inc. member firm.
[2] Specifically, SEC Release Nos. 34-50980; IA-2340 (January 6, 2005) (the "Reproposal").
[3] Subject to oversight by the SEC and self-regulatory organization(s) ("SRO" or "SROs") under the Securities Exchange Act of 1934 (the "Exchange Act").
[4] Such as wrap fee programs in which a broker-dealer is the sponsor subject to the SEC's oversight under the Advisers Act.

dealers and their clients. Second, we believe that, subject to appropriate (but not additional and duplicative) regulatory oversight, broker-dealers should have the ability to re-price their traditional package of services[5] to better meet the needs of their customers. Accordingly, we agree with the SEC's view that, as stated in the Reproposal, when broker-dealers offer advisory services as part of the traditional package of brokerage services, broker-dealers ought not to be subject to the Advisers Act merely because they re-price those services. Finally, we also agree with the SEC that, as discussed in detail in the Reproposal, the Exchange Act, Commission rules and SRO rules provide substantial protections for broker-dealer customers.

Accordingly, AEFA believes that by subjecting fee-based brokerage programs to the Exchange Act as well as Commission and SRO rules (and not the Advisers Act), fee-based brokerage programs are subject to appropriate, but not additional and duplicative, regulation.

## II. Proposed Statement of Interpretive Position.

As noted above, AEFA supports the efforts of the Commission to promulgate a final rule that would not, at least with respect to accounts covered by the rule, unnecessarily subject broker-dealers to any provisions of the Advisers Act. Nonetheless, we offer the following comments and provide a suggested modification relating to certain aspects of the Commission's proposed statement of interpretive position.

- Holding Out As an Investment Adviser. We share the SEC's concerns that, based on how a particular fee-based brokerage account program is marketed (with, for example, a heavy emphasis on advisory services provided rather than securities transaction services), investors could perceive such accounts to be advisory accounts rather than brokerage accounts. Accordingly, we support the SEC's effort to address those concerns in the context of fee-based brokerage accounts by requiring broker-dealers to, under the Reproposed Rule, include a prominent statement in applicable fee-based brokerage account materials.[6] Additionally, we believe that the SEC's proposed disclosure approach[7] will help address any investor confusion by making available to investors information, in a prominent manner, relating to the type of account (a brokerage account, not an advisory account) being offered and the potential differences in the customer's rights, as well as the firm's duties and obligations, that may exist as a result of the account being a brokerage account and not an advisory account.

[5] As noted in the Reproposal, such services include execution, investment advice, custodial and recordkeeping services.

[6] Specifically, the prominent statement would be included in all advertisements for, and contracts, agreements, applications and other forms governing fee-based brokerage accounts.

[7] Under the Reproposed Rule, the disclosure statement will be required to state that the accounts are brokerage accounts and not advisory accounts, that, as a consequence, the customer's rights and the firm's duties and obligations to the customer, including the scope of the firm's fiduciary obligations, may differ, and must identify an appropriate person at the firm with whom the customer can discuss the differences.

- Financial Planning Services. As discussed in the Reproposal, financial planning services typically involve the preparation of a financial program for a client based on the client's financial circumstances and objectives. As further discussed in the Reproprosal, a financial planner generally seeks to address a wide spectrum of the client's long term financial needs, including insurance, savings and investments,[8] taking into consideration anticipated retirement or other employee benefits. Finally, the Reproposal notes that a financial planner may also, among other things, develop tax or estate plans for clients. In the Reproposal, the SEC noted its understanding that most broker-dealers currently offer financial planning services for a separate fee and treat the customers receiving such services as advisory clients.[9] The Commission proposes to address the financial planning issues raised in the Reproposal by issuing an interpretation stating that if a broker-dealer holds itself out as a financial planner or as providing financial planning services, it cannot be considered to be giving advice that is solely incidental to the brokerage business.

  AEFA is concerned that the proposed interpretation could be applied in what we believe would be an overly broad manner without providing any specific incremental investor protection benefits. Specifically, we believe that the proposed interpretation could result in a finding that a broker-dealer (that is dually registered as an investment adviser) and who holds itself out as providing financial planning services in one advisory aspect of its business (unrelated to any fee-based brokerage account program it may offer) would not be considered to be giving advice that is solely incidental to its brokerage business in any aspect of its brokerage business.[10] We believe that a final interpretation related to financial planning should, in order to best address the investor protection concerns relating to financial planning raised in the Reproposal, be limited to accounts covered by the final rule. AEFA, therefore, recommends that the SEC's final statement of interpretive position to address financial planning issues in the context of fee-based brokerage account programs indicate that "if a broker-dealer, with respect to any of its brokerage accounts subject to Rule 202(a)(11)-1, holds itself out in any applicable advertisements and contracts, agreements, applications and other forms as a financial planner or as providing financial planning services through and/or as part of such brokerage accounts, it cannot be considered to be giving advice in those brokerage accounts that is solely incidental to the brokerage business." AEFA believes that such an interpretative statement would, in addition to addressing the potentially overly broad manner in which the proposed interpretive statement could be viewed, address any concern that the Commission

[8] The Reproposal indicates that, in most cases, financial planners who provide advice about the advisability of investing in securities, advice about market trends or advice about retaining an investment manager are subject to the Advisers Act.

[9] Similarly, the SEC noted its understanding that broker-dealer sponsors of wrap fee programs today are registered under the Advisers Act and treat wrap fee customers as advisory clients.

[10] For example, when a client after receiving and considering a financial plan concerning at least in part the advisability of investing in securities, decides to implement certain transactions in a brokerage account or when an investor, unrelated to any advisory services (including any financial planning services) engages such a broker-dealer to sell certain stocks.

may have regarding fee-based brokerage accounts being promoted as providing "financial planning" as a way of acquiring the confidence of customers to promote brokerage services without actually providing any meaningful financial planning. Finally, AEFA believes that such an interpretive position would not interfere with a full service broker-dealer's consideration of some aspects of financial planning when determining that their recommendations are suitable.[11]

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AEFA supports the goal of the Commission to to promulgate a final rule in this area that will permit broker-dealers to be able to continue to offer brokerage programs, including fee-based brokerage account programs, that better align the interests of those broker-dealers and their customers. Our comments are intended to assist the Commission in making the Reproposed Rule as effective as possible in meeting that goal. If you have any questions regarding this letter, please contact me. Thank you for providing us with this opportunity to comment on the Reproposed Rule.

Sincerely,

ReBecca Koenig Roloff
SVP Global Financial Advice & Systems
American Express Financial Advisors Inc.

[11] As noted in the Reproposal, a broker must have a reasonable basis for believing that a recommendation to buy or sell a particular security is suitable for the broker's customer considering the customer's risk tolerance, other securities holdings, financial situation, financial needs and investment objectives.