

INVESTMENT COUNSEL ASSOCIATION OF AMERICA, INC.

Investment Advisers Act of 1940 - Rule 206(4)-1(b)

March 1, 2004

**Karen L. Barr
General Counsel
Investment Counsel Association of America, Inc.
1050 17th Street, N.W.
Suite 725
Washington, D.C. 20036-5503**

Dear Ms. Barr:

You have requested that we provide you and your members with certain guidance concerning the application of rule 206(4)-1 under the Investment Advisers Act of 1940. This letter responds, in part, to your request.

You have stated that clients and consultants and others are increasingly requesting registered investment advisers to provide them with information that may be deemed to be "advertisements" within the meaning of rule 206(4)-1(b) under the Act and thus would be subject to the prohibitions in rule 206(4)-1(a). For example, you have stated that many clients or their consultants request investment advisers to provide attribution analyses that would involve discussions of their past specific recommendations, including which recommendations were profitable or unprofitable. You believe, however, that such information that is provided by an investment adviser in response to the request of a client, prospective client or consultant is not an advertisement, even if the same information is requested by and provided to more than one client, prospective client or consultant.

Rule 206(4)-1(b) under the Act defines "advertisement" for purposes of the rule as including:

[a]ny notice, circular, letter or other written communication addressed to more than one person, or any notice or other announcement in any publication or by radio or television, which offers (1) any analysis, report, or publication concerning securities, or (2) any graph, chart, formula or other device to be used in making any determination as to when to buy or sell any security, or which us security to buy or sell, or (3) any other investment advisory service with regard to securities.

Thus, by its terms, the rule applies to written communications addressed to more than one person. The rule also applies to announcements in publications and to radio and television broadcasts, but does not apply to any other oral communications. Whether any particular communication - or series of communications - constitutes an advertisement under rule 206(4)-1(b) under the Act depends upon all of the facts and circumstances.

We believe that a written communication by an investment adviser that does no more than respond to an unsolicited¹ request by a client, prospective client or consultant for specific information about the adviser's past specific recommendations is not an "advertisement." Thus, for example, if a consultant specifically requests an investment adviser to provide it with written information about the adviser's past specific recommendations, the adviser's mere communication of that information in writing to the consultant would not, by itself, be an "advertisement" within the meaning of the rule and would not be prohibited by rule 206(4)-1(a)(2) under the Act, so long as the adviser did not directly or indirectly solicit the consultant to make the request. We also would reach the same conclusion if the adviser provided the same information to (a) one consultant that was requesting the information on behalf of several clients or (b) several consultants, so long as the adviser was providing the information in response to a specific, unsolicited request for information about the adviser's past specific recommendations.²

We also believe that a written communication by an investment adviser to its existing clients generally would not be an advertisement within the meaning of rule 206(4)-1(b) merely because it discusses the adviser's past specific recommendations concerning securities that are or were recently held by each of those clients. In general, written communications by advisers to their existing clients about the performance of the securities in their accounts are not offers of investment advisory services but are part of the adviser's advisory services. If, however, the context in which the past specific recommendations are presented by the investment adviser to an existing client suggests that a purpose of the communication is to offer advisory services, we would conclude that the communication was an advertisement. In this regard, a letter written by an adviser that discussed its past specific recommendations concerning securities not held or not recently held by some of the clients to whom the letter was directed would suggest that a purpose of the communication was to promote the advisory services of the adviser and thus may constitute an advertisement and be prohibited by rule 206(4)-1(a)(2) under the Act. See, e.g., Franklin Management, Inc. (pub. avail. Dec. 10, 1998).

As you know, all communications by investment advisers to clients, consultants and prospective clients, whether or not they are advertisements, are subject to the prohibitions in section 206(1) and (2) of the Act. Thus, investment advisers should take care to ensure that all of their communications with clients, prospective clients and others contain are truthful, accurate, balanced and not misleading.

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We hope that this letter will clarify our views on the application of rule 206(4)-1 under the Act for you and your members. We would appreciate your sharing this letter with your members.

Very truly yours,

Douglas Scheidt
Associate Director and
Chief Counsel

Robert E. Plaze
Associate Director

Endnotes

1 A solicited request would be the result of, for example, any affirmative effort by an investment adviser that is intended or designed to induce a client, prospective client or consultant to request the adviser to provide past specific recommendations, or an advertisement indicating that the adviser is willing to provide past specific recommendations upon request. Cf. Rule 15a-6 under the Securities Exchange Act of 1934. See Securities Exchange Act Release No. 27017 (July 11, 1989) at text accompanying notes 53-56.

2 This position also applies to the provision of client testimonials by an investment adviser in response to an unsolicited request by a client, prospective client or consultant for client testimonials.