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(S.E.C. No - Action Letter)
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Cambiar Investors, Inc.

Our Ref No. 97-89-CC

Cambiar Investors, Inc.

File No. 801-9538

Your letter of February 10, 1997 requests the staff's concurrence with your view that an investment adviser would not violate Section 206(4) of the Investment Advisers Act of 1940 ("Advisers Act") and Rule 206(4)-1 thereunder if the adviser includes a partial list of clients in advertisements distributed to brokers, consultants, existing clients or prospective clients, as described below.

Cambiar Investors, Inc. ("Cambiar") is a registered investment adviser that proposes to distribute a brochure describing its investment advisory services that includes a partial client list.¹ You represent that Cambiar will use criteria unrelated in any way to the performance of the underlying accounts to compile the partial client list.² You also indicate that the partial client list will be accompanied by disclosure that identifies the criteria used to compile the list and a disclaimer that states that the inclusion of a client on the list does not imply that the client endorses or recommends Cambiar as an investment adviser.

Section 206(4) of the Advisers Act prohibits investment advisers from engaging in any act, practice or course of business that the Commission, by rule, defines as fraudulent, deceptive or manipulative. Rule 206(4)-1(a)(1) provides that it is a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of the Section 206(4) of the Advisers Act for any investment adviser to distribute any advertisement³ which refers, directly or indirectly, to any testimonial of any kind concerning the investment adviser. Although the term "testimonial" is not defined in Rule 206(4) -1, the

¹ You have not requested our view, and we express none, regarding the legal issues arising from an investment adviser's use of a client's name in an advertisement without first obtaining the client's informed consent.

² Telephone conversation on March 19, 1997 between Edward L. Sperry, counsel for Cambiar and Eileen M. Smiley.

³ Cambiar's brochure is an "advertisement" because it is a communication addressed to more than one person that offers advisory services regarding securities. See Advisers Act Rule 206(4)-1(b). See also Denver Investment Advisors, Inc. (pub. avail. July 30, 1993). For purposes of this letter, the term "brochure" refers to the advertisement to be prepared by Cambiar that will include the partial client list and not the brochure required under Advisers Act Rule 204-3.

staff consistently has interpreted that term to include a statement of a client's experience with, or endorsement of, an investment adviser.⁴

In Denver Investment Advisors, Inc. (pub. avail. July 30, 1993) (“DIA”), the staff declined to take a position on whether a partial client list constituted a testimonial. The staff, however, stated that it would not recommend enforcement action to the Commission under Rule 206(4) -1 under the Advisers Act if an investment adviser included a partial client list in a firm profile that it distributed, upon request, to pension plan consultants and other intermediaries (“consultants”), based on the adviser's representations that it would: 1) use objective criteria, unrelated to the performance of client accounts, in compiling the list; 2) disclose in the profile the objective criteria used to compile the list; and 3) include in the profile the disclaimer that “it is not known whether the listed clients approve or disapprove of [the adviser] or the advisory services provided.”

You maintain that a partial client list prepared and presented in the manner described in DIA is not a testimonial within the meaning of Rule 206(4) - 1(a)(1). You contend that such a partial client list is neither a statement of a client's experience with, nor endorsement of, the adviser by the clients identified on the list. You also contend that a partial client list prepared and presented in the manner described in DIA does not present the evils that prompted the Commission to prohibit testimonials in adviser advertising.

We agree that a partial client list that does not more than identify certain clients of the adviser cannot be viewed either as a statement of a client's experience with, or endorsement of, the investment adviser, and therefore is not a testimonial.⁵ Our position is not conditioned on the adviser's use of nonperformance-related criteria to select clients that appear on the partial client list or the presence of any particular disclosure or disclaimer. Our position also is not conditioned on who receives the advertisement (consultant or client) or whether the recipient requested the information. In our view, these factors are not relevant to determining whether the content of an advertisement constitutes a statement of a client's experience with, or endorsement of, a particular investment adviser.

You also seek the staff's concurrence with your view that an adviser would not violate Rule 206(4) - 1(a)(5) by distributing an advertisement containing a partial client list prepared and presented in the manner described in DIA. Rule 206(4) - 1(a)(5) provides that it is a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of Section 206(4) of the Advisers Act

⁴ See, e.g., Letter to the Editor of Journal of Financial Planning from Jack W. Murphy, Associate Director and Chief Counsel (pub. avail. Feb. 2, 1996); Denver Investment Advisors, Inc. (pub. avail. July 30, 1993); CIGNA Securities, Inc. (pub. avail. May 8, 1991); John Y. Barry (pub. avail. Oct. 18, 1989); Richard Silverman (pub. avail. Mar. 27, 1985); New York Investors Group, Inc. (pub. avail. Sept. 7, 1982).

⁵ This position is consistent with the reasoning underlying the Commission's prohibition of testimonials. In prohibiting the use of testimonials, the Commission was concerned that such advertisements were inherently misleading because “by their very nature they emphasize the comments and the activities favorable to the investment adviser and ignore those which are unfavorable.” Advisers Act Release No. 121 (Nov. 2, 1961) (adopting Rule 206(4) - 1) (emphasis added). A partial client list neither emphasizes comments or activities favorable to the investment adviser nor ignores those that are unfavorable. The advertisement merely identifies certain clients of the adviser

for any investment adviser to distribute, directly or indirectly, any advertisement that contains any untrue statement of a material fact or that is otherwise false or misleading.

Whether a particular advertisement is false or misleading depends upon all of the relevant facts and circumstances.⁶ In our view, Section 206(4) and Rule 206(4) - 1(a)(5) do not prohibit an adviser from distributing an advertisement that includes a partial client list prepared and presented in the manner described in DIA⁷, provided that the advertisement does not contain any untrue statement of material fact and is not otherwise false or misleading. We note that an advertisement containing a partial client list that is not prepared and presented in the manner described in DIA would not necessarily be false or misleading. In deciding whether an advertisement containing a partial client list is false or misleading under Section 206(4) and Rule 206(4) - 1(a)(5), an adviser's deviation from one or more of the DIA representations could be relevant, but would not necessarily be determinative.⁸

For the reasons discussed above, in our view, an advertisement that does no more than identify certain clients of an adviser is not a testimonial within the meaning of Rule 206(4) - 1(a)(1) under the Advisers Act. We also would not recommend enforcement action pursuant to Section 206(4) of the Advisers Act and Rule 206(4) - 1(a)(5) thereunder based on an adviser's inclusion of a partial client list in an advertisement, provided that the list is not presented in a false or misleading manner and the advertisement contains no untrue statement of material fact and is not otherwise false or misleading. This letter addresses an adviser's responsibilities only with respect to Section 206(4) of the Advisers Act and

6 See, e.g., *Anametrics Investment Management* (pub. avail. May 5, 1977) (whether a communication is misleading will depend upon all of the particular facts, including the form and content of the communication, the implications or inferences arising out of the context of the communication, and the sophistication of the prospective client). See also *In the Matter of LBS Capital Management, Inc.*, Advisers Act Release No. 1644 (July 18, 1997), and *In the Matter of Spear & Staff, Inc.*, Advisers Act Release No. 188 (Mar. 25, 1965) ("In appraising advertisements . . . we do not look only to the effect that they might have had on careful analytical persons. We look also to their possible impact on those unskilled and unsophisticated in investment matters," particularly when the advertisements are designed to appeal to unsophisticated recipients).

7 Although the DIA no-action request stated that the profile would be distributed only to consultants and not to the general public, you note that the staff's response did not appear to require this limitation. We confirm that the staff's response in DIA was not limited to partial client lists distributed only to consultants.

8 For example, the inclusion of a partial client list in an adviser's advertisement has the potential to mislead investors if the clients on the list are selected on the basis of performance and this selection bias is not adequately disclosed. A list that includes only advisory clients who have experienced above-average performance could lead an investor who contacts the clients for references to infer something about the adviser's competence or about the possibility of enjoying a similar investment experience that the investor might not have inferred if criteria unrelated to the client's performance had been used to select the clients on the list or if the selection bias was fully and fairly disclosed. See *Stalker Advisory Services* (pub. avail. Jan. 18, 1994) (although a reprint of an article written by an unbiased third party that refers to an adviser's performance is not a testimonial subject to Rule 206(4) - 1(a)(1), an adviser's distribution of a reprint could be a fraudulent, deceptive or manipulative practice within the meaning of Rule 206(4) - 1(a)(5), and therefore a violation of Section 206(4) of the Advisers Act, if the reprint implies something about, or is likely to cause an unwarranted inference to be drawn concerning, the experience of advisory clients, the possibility of clients enjoying an investment experience similar to prior clients, or the adviser's competence). *Accord, Kurtz Capital Management* (pub. avail. Jan. 18, 1988).

Rule 206(4) - 1 promulgated thereunder.⁹

Eileen M. Smiley
Senior Counsel

⁹ Advisers that distribute partial client lists remain subject to the fiduciary responsibilities imposed by Sections 206(1) and (2) of the Advisers Act. Thus, if an adviser is aware that a prospective client has misinterpreted, or is likely to misinterpret, the meaning of an advertisement containing a partial client list, Sections 206(1) and (2) may require the adviser to disclose additional information necessary to either correct the express, or prevent the potential, misinterpretation.

LETTER TO SEC

February 10, 1997

Division of Investment Management
ATTN: Office of Chief Counsel
Securities and Exchange Commission
450 5th Street, N.W.
Washington, D.C. 20549Re: Cambiar Investors, Inc.

Ladies and Gentlemen:

On behalf of Cambiar Investors, Inc. ("Cambiar"), we hereby request the concurrence of the Division of Investment Management (the "Division") with our opinion that the inclusion of a partial client list in Cambiar's promotional materials disseminated to brokers, consultants, clients and/or prospective clients, as described below, does not violate Rule 206(4)-1 of the Investment Advisors Act of 1940 (the "Act")¹.

Cambiar is a registered investment adviser under the Act and manages portfolios for a wide variety of clients, including pension and profit-sharing plans, trusts, estates, foundations, endowments, business entities, and individuals.

During the course of a recent examination of Cambiar by the Central Regional Office of the Securities and Exchange Commission, an issue arose with respect to Rule 206(4)-1 and its interpretation under Denver Investment Advisors, Inc. (July 30, 1993) (the "DIA Letter"). Should the DIA Letter be interpreted narrowly to permit an investment adviser to use partial client lists only? Or, should the DIA Letter be interpreted more expansively to permit the use of partial client lists in brochures distributed, not only to consultants or brokers, but also to existing clients and/or prospective clients?

Cambiar believes that the DIA Letter should be interpreted more expansively. In DIA's no-action request, DIA stated that it distributes its "Profile" containing client lists to consultants that have expressed an interest in acquiring information about DIA and that it did not distribute the Profile to prospective clients. The Division in its response to DIA noted "DIA distributes the Profile to consultants or clients that have expressed an interest in acquiring information about DIA" (emphasis added). The Division went on to state, "we would not recommend enforcement action to the Commission under Rule 206(4)-1 of the Advisers Act if DIA includes a partial list of clients in the Profile." Such position was conditioned upon the inclusion of certain disclaimers and disclosures as described in the Division's response.

It is Cambiar's position that they should interpret the Division's response in the DIA Letter as written:

¹ 17 C.F.R. Section 275.206(4)-1(a)(1).

namely, as permitting an investment adviser's distribution of a partial client list to consultants or clients that have expressed an interest in acquiring information about the investment adviser, provided, the investment adviser: (1) includes the disclaimers and disclosures set forth in the Division's response; and (2) the partial client list is not distributed on an unsolicited basis. This interpretation places more emphasis on the required disclaimers and disclosures rather than the status of the recipient and is the generally accepted interpretation of the Division's response in the DIA Letter by other investment advisers. Cambiar interprets distribution on an "unsolicited" basis to permit the delivery of its firm brochure containing a partial client list to clients and prospective clients either following their expression of interest in obtaining information regarding Cambiar or at one-on-one meetings, but would not permit the inclusion of a partial client list in a mass distribution of marketing materials in either print or electronic media.

Even if the Division believes that the scope of the DIA Letter is limited solely to the issue of whether a partial client list can be included in brochures distributed to brokers and consultants and not to the broader issue of whether a partial client list can be included in brochures distributed to existing clients and/or prospective clients, Cambiar still believes that for many of the same reasons set forth in DIA's no-action request and the additional reasons set forth below that partial client lists in brochures distributed to existing clients and prospective clients should be permitted provided that they contain the disclaimers and disclosures required under the DIA Letter.

Not Testimonials Under Rule 206(4)-1(a)(1).

DIA, in its no-action request, persuasively argued that partial client lists should not be considered "testimonials" under Rule 206(4)-1(a)(1). Cambiar agrees with the arguments made by DIA and proposes the following additional arguments.

Since the adoption of the Rule 206(4)-1, a number of Commission no-action letters and releases² have stated that the definition of testimonial is "a statement of a customer's experience or endorsement". The Commission's definition seems to require actual statements by clients which, in turn, are utilized by the investment adviser in its advertising. A partial client list is not a list of statements by clients. It does not relay the "experience" of the listed clients. Since it does not relay the "experience" of clients, it cannot run the risk of fraudulently or deceptively implying that the experience of the listed clients is the experience that the prospective client can expect. Furthermore, given the disclaimers and disclosures required under the Division's response in the DIA Letter, prospective clients should not be misled.

Investment Advisors Act Release No. 121 (November 2, 1961) states that the Commission finds that testimonials "are misleading; by their very nature they emphasize the comments and activities favorable to the investment adviser and ignore those which are unfavorable. This is true even when the testimonials are unsolicited and are printed in full." A partial client list states nothing more than the names of several clients. It neither emphasizes "comments and activities" favorable

² New York Investors Group, Inc. (Sept. 7, 1982); CIGNA Securities, Inc. (Sept. 10, 1991); Richard Silverman (March 27, 1985); J. Y. Barry Arbitrage Management, Inc. (Oct. 18, 1989).

to the investment adviser nor ignores those which are unfavorable.

Not False or Misleading Under Rule 206(4)-1(a)(5).

Rule 206(4)-1(a)(5) prohibits any advertisement “which contains any untrue statement of a material fact, or which is otherwise false or misleading.” The adopting Release expresses the Commission's intent that Rule 206(4)-1(a)(5) be a catch-all provision when it states “subparagraph (5) contains a more general provision which makes it unlawful for an investment adviser to use any advertisement if it contains any untrue statement of a material fact or is otherwise false or misleading.”

Regardless of whether partial client lists are within the definition of a “testimonial” under Rule 206(4)-1(a)(1), adequate protection of clients and prospective clients is provided under the provisions of Rule 206(4)-1(a)(5). The disclaimers or disclosures described in the Division's response to the DIA Letter ensure that partial client lists are not misleading.

Assuming such safeguards are present, no distinction should be drawn as to whether the recipient is a broker, consultant, client or prospective client. Any assumption that brokers or consultants are more sophisticated than the universe of potential clients is not valid. Brokers or consultants that have been in the securities business for a few short months automatically should not be considered more sophisticated than managers of institutional funds with assets in the hundreds of millions of dollars. Furthermore, permitting partial client lists to be distributed solely to consultants or brokers with specified disclaimers and disclosures provides no assurance that those brokers or consultants will not ultimately pass the partial client lists on to clients or prospective clients. Indeed, there is no assurance that if partial client lists are passed on to clients or prospective clients in one form or another that they would continue to retain the original disclaimers and disclosures. Permitting Cambiar to distribute partial client lists to clients and prospective clients, with the disclaimer and disclosures described in the Division's response in the DIA Letter, will assure that clients and prospective clients receive information in a form carefully designed to preclude any misleading inferences.

Conclusion.

For the reasons set forth above, Cambiar does not believe that partial client lists (containing the disclaimers and disclosures described in the Division's response to the DIA Letter) constitute testimonials or are misleading. However, the Division may determine to grant the “No Action” request summarized below without determining whether such partial client lists constitute testimonials in the same manner as the Division declined to make such a determination in the DIA Letter. The Division simply assumed in the DIA Letter that the safeguards were sufficient to mitigate against the potential that the client list might otherwise be misleading.

We therefore respectfully request that you advise Cambiar that you would not recommend enforcement action by the Commission under either Rule 206(4)-1(a)(1) or Rule 206(4)-1(a)(5) if

Cambiar includes partial client lists (containing the disclaimers and disclosures described in the Division's response in the DIA Letter) in its marketing materials distributed to consultants, brokers, clients, and prospective clients on an unsolicited basis.

If you have any questions or would like to discuss this matter further, you may contact either Joseph S. Borus or the undersigned at (303) 825-0800.

Respectfully submitted,

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