[**Is it an Advertisement?**](http://www.compliancebuilding.com/2011/04/13/is-it-an-advertisement/)

on April 13, 2011 in [Fundraising](http://www.compliancebuilding.com/category/fundraising/)

[Section 206 of the Investment Advisers Act](http://taft.law.uc.edu/CCL/InvAdvAct/sec206.html) prohibits fraud, deception or manipulation, regardless of whether the fund manager is registered. Once registered, [Rule 206(4)-1](http://taft.law.uc.edu/CCL/InvAdvRls/rule206%284%29-1.html) imposes additional restrictions on advertising that the SEC has determined would be fraudulent deceptive or manipulative.

So what is an [advertisement for purposes of the rule 206(4)-1](http://taft.law.uc.edu/CCL/InvAdvRls/rule206%284%29-1.html):

“[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 which is to be used in making any determination as to when to buy or sell any security, or which security to buy or sell, 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 security to buy or sell, or (3) any other investment advisory service with regard to securities.”

That is a very broad definition.

The first thing I notice is that it must be in written. So oral communications do not fall within the definition. A speaking engagement would not be an advertisement for purposes of this rule. However, the Powerpoint presentation would be, especially if it’s handed out or otherwise made available.

The second is that it must be a “communication addressed to more than one person.” So one-on-one communications should fall outside the limitations of this rule.

A reply for a request for information is generally not an advertisement. In the 1984 [SEC Letter to the Investment Counsel Association of America, Inc.](http://sec.gov/divisions/investment/noaction/ica030104.htm) they pointed out that an unsolicited request by a client, prospective client or consultant for specific information 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.

In that same letter, the SEC pointed out that a communication to existing investors is generally not an advertisement. “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. ”

Keep in mind that even if the communications falls outside the definition of “advertisement” and the limitations of Rule 206(4)-1, it is still subject to the anti-fraud provision of Section 206.

*Sources:*

* [Rule 206(4)-1](http://taft.law.uc.edu/CCL/InvAdvRls/rule206%284%29-1.html)
* [SEC Letter to the Investment Counsel Association of America, Inc.](http://sec.gov/divisions/investment/noaction/ica030104.htm) (2004)