

Sep 7, 1982

TOTAL NUMBER OF LETTERS: 2

**SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549**

August 6, 1982

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT**

**Our Ref. No. 82-50-CC
New York Investors Group, Inc.
File No. 132-3**

Rule 206(4)-1(a) under the Investment Advisors Act of 1940 provides, in part, that:

it shall constitute a fraudulent, deceptive, or manipulative act, practice, or course of business within the meaning of Section 206(4) of the Act, for any investment adviser, directly or indirectly, to publish, circulate or distribute any advertisement:

(1) which refers, directly or indirectly to any testimonial of any kind concerning the investment adviser or concerning any advice, analysis, report or other service rendered by such investment adviser; or

(2) which refers, directly or indirectly, to past specific recommendations of such investment adviser which were or would be profitable to any person: **provided, however**, that an advertisement which sets out or offers to furnish a list of all recommendations made within the preceding period of not less than one year, or which offers to furnish a separate list of such recommendations, is not prohibited, or

(5) which contains any untrue statement of a material fact, or which is otherwise false or misleading (emphasis in original).

An investment adviser which quotes, in an advertisement, an article in "a financial publication that... lauds the Company and/or the Company president's success in picking stocks that do well under both favorable and unfavorable market conditions", would, because the article indirectly refers to specific past recommendations which would have been profitable, violate rule 206(4)-1(a)(2) unless the advertisement contains all the recommendations made by the adviser within the preceding year.

Furthermore, even if an article does not contain direct or indirect references to specific past recommendations, if it includes information concerning the performance of accounts under the adviser's management, it would be misleading, and an investment adviser who uses such an article in an advertisement would violate rule 206(4)-1(a)(5), if the article, together with the remainder of the advertisement, implies something about, or is likely to cause an inference to be drawn concerning, the experience of advisory clients, the possibilities of a prospective client having an investment experience similar to that which the information about performance suggests was enjoyed by the adviser's clients, or the adviser's competence when there are additional facts which the adviser knows, or ought to know, which, if also provided, would imply different results from, or cause one to draw different inferences than, those suggested by the information provided.

Rule 206(4)-1(a)(1) forbids the use of a testimonial, (i.e. a statement of a customer's experience or endorsement) in an advertisement by an investment adviser because the testimonial may give

rise to a fraudulent or deceptive implication, or mistaken inference, that the experience of the person giving the testimonial is typical of the experience of the adviser's clients. See Rel. No. 1A-121 (26 FR 10,548 (Nov. 9, 1961)). An article by an unbiased-third party concerning an investment adviser's performance, however, is not a testimonial unless it includes a statement of a customer's experience or endorsement. For the reasons explained above, such an article, even though not a testimonial, may still be misleading. Use of a misleading article in an advertisement by an adviser would violate Rule 206(4)-1(a)(5) unless the misleading nature of the article is corrected by the remainder of the advertisement.

Stanley B. Judd
Deputy Chief Counsel

**INQUIRY-1:
LAW OFFICES OF
HAHN CAZIER & LEFF
FORTY-SECOND FLOOR
555 SOUTH FLOWER STREET
LOS ANGELES, CALIFORNIA 90071
(213) 485-9001
February 10, 1982**

**Sidney L. Ciment, Esq.
Chief Counsel
Division of Investment Management
500 North Capitol
Washington, D.C. 20002**

Dear Mr. Ciment:

New York Investors Group, Inc. (the "Company") has sought our assistance in requesting the staff of the Securities and Exchange Commission to advise us of their interpretation of the provisions of Rule 206(4)-1(a)(1) promulgated under Section 206 of the Investment Advisers Act, as it relates to the situation described below.

The Company requests whether it may quote in an advertisement about the Company an article in a financial publication such as Barron's Weekly that lauds the Company and/or the Company president's success in picking stocks that do well under both favorable and unfavorable market conditions.

The Company desires to know whether the use of such a quote would be deemed to be a "testimonial" within the provisions of Rule 206(4)-1(a)(1) and thus be prohibited from use by that Rule.

If you have any questions or comments regarding this matter, please contact me.

Very truly yours,
Janet E. Kerr