

THE AVERAGE INVESTOR'S RAGE (MR. DONALD E. KENDRICK)

Publicly Available October 30, 1990

SEC LETTER

Advisers Act Sec. 202(a)(11)(D)

October 30, 1990

**Mr. Donald E. Kendrick
5290 Glenburnie Drive
Baton Rouge, LA 70808**

Dear Mr. Kendrick:

This Office received your letters dated July 17 and September 5, 1990, on October 9, and your letter of September 30, 1990, on October 17. They raise questions relating both to federal and state requirements for investment advisers.

Regarding state requirements, you ask whether, as the author of a book entitled *The Average Investor's Rage*, which you expect to be published in December 1990 or January 1991, you will need to register as an investment adviser in each state before you may discuss the contents of the book in that state. You also ask whether you must adhere to the fees stated in the Form ADV you filed in Louisiana when giving talks on your book outside Louisiana. Over 40 states regulate investment advisers, and the laws and regulations governing investment advisers vary from state to state. We are enclosing copies of portions of the 1990 Directory of the North American Securities Administrators Association, Inc. ("NASAA"), containing the names, addresses, and telephone numbers of state officials you may wish to contact for specific information.

Regarding federal requirements, you ask whether, if you become a syndicated columnist, you would need to register with the Commission before you may "discuss in print specific stocks, industries, etc." The Investment Advisers Act of 1940 ("Advisers Act") defines the term "investment adviser" in section 202(a)(11), as "any person 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." The staff generally believes that a person who provides advice concerning securities, even though the advice does not relate to specific securities, is an investment adviser, assuming the services are performed as part of a business and for compensation.¹ This broad definition, however, needs to be read in conjunction with the exclusion from the definition of investment adviser provided by the Advisers Act to any publisher of a bona fide newspaper, news magazine or business or financial publication of general and regular circulation ("publisher's exclusion").²

The United States Supreme Court examined the publisher's exclusion in *Lowe v. Securities and Exchange Commission* ("Lowe"),³ and concluded that the Advisers Act was not intended to regulate publications that are offered to the general public on a regular schedule, i.e., that are not tied to market events, if those publications "contain disinterested commentary and analysis as opposed to promotional material disseminated by a 'tout.'" The Supreme Court stated that

The Act was designed to apply to those persons engaged in the investment-advisory profession—those who provide personalized advice attuned to a client's concerns, whether by written or verbal communication. The mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser.⁴

The Court generally held that publishers who offer only impersonal investment advice (as opposed to individualized advice tailored to any specific portfolio or to any client's particular needs) in a bona fide

publication of general and regular circulation are not subject to the Advisers Act. Under the Court's decision, a publication qualifies for the exclusion if its content is disinterested and if it is offered to the general public on a regular schedule. Therefore, if a publication meets the Lowe criteria, its publisher would not be required to register under the Advisers Act. The staff would take the same position with respect to columnists that meet the Lowe criteria. Because these determinations are often primarily factual in nature, the staff is generally unable to express an opinion on whether registration is necessary.⁵

I hope that you will find the foregoing information useful. If you have any further questions, you may write or call this Office at (202)272-2030.

Sincerely,
Thomas S. Harman
Chief Counsel

Footnotes

1 See Investment Advisers Act Rel. No. 1092 (Oct. 8, 1987) (expressing the views jointly developed by this Division and NASAA on the application of federal and state adviser laws to financial planners, pension consultants, and other persons who provide investment advisory services as a component of other financial services).

2 See section 202(a)(11)(D) of the Advisers Act.

3 472 U.S. 181, 206 (1985).

4 Lowe at 207-208.

In Investment Advisers Act Rel. No. 563 (Jan. 10, 1977), the staff stated that the definition of investment adviser should not be construed to include the author or publisher of any book, pamphlet, or article which (1) does not contain recommendations, reports, analyses, or other advisory information relating to specific securities or issuers and (2) is not one of a series of publications by such person or intended to be supplemented or updated, provided that the author or publisher has not and does not intend to engage in any other activities which would bring him within the definition of investment adviser. The staff further stated that the publisher's exclusion is applicable only where, based on the content, advertising material, readership, and other relevant factors, a publication is not primarily a vehicle for distributing investment advice. The Supreme Court criticized the publisher's exclusion portion of this interpretive release, stating that it recasts "the statutory language without capturing the central thrust of the legislative history, and without even mentioning the apparent intent of Congress to keep the Act free of constitutional infirmities." Lowe at 207.

5 Before Lowe, the staff stated that it would not recommend any enforcement action to the Commission if a financial writer did not remain registered as an investment adviser but continued writing articles for a fee for publications of general and regular circulation, where his articles discussed financial and economic matters in a general way and did not recommend specific securities, categories of securities, or timing of investment decisions. See E.M. Abramson (pub. avail. Feb. 27, 1984).

In other letters issued before Lowe, however, the staff often took the view that the publisher's exclusion was not available to a financial columnist in a magazine or newspaper covered by the exclusion. See, e.g., Bernard Feuer (pub. avail. Dec. 17, 1978) (involving an independent contractor who proposed to write a column recommending specific securities); Raymond L. Panico (pub. avail. Feb. 2, 1975) (involving an individual newspaper publisher who proposed to include a column he would write discussing the desirability of investing in, purchasing, or selling securities); Faryl Anderson (pub. avail. Dec. 19, 1974) (involving an individual who proposed to write a column discussing the relative merits of specific securities).

INCOMING LETTER

September 5, 1990

**Director
Securities & Exchange Commission
Registered Investment Advisors Div.
Washington, D.C. 20549
File #: 801-29749**

Dear Sir:

Enclosed is a copy of a letter I wrote to the Securities and Exchange Commission July 17. I never received a reply. I am now seeking additional information. My book is due to be released around December, 1990 or January, 1991. I am trying to do everything correctly. Therefore, I need a reply on my questions, as I want to do everything legally.

If I become a syndicated columnist, must I register with the SEC before I discuss in print specific stocks, industries, etc.? Are all financial columnists registered with the SEC, or is this a choice?

Is there a section of the legal code that covers this field? If so, would you be kind enough to let me know?

In closing, I want to do everything correctly. I have seen so much abuse in the financial community, I would like to try to make a positive contribution, while making a living at the same time. My book, *The Average Investor's Rage*, has taken many years to complete. I have spent a great deal of my money to bring this book forth. Although I do not know for sure how it will do, I want to be prepared to give speeches and lectures around the United States, wherever I am asked to go. I, also, want to do it right. I must know the legal requirements so that I can prepare.

Looking forward to hearing from you. With kindest regards, I am,

Most sincerely,

Donald E. Kendrick

July 17, 1990

**Securities & Exchange Commission
Registered Investment Advisors Div.
Washington, D.C. 20549
File #: 801-29749**

Dear Sir:

I have a book due to be on the market in December, 1990 or January, 1991. The title is: *The Average Investor's Rage*. I am only registered in the state of Louisiana presently. I have several questions.

1. If I am asked to speak on my book and its contents in another state—any state—must I be registered in that state? As an author of a book, surely I would not have to register to discuss my book. I am not talking about recommending stocks, bonds, etc. Simply discussing the material in my book.

2. When I registered, my book was just a lot of papers. However, now I have what could be a truly successful book. Must I adhere to my ADV form in what I charge for giving talks on my book—outside of

Louisiana?

3. If you have material from the other states that would help me, I would appreciate it. If not, can you provide me with the addresses of the other states' addresses where I might write to inquire?

Since I am trying to do everything legally, I would appreciate your help in this matter. Thank you very much.

Sincerely yours,

Donald E. Kendrick

September 30, 1990
Director
Securities & Exchange Commission
Registered Investment Advisors Div.
Washington, D.C. 20549
File #: 801-29749

Dear Sir:

This is my third attempt to obtain proper information from the Securities and Exchange Commission. I am trying to follow proper channels. Please assist me in this manner as my book should be coming out in a few months. I need the answers to my questions so that I know I am following the proper legal procedures. Enclosed are copies of my other correspondence to your office.

My main concern is my talks and seminars in other states outside of Louisiana, as I am registered here. As an author, can I or can I not discuss the material in my book in other states without registering. I will not be selling securities; just discussing the material in my book.

Looking forward to hearing from you.

Sincerely yours,

Donald E. Kendrick