

MEMO# 14419

February 1, 2002

DC COURT HOLDS FEDERAL TRADE COMMISSION NOT BARRED FROM INVESTIGATING SEC REGISTRANT'S ADVERTISING

[14419] February 1, 2002 TO: ADVERTISING COMPLIANCE ADVISORY COMMITTEE No. 4-02 COMPLIANCE ADVISORY COMMITTEE No. 9-02 INVESTMENT ADVISERS COMMITTEE No. 2-02 SEC RULES COMMITTEE No. 11-02 RE: DC COURT HOLDS FEDERAL TRADE COMMISSION NOT BARRED FROM INVESTIGATING SEC REGISTRANT'S ADVERTISING In a recent case, the U.S. Court of Appeals for the District of Columbia Circuit upheld the authority of the Federal Trade Commission (FTC) to subpoena the records of a federally- registered investment adviser in connection with an FTC investigation of fraudulent or deceptive advertising. The holding in this case resulted from a proceeding filed by the FTC in the U.S. District Court seeking compliance with a civil investigative demand (CID). The facts of this case, and the court's holding, are summarized below. BACKGROUND The appellant company in this case, which sold instructional materials that purported to teach would-be-investors how to make money investing in the commodities and securities markets, was registered with the Securities and Exchange Commission under the Investment Advisers Act of 1940 and with the Commodity Futures Trading Commission under the Commodity Exchange Act. In an effort to determine whether the appellant had engaged in deceptive advertising under the Federal Trade Commission Act, the FTC issued CIDs requiring the appellant to produce documents and respond to interrogatories relating to the appellant's business practices. The appellant declined to respond to most of the FTC's request and, instead, filed with the FTC a Petition to Quash the CIDs, claiming that because the regulation of the appellant's advertising practices was subject to the exclusive jurisdiction of the SEC or CFTC, the FTC lack authority to investigate. The FTC denied the petition and filed a petition in the U.S. District Court for the District of Columbia seeking an order to enforce the CIDs. In May 2000, the District Court upheld the FTC's jurisdiction and ordered the appellant to comply with the CIDs. The appellants appealed to the Court of Appeals. On appeal, the Court of Appeals affirmed the District Court's holding. 2 THE APPELLATE DECISION The Court of Appeals' decision affirming the lower court's holding includes the following: . . . Unless it is patently clear that an agency lacks the jurisdiction that it seeks to assert, an investigative subpoena will be enforced. Whatever the ultimate merit of [the appellant's] preemption argument – and we believe they have little – appellants cannot overcome the long-standing doctrine that precludes courts from entertaining challenges to the jurisdiction of administrative agencies during subpoena enforcement proceedings. Because under no reasonable reading of the CEA or the IAA does either of those statutes manifestly strip the FTC of its broad power over deceptive advertising, we affirm the District's Court's decision

that appellants must comply with the FTC's compulsory process. * * * * . . . [W]e hold that the FTC is entitled to enforce its CIDs against [the appellants] in this case. Neither the Commodity Exchange Act nor the Investment Advisers Act evince an unambiguous intent to deprive the FTC of its otherwise applicable authority to investigate possibly deceptive advertising and marketing practices merely because those practices relate to either the commodities or securities business. Accordingly the decision of the District Court is affirmed. [Emphasis added.] A copy of the decision of the Court of Appeals is attached.

Tamara K. Reed Associate Counsel Attachment Attachment (in .pdf format)

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