



July 31, 2002

Jonathan G. Katz
Secretary
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Proposed Amendments to Investment Company Advertising Rules
(Release Nos. 33-8101, 34-45953, IC-25575; File No. S7-17-02)

Dear Mr. Katz:

The Investment Company and Investment Adviser Committees of the Securities Industry Association (“SIA”)¹ are taking this opportunity to comment on proposed revisions to the SEC investment company advertising rules. The proposed revisions encompass rule and form amendments to Rules 482, 134 and 156 under the Securities Act of 1933, and Rule 34b-1 under the Investment Company Act of 1940.

As a general matter, we welcome and support the proposed amendments and, as discussed below, believe that the additional disclosure flexibility they provide with respect to mutual fund advertisements will be beneficial to both funds and investors.

Rule 482

As noted in the proposing release, in conjunction with the passage of the National Securities Markets Improvement Act of 1996 (“NSMIA”)² Congress added Section 24(g) to the Investment Company Act of 1940. Section 24(g) directs the SEC to adopt rules or

¹ The Securities Industry Association brings together the shared interests of more than 600 securities firms to accomplish common goals. SIA member-firms (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. The U.S. securities industry manages the accounts of nearly 93 million investors directly and indirectly through corporate, thrift, and pension plans. In the year 2001, the industry generated \$198 billion in U.S. revenue and \$358 billion in global revenues. Securities firms employ approximately 750,000 individuals in the United States. (More information about SIA is available on its home page: <http://www.sia.com>).

² Public Law 104-290.

regulations to permit the use of advertisements that include information, the “substance of which” is not included in the statutory prospectus. The proposed amendments to Rule

482 are designed to implement the provisions of Section 24(g) by eliminating the “substance of which” requirement from fund advertising, and in so doing, will add needed flexibility to the content of fund advertising, especially with respect to the disclosure of material developments which have occurred subsequent to the publication of the most recent statutory prospectus. While the “substance of which” requirement was intended to protect public investors, in many instances it actually inhibits the timely flow of important information to investors. Therefore, we applaud the proposed elimination of the requirement, and the SEC’s recognition that application of general antifraud standards of the federal securities laws and prospectus liability under Section 12(a)(2) of the Securities Act of 1933 will provide substantial protection against potential abuse.

We also support improved advertising disclosure which will make more current performance data available to prospective investors, and direct them to where they can obtain information about fund charges and expenses.³ We believe that improving disclosure in these areas is beneficial to investors as long as the additional disclosure is presented in a balanced manner so that short-term performance (good or bad) or fees and charges are not given undue weight at the expense of a critical evaluation of long-term investment performance. In that regard, we note that the instant proposal has been issued during a period of generally declining prices, and the SEC has expressed concern that in the absence of the most recent performance data, investors may base their investment decisions on performance that is not likely to be duplicated. However, since markets will inevitably turn around, it is equally possible that investors will be unduly influenced by recent performance which may not be indicative of a fund’s historic performance. Therefore we support the SEC’s efforts, discussed below, to reinforce the antifraud protections in the fund advertising rules.

Rule 134

We do not believe that the elimination of the “substance of which” requirement from Rule 482 dictates that Rule 134 should not remain available with respect to fund advertisements. So-called “tombstone” ads under Rule 134 have traditionally provided a more succinct methodology for funds to convey useful information to prospective investors, and there has been little evidence of abuse with respect to such ads. Therefore, we question whether exposing such ads to Section 12(a)(2) liability will meaningfully increase investor protection, or instead will discourage funds from utilizing a form of advertising which has proven to be useful and informative for prospective investors. We therefore respectfully suggest that, rather than eliminating the availability of Rule 134 for

³ Although we support the provision of more current performance information, we urge the Commission to consider carefully the operational ability of funds and financial intermediaries to do so within the proposed time period. We believe that industry participants are best able to evaluate the technical feasibility of this proposal and suggest a reasonable time frame.

fund advertising at this time, further action be deferred until a more flexible Rule 482 has been in operation for some time, and a more thorough analysis can be made of the continuing need for retaining Rule 134 availability for funds.

Rules 156 and 34b-1

We welcome the proposed amendments to Rule 156 and the addition of a note to Rule 34b-1 which, among other things, underscore a fund's obligation to ensure that an advertisement is not false or misleading, whether due to an affirmative misstatement or omission. We believe these modifications more clearly articulate that it is the "totality" of the ad, and the context in which information is presented, which is determinative of whether the ad is in compliance with the antifraud provisions of the federal securities laws and related rules.

INVESTMENT ADVISERS ACT ADVERTISING RULES

The instant proposals reflect a shift in regulatory focus with respect to advertising rules, from prescribing or proscribing particular activities, toward a more general antifraud standard. We believe this is a good thing, as the former tends to inhibit rather than promote effective disclosure, and may encourage technical compliance with the rules, rather than true adherence to their spirit and purpose.

We also believe that a similar shift in focus is needed with respect to the regulation of investment adviser advertising. Currently, Rule 206(4)-1 under the Investment Advisers Act of 1940 contains numerous specific, but outmoded, advertising proscriptions, such as those that prohibit use of testimonials or specific past recommendations. These, and other proscriptions, may deprive investors of important information they want and should have. Such investors would be better served by replacing the current regimen with a general antifraud standard similar to that contained in Rule 156. We note that in August, 2001 the Investment Counsel Association of America ("ICAA") submitted a thoughtful letter to the SEC containing recommendations for modernizing investment adviser advertising regulation.⁴ We believe these recommendations should be given serious consideration.

CONCLUSION

The SIA Committees support and welcome the SEC's proposed amendments to help clarify and re-focus mutual fund advertising regulations. Specifically, the Committees support the proposed amendments to Rules 482 and 156 under the Securities

⁴ Letter from Karen L. Barr, Esq., General Counsel, ICAA to Paul F. Roye, Esq., Director, SEC Division of Investment Management, "Proposed Changes to Investment Advisers Act Advertising Rule" (August 21, 2001).

Act of 1933 and Rule 34b-1 under the Investment Company Act of 1940. However, we respectfully request that the SEC defer action with respect to eliminating the availability of Rule 134 for fund advertising, until the proposed amendments to Rule 482 have been in effect for a reasonable period of time, so that a more thorough analysis can be made as to whether there is a continuing need to retain Rule 134 availability for fund advertising.

Finally, the Committees urge that the SEC move promptly to modernize investment adviser advertising regulation, utilizing an approach similar to that reflected in the instant proposal.

The Committees appreciate the opportunity to comment. Questions regarding this letter may be directed to Michael D. Udoff of SIA staff at 212-618-0509.

Sincerely,

Gerald T. Lins
Chairman, Investment Company Committee

Paul S. Gottlieb
Chairman, Investment Adviser Committee

cc: Karen L. Barr, Esq.
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