

Why SEC Registration and Certification are Not Required

Rev. Sept. 2013

Summary

The Uniform Securities Act, as written by Congress, specifically protects a publisher's right to freedom of speech as provided by the US Constitution's First Amendment. Thus, expressly excluded from the definition of "investment adviser" in federal law is ***"the publisher of bona fide newspaper, news magazine or business or financial publication of general and regular circulation."***

Although the current phraseology is shorter, it's meaning, as interpreted by the SEC, has not changed from the more verbose phraseology of earlier revisions that read: ***"a publisher of any bona fide newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client."***

In 1985 the U.S. Supreme Court heard ***Lowe v. SEC - 472 U.S. 181*** and vindicated Lowe based on the law's clearly intended exclusion of newsletter publishers from the definition of "investment adviser."

To help ensure that customers understand that we do not provide personal financial advice, they are asked to click the checkbox shown to the right prior to accessing the My Strategies page. Additionally, the footer of every SectorSurfer page includes this disclaimer: ***SumGrowth Strategies is not a registered investment advisor and does not provide professional financial investment advice specific to your life situation. SectorSurfer is solely an algorithmic market analysis tool that produces trade signals according to the set of funds provided for analysis. [Read More Here.](#)***

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Documents

The following documents are provided for reference from the SEC, Congress, and the Supreme Court.

<http://www.sec.gov/investor/pubs/cyberfraud/newsletter.htm>



The screenshot shows the U.S. Securities and Exchange Commission (SEC) website. At the top left is the SEC seal. The page title is "Tips for Checking Out Newsletters". The main heading is "Tips for Checking Out Newsletters". Below this, the text reads: "Find out whether the newsletter received payment to 'tout' or recommend the stock and, if so, what it received and from whom." The body text explains that because the U.S. Constitution's First Amendment protects freedom of speech, the SEC cannot simply prohibit newsletters from recommending or touting particular stocks. However, when newsletters receive payment for touting, securities laws require them to disclose specifically who paid them, the amount, and the type of payment (cash, stock, or some other thing of value).

Regulation of Investment Advisers by the U.S. Securities and Exchange Commission

March 2013

Staff of the Investment Adviser Regulation Office
Division of Investment Management
U.S. Securities and Exchange Commission



II. Who is an Investment Adviser?

A. Definition of Investment Adviser

Section 202(a)(11) of the Act defines an investment adviser as any person or firm that:

- for compensation;
- is engaged in the business of;
- providing advice to others or issuing reports or analyses regarding securities.



B. Exclusions from Definition

There are several exclusions from the investment adviser definition available to persons who presumably (or at least arguably) satisfy all three elements of the definition. A person eligible for one of the exclusions is not subject to any provisions of the Act.



4. *Publishers.* Publishers are excluded from the Act, but only if a publication: (i) provides only impersonal advice (*i.e.*, advice not tailored to the individual needs of a specific client);²⁷ (ii) is “bona fide,” (containing disinterested commentary and analysis rather than promotional material disseminated by someone touting particular securities); and (iii) is of general and regular circulation (rather than issued from time to time in response to episodic market activity).²⁸

UNIFORM SECURITIES ACT (1956), AS AMENDED

AN ACT

[Relating to securities; prohibiting fraudulent practices in relation thereto; requiring the registration of broker-dealers, agents, investment advisers, and securities; and making uniform the law with reference thereto:]

[Be it enacted. . . .]

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Part IV General Provisions

Sec. 401. [DEFINITIONS.] When used in this act, unless the context otherwise requires:

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(f) "Investment adviser" means 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 a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, provide the foregoing investment advisory services to others for compensation and as part of a business or who hold themselves out as providing the foregoing investment advisory services to others for compensation. "Investment adviser" does not include (1) an investment adviser representative; (2) a bank, savings institution, or trust company; (3) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession; (4) a broker-dealer or its agent whose performance of these services is solely incidental to the conduct of its business as a broker-dealer and who receives no special compensation for them; (5) a publisher of any bona fide newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client; (6) any person that is a federal covered adviser; or (7) such other persons not within the intent of this subsection as the [Administrator] may by rule or order designate.

Lowe v. SEC - 472 U.S. 181 (1985)

U.S. Supreme Court

Syllabus <http://supreme.justia.com/cases/federal/us/472/181/>

Petitioner Lowe is the president and principal shareholder of a corporation (also a petitioner) that was registered as an investment adviser under the Investment Advisers Act of 1940 (Act). Because Lowe was convicted of various offenses involving investments, the Securities and Exchange Commission (SEC), after a hearing, ordered that the corporation's registration be revoked and that Lowe not associate with any investment adviser. Thereafter, the SEC brought an action in Federal District Court, alleging that Lowe, the corporation, and two other unregistered corporations (also petitioners) were violating the Act, and that Lowe was violating the SEC's order by publishing, for paid subscribers, purportedly semimonthly newsletters containing investment advice and commentary. After determining that petitioners' publications were protected by the First Amendment, the District Court, denying for the most part the SEC's requested injunctive relief, held that the Act must be construed to allow a publisher who is willing to comply with the Act's reporting and disclosure requirements to register for the limited purpose of publishing such material and to engage in such publishing. The Court of Appeals reversed, holding that the Act does not distinguish between person-to-person advice and impersonal advice given in publications, that petitioners were engaged in business as "investment advisers" within the meaning of the Act, and that the exclusion in § 202(a)(11)(D) of the Act from the Act's definition of covered "investment advisers" for "the publisher of any bona fide newspaper, news magazine, or business or financial publication of general and regular circulation" did not apply to petitioners. Rejecting petitioners' constitutional claim, the court further held that Lowe's history of criminal conduct justified the characterization of petitioners' publications "as potentially deceptive commercial speech."

Held: Petitioners' publications fall within the statutory exclusion for bona fide publications, none of the petitioners is an "investment adviser" as defined in the Act, and therefore neither petitioners' unregistered status nor the SEC order against Lowe provides a justification for restraining the future publication of their newsletters. Pp. [472 U. S. 190](#)-211.

Page 472 U. S. 182

(a) The Act's legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities. Pp. [472 U. S. 203](#)-204.

(b) Because the content of petitioners' newsletters was completely disinterested, and because they were offered to the general public on a regular schedule, they are described by the plain language of § 202(a)(11)(D)'s exclusion. 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. Thus, petitioners' newsletters do not fit within the Act's central purpose, because they do not

offer individualized advice attuned to any specific portfolio or to any client's particular needs. On the contrary, they circulate for sale to the public in a free, open market. Lowe's unsavory history does not prevent the newsletters from being "bona fide" within the meaning of the exclusion. In light of the legislative history, the term "bona fide" translates best to "genuine"; petitioners' publications meet this definition. Moreover, the publications are "of general and regular circulation." Although they have not been published on a regular semimonthly basis as advertised, and thus have not been "regular" in the sense of consistent circulation, they have been "regular" in the sense important to the securities market. Pp. [472 U. S. 204](#)-209.

725 F.2d 892, reversed.

STEVENS, J., delivered the opinion of the Court, in which BRENNAN, MARSHALL, BLACKMUN, and O'CONNOR, JJ., joined. WHITE, J., filed an opinion concurring in the result, in which BURGER, C.J., and REHNQUIST, J., joined, **post**, p. [472 U. S. 211](#). POWELL, J., took no part in the decision of the case

After the 1956 Act was published, the United States Supreme Court construed the definition of investment adviser in *Lowe v. SEC*, 472 U.S. 181 (1985), and concluded: Congress did not intend to exclude publications that are distributed by investment advisers as a normal part of the business of servicing their clients. The legislative history plainly demonstrates that Congress was primarily interested in regulating the business of rendering personalized investment advice, including publishing activities that are a normal incident thereto. On the other hand, Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the press through the licensing of nonpersonalized publishing activities.