TOTAL NUMBER OF LETTERS: 2

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

January 18, 1994

Michael C. Stalker, CFA
Stalker Advisory Services
399 E. 10th Avenue
Suite 204
Eugene, Oregon 97401-3202

Dear Mr. Stalker:

In your letter dated August 25, 1993, you express concerns that certain advertising materials used by Stalker Advisory Services ("SAS"), a registered investment adviser, may be testimonials. You state that these materials are copies of articles printed in independent financial publications, such as Barron's. The articles contain information regarding the past performance of certain investment advisers, including SAS. This performance information is supplied by Money Manager Verified Ratings ("MMVR"), an independent organization with no affiliations to SAS. SAS contracts with MMVR to verify the investment performance of a group of tax-exempt accounts. Each quarter, SAS sends MMVR the brokerage statements for the accounts being tracked and SAS' performance calculation for the period. MMVR reviews the statements, verifies the calculations, and ranks the adviser in its respective category. These rankings are then used by financial publications, such as Barron's.

Rule 206(4)-1 defines the use of certain specific types of advertisements n1 by advisers as fraudulent, deceptive, or manipulative. Paragraph (a)(1) prohibits an investment adviser from using a testimonial concerning the adviser or any advice, analysis, report or other service rendered by the adviser. The staff takes the position that bona fide, unbiased third-party reports generally are not prohibited by the testimonial rule. n2 Under the facts described in your letter, even though SAS pays MMVR a fee to verify SAS' investment performance, and MMVR's performance information may be included in a financial publication, paragraph (a)(1) would not prohibit SAS from using reprinted articles containing this performance information.

The use of these reprints, of course, would continue to be subject to paragraph (5) of Rule 206(4)-1. Paragraph (5) makes it a fraudulent, deceptive or manipulative act for any investment adviser to distribute, directly or indirectly, any advertisement that contains any untrue statement of a material fact or that is otherwise false or misleading. n3 The use of a reprint containing this performance information and rankings, as you describe, would be prohibited if it implied something about or caused a reader to draw an inference concerning (i) the experience of advisory clients, (ii) the possibility of a prospective client having an investment experience similar to that of prior clients, or (iii) the adviser's competence, when there are additional facts that, if disclosed, would imply different results from those suggested in the article. n4

I hope this information is helpful. I apologize for the delay in our response. You may call this Office at (202) 272-2030 if you have any further questions.

Sincerely yours,

Linda A. Schneider
Attorney
Office of Chief Counsel

Footnotes

n1 Rule 206(4)-1(b) generally defines an "advertisement" to include any communication addressed to more than one person that offers any investment advisory service with regard to securities.

n2 Kurtz Capital Management (pub. avail. Dec. 18, 1987) ("Kurtz").

n3 Whether any advertisement is false or misleading will depend generally on the particular facts and circumstances surrounding its use.

n4 Kurtz.

INQUIRY-1:
STALKER ADVISORY SERVICES
399 E. 10th Avenue
Suite 204
Eugene, Oregon 97401-3202

Telephone: (808) 525-8808
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August 25, 1993

Re: IAA-40
Rule: 206(4)-1

Mr. Thomas S. Harmon, Chief Counsel
Division of Investment Management
Securities & Exchange Commission
450 Fifth St. N.W.
Washington, D.C. 20549

Dear Mr. Harmon:

Recently I spoke with Linda Schneider at the SEC regarding the use as marketing material of unbiased third party articles which describe investment advisors performance. Specifically I inquired whether such use was considered a testimonial by the SEC. She informed me that unbiased third party articles were not generally considered a testimonial and referred me to no-action letters SEC Ref No. 84-361-CC, Richard Silverman, File No. 132-3 and SEC Ref. No. 87-618, Kurtz Capital Management, File No. 801-20163.

In describing the Barron's article I mentioned that the source of the performance ranking that Barron's published, Money Manager Verified Rating was a company that Stalker Advisory Services (SAS) paid to track its investment performance. Upon hearing that I paid to have my performance tracked she was unsure whether I could use the article in reliance on the no-action letters regarding unbiased third party articles not being considered testimonials.

Issue:

The concern of Ms. Schneider and an associate she consulted was that there may be a potential conflict set up vis-a-vis the fact that SAS pays to have its performance measured and then would like to use any articles that may publish the ranking to market SAS' services.

The purpose of this letter is to ask for a no-action letter based on the use as marketing material of an unbiased third party article that incorporates in the article performance statistics from a source that receives a fee from participating advisors to track their performance.

Background:

Stalker Advisory Services (SAS) contracts with Money Manager Verified Ratings (MMVR), an independent organization with no affiliations (ownership, marketing or otherwise) to SAS, to verify the investment performance of a group of tax exempt accounts. The accounts tracked by MMVR for SAS must meet certain criteria established by MMVR, e.g. the aggregate value is in excess of $ 1 million, and that the portfolio meet certain risk characteristics. The risk characteristics determine what category (Aggressive, Conservative Growth or Low Risk) the portfolio will be ranked in. Each quarter SAS sends MMVR the brokerage statements for the accounts being tracked and its performance calculation for the period. MMVR reviews the statements, verifies the calculations, and ranks the advisors in their respective categories. From time to time articles appear in the financial press featuring these rankings.

Discussion:

SAS would like the SEC to consider the following:

1. SAS has no control over its ranking.

2. SAS has no control over whether any articles using the rankings will be published. Therefore the appearance of an article cannot be considered advertising on the part of SAS.

3. SAS has no assurance that when the ranking appears SAS will be named in the article. For example if SAS ranked 12th in its category the publication may, for space considerations, print only the top ten in the category.

4. Any advisor who wishes to have his performance tracked by an outside service bears a cost for doing so. The cost may be, explicit or implicit (The advisor pays a third party to confirm its performance or the advisor bears internal costs to track, answer questionnaires, be subject to audits for verification, etc.) or both. Either way the advisor pays to get his or her performance into the public domain. There is an entire industry set up to do just that - sell performance statistics.

5. Although I have not done an extensive survey of the performance measurement industry I did call SEI. SEI is an industry leader in providing performance evaluations of money managers. SEI charges managers between $ 15,000 and $ 30,000 to evaluate their performance. The evaluation process was similar to MMVR - review of custodial statements of the account. SEI also sells performance consulting services to plan sponsors conducting manager searches.

I asked whether SEI required managers to use its performance measurement services in order to be included in its manager searches. SEI said it would accept other third party verification provided the verification process was similar to that of SEI. The bottom line is that the manger must pay some third party to verify its performance.

6. SAS uses its category ranking in its entirety. There is no deletion of competitors or gaming of the performance period being measured. Mutual funds select their performance measurement period in advertising. This gives them greater latitude to produce a comparatively good track record.

7. SAS has placed a cautionary legend on the article. See enclosed.

8. Debt issuers pay rating agencies to rate their debt - a process that on its surface would appear to create a tremendous potential for conflict since a company's cost of funds and an investor's

return are directly related to an issuers ratings. No one has suggested (nor am I) that this practice is inappropriate. In fact financial markets rely on the ratings.

Public corporations pay accounting firms to issue certified financial statements. Investors rely on the integrity of those statements to value a company. This too would appear to create a potential conflict. Yet, in general, the potential conflict does not trouble investors nor should it.

It is therefore troubling that an investment advisor might be questioned for performing a similar function i.e. paying an independent third party for an evaluation or ranking, and subsequently using those results if published by an unbiased third party.

Finally, I am enclosing an example that, in my opinion, is not the way to use an article featuring performance rankings. This article was sent in a Kaufmann Fund mailing that included a prospectus.

Thank you for your attention to this matter.

Sincerely,

Michael C. Stalker, CFA