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Alert | Financial Regulatory & Compliance

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No Need for Seeking Alpha to Seek Registration

Go-To Guide:

- A federal court ruled that Seeking Alpha, Inc. is protected by the publishers' exclusion to the definition of "investment adviser" in the Investment Advisers Act of 1940.
- The court declined a narrow reading of the publishers' exclusion, citing *Lowe v. SEC*.
- Publications that are "bona fide" for purposes of the publishers' exclusion should not be personal communications, contain false or misleading information, or be designed to tout any security in which the publisher has an interest.
- Publications that are updated in response to breaking news fall within the ordinary usage of the term "regular."

On Aug. 15, 2024, a federal court dismissed a proposed class action against financial analysis website Seeking Alpha, Inc. (Seeking Alpha). The lawsuit was brought in July 2023 by subscribers who accused Seeking Alpha of operating as an unregistered investment adviser and unlawfully collecting subscription fees by providing investing advice and customized email alerts on its website without having relevant state and federal registrations.

The court ruled that Seeking Alpha is protected from the requirement to register as an investment adviser under the Investment Advisers Act of 1940 (Advisers Act) due to an exclusion for publishers of newspapers, magazines, and business or financial publications.

Analysis

In reaching its decision, the court considered whether Seeking Alpha's conduct was sufficient to qualify them as an investment adviser under the Advisers Act, under which an investment adviser is defined as:

> 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 part of a regular business, issues or promulgates analyses or reports concerning securities.[1]

The Advisers Act includes several exceptions from the scope of this definition, including for publishers "of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation" (the publishers' exclusion).

The court cited the 1985 U.S. Supreme Court decision in *Lowe v. SEC*[2] in examining the applicability of the publishers' exclusion to Seeking Alpha, which held that under the publishers' exclusion, the SEC could not stop a publisher from issuing investment advice even if its authors were not registered as investment advisers. The Supreme Court determined that for the publishers' exclusion to apply, the publication must be "bona fide" and "of regular and general circulation."

Bona Fide

In *Lowe*, the Supreme Court reasoned that "bona fide" publications would contain disinterested commentary and analysis as opposed to promotional material. The Supreme Court found that the publications in question were "bona fide," as they:

1. were not personal communications,[3]
2. did not contain false or misleading information, and
3. were not designed to tout any security in which the defendant had an interest.

The plaintiffs in this case did not contend that Seeking Alpha's publications contained false or misleading information or were designed to tout any security in which Seeking Alpha had an interest. Instead, their argument that Seeking Alpha's publications were not "bona fide" hinged on the claim that the publications amounted to "personal communications" due to features on its website that allow subscribers to receive email alerts regarding ratings changes, investment recommendations, and warnings about stocks in their portfolio at risk of poor performance. Additionally, Seeking Alpha allows subscribers to compare potential investment opportunities based on subscribers' preferences, and provides breaking news and critical market updates around the clock.

Using the analysis in *Lowe*, the court found that Seeking Alpha's publications satisfied each of the requirements to be considered "bona fide" and disagreed that the website's features constituted "personal communications," reasoning that these features "merely allow the subscriber to filter generally available content that would be visible to any subscriber who looks for it or signs up for the same alerts." These

[1] 15 U.S.C. § 80b-2(a)(11)
[2] *Lowe v. SEC*, 472 U.S. 181 (1985)
[3] See also, *Weiss Research, Inc.*, IAA Release No. 2525, 88 SEC Docket 810, 2006 WL 1725099 (June 22, 2006), in which the publishers' exclusion was not found due to the respondent's engagement in personalized communications with its subscribers and effectively having authority over the funds of subscribers.

features do not render "impersonal, disinterested, and generally available content" as "individualized and personal as soon as it is caught by the filter." The fact that the plaintiffs did not allege that Seeking Alpha created publications specifically for and delivered only to them supported the court's conclusion.

Regular and General Circulation

In *Lowe*, the Supreme Court found that although the defendant's publications were not consistently circulated, they were nevertheless "of general and regular circulation" because there was "no indication that they had been timed to specific market activity or to events affecting or having the ability to affect the securities industry."

Here, the plaintiffs argued that Seeking Alpha's publications did not regularly and generally circulate because the website's features would change in response to market activity, as demonstrated by the publication of breaking news and email alerts on ratings changes and recommendations. However, the court disagreed, finding that publications that are updated in response to breaking news fall within the ordinary usage of the term "regular."[4]

The court noted that in *Lowe*, the Supreme Court held that Congress, in passing the Advisers Act, was "plainly sensitive to First Amendment concerns" and "wanted to make clear that it did not seek to regulate the press through the licensing of non-personalized publishing activities." Given this, the court rebuked plaintiffs' suggestion that the publishers' exclusion is limited to publications that circulate "only at strictly measured, predictable intervals regardless of whether breaking news occurs in the meantime," noting that this would "make the exclusion inapplicable to virtually all modern financial news organizations, which publish breaking news and market updates in real time."

Conclusion

The court granted Seeking Alpha's motion to dismiss, concluding that the plaintiffs did not meet their burden to plead facts sufficient to support a plausible inference that Seeking Alpha operated as an investment adviser and was not protected from registration by the publishers' exclusion.

In holding that the publishers' exclusion applied to Seeking Alpha, the court rejected a narrow interpretation of the Advisers Act and hyper-literal reliance on *Lowe* divorced from context or modern-day realities. The financial media industry has significantly evolved since the 1985 *Lowe* decision. This decision from a key court should give financial news and analysis websites some comfort that plaintiffs who try to weaponize *Lowe* may run into resistance from courts who recognize this evolution.

The case was dismissed at the pleading stage, with the court finding that the plaintiffs had the burden of alleging facts sufficient to demonstrate that the publishers' exclusion was not applicable. The plaintiffs may file an amended complaint within 30 days of the date of the decision.

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[4] See also, *SEC v. Park* (99 F. Supp. 2d 889, 892 (N.D. Ill. 2000), in which the defendants timed the circulation of their advice to take advantage of certain prices or to sell or purchase their own shares of a particular stock profitability.

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