



AUG 7 1996

RESPONSE OF THE OFFICE OF
CHIEF COUNSEL, DIVISION OF
INVESTMENT MANAGEMENT

Our Ref. No. 95-740-CC
Bramwell Growth Fund
File No. 811-8456

Your letter dated June 30, 1996 requests our assurance that we would not recommend enforcement action to the Commission under Section 34(b) of the Investment Company Act of 1940 (the "Investment Company Act") or Section 206 of the Investment Advisers Act of 1940 (the "Advisers Act") if the prospectus of the Bramwell Growth Fund (the "Fund") includes, in addition to the total return information for the Fund, performance information relating to another open-end investment company for which the Fund's portfolio manager previously served as portfolio manager, under the circumstances described below.

Facts

The Fund is a registered open-end investment company whose registration statement became effective on August 1, 1994. The Fund has entered into an advisory agreement with Bramwell Capital Management, Inc. ("BramCap"), a registered investment adviser. Elizabeth R. Bramwell, the founder and Chief Investment Officer of BramCap, acts as the portfolio manager for the Fund and is responsible for day-to-day management of the Fund. Prior to forming BramCap, Ms. Bramwell was President, Chief Investment Officer, and Trustee of The Gabelli Growth Fund ("GGF"), a registered open-end investment company, from GGF's inception on April 10, 1987 through February 9, 1994. You represent that Ms. Bramwell was primarily responsible for the day-to-day management of GGF's portfolio and that no other person played a significant role in managing GGF's portfolio.¹

You represent that, during the time that GGF was managed by Ms. Bramwell, it had investment objectives, policies and strategies that were substantially similar in all material respects to those of the Fund.² Both funds are diversified open-end investment companies that cite capital growth as a primary investment objective. You state that Ms. Bramwell uses the same analytical methods for identifying potential investments for the Fund as she used for GGF.

¹ You also note that Ms. Bramwell was identified in GGF's prospectus as the individual primarily responsible for the day-to-day management of GGF's portfolio.

² You represent that Ms. Bramwell managed no other comparable registered funds or private accounts while managing GGF.

Requested Relief

The Fund seeks to include in its prospectus performance information for GGF during Ms. Bramwell's tenure as GGF's portfolio manager.³ The performance information will consist of the average annual total return information for one-, three-, and five-year periods ended December 31, 1993, and for the period from GGF's inception through February 9, 1994, the last date Ms. Bramwell was associated with GGF.⁴ The prospectus will present the GGF performance information with other disclosure about the portfolio manager's background.⁵

You maintain that BramCap's request is consistent with the staff's position under Section 206 of the Advisers Act that it is not necessarily misleading for an adviser to advertise an account manager's performance achieved at a predecessor firm when no person other than the account manager played a significant part in achieving the prior performance.⁶ You also assert that Items

³ You have not requested, nor do we express, our view regarding the inclusion of the GGF performance information in Rule 482 advertisements or supplemental sales literature. We understand that the Fund's shares are not distributed by a member of the National Association of Securities Dealers, Inc. ("NASD"). We note, however, that if a fund's shares are distributed by a NASD member, the fund's use of other account performance information may raise issues under the NASD advertising guidelines. See NASD Regulatory and Compliance Alert at 7-8 (June 1992).

⁴ You represent that the GGF performance will be computed in accordance with Item 22(b) of Form N-1A and that it will be compared with the performance of the Standard & Poor's 500 Common Stock Index. The performance of the Fund also will be compared to this index.

⁵ You represent that the GGF performance information will be presented separately from, and given no greater prominence than, the Fund's own performance record. You also represent that the GGF performance information will be accompanied by clear disclosure that the Fund and GGF are separate funds and that the past performance of GGF is not indicative of the past or future performance of the Fund.

⁶ See, e.g., Fiduciary Management Associates, Inc. (pub. avail. Mar. 5, 1984) (stating that it is not misleading for a new adviser to use performance of another adviser when, among other things, the investment personnel were the same); Conway Asset Management Inc. (pub. avail. Jan. 27,

5(c) and 5A of Form N-1A reflect the Commission's determination that (1) the identity and business background of a fund's portfolio manager and (2) historical performance information, are material to a prospective investor's decision whether to invest in a fund. You maintain that providing the prior performance of a fund's portfolio manager in managing another fund with substantially similar investment objectives and strategies is consistent with these Commission policies because it reflects on the manager's experience and provides investors with pertinent historical performance information.

Analysis

It is the staff's position that neither Section 34(b) of the Investment Company Act nor Section 206 of the Advisers Act prohibits an investment company from including in its prospectus the performance of its adviser's other accounts, provided that the performance is not presented in a misleading manner and does not obscure or impede understanding of information that is required to be in the prospectus.⁷ As noted above, in certain

1992) (allowing newly registered (sole-owner/employee) investment adviser to use performance data of several accounts managed by employee before registration).


⁷ See Nicholas-Applegate Mutual Funds (pub. avail. Aug. 6, 1996). Section 34(b) of the Investment Company Act, in pertinent part, prohibits an investment company from (1) making an untrue statement of material fact in its registration statement or (2) omitting facts necessary to make the statements made in its registration statement not materially misleading. An investment adviser that causes a fund to include false or misleading information in the fund's prospectus could be deemed to be engaging in fraudulent conduct with respect to a client, in violation of Section 206 of the Advisers Act.

The general instructions for completing an investment company registration statement on Form N-1A permit a fund to include non-required information in its prospectus or statement of additional information "provided that such information is not incomplete, inaccurate or misleading" and does not, "by virtue of its nature, quantity, or manner of presentation, obscure or impede understanding of the information that is required to be included." General Instruction G to Form N-1A, General Instructions to Parts A and B, Instruction 2. It is a fund's responsibility to ensure that non-required information included in its prospectus is not misleading and does not obscure or impede

instances, the staff has recognized that it is not misleading under Section 206 of the Advisers Act for a newly established adviser to present performance information for accounts managed by another advisory entity when the persons responsible for investment management of those accounts at the former adviser are the same persons who will be responsible for investment management at the new entity.⁸ Consistent with these positions, we believe that it would not be misleading for the Fund to include in its prospectus the performance information for GGF during Ms. Bramwell's tenure as GGF's portfolio manager, provided that (1) during Ms. Bramwell's tenure, no other person played a significant part in achieving GGF's performance and (2) the performance information is not presented in a misleading manner and does not obscure or impede understanding of information that is required to be in the Fund's prospectus.

Conclusion

We would not recommend enforcement action to the Commission if the Fund includes in its prospectus performance information relating to GGF under the circumstances described in your letter.⁹ This response is based on the facts and representations made in your letter. You should note that different facts or representations might require a different conclusion.



Phillip S. Gillespie
Senior Counsel

understanding of required information. Determining whether a fund has fulfilled this responsibility is an inherently factual issue that the staff will not address in the context of a request for no-action relief.

⁸ See supra note 6.

⁹ This response should not be construed as providing no-action assurance with respect to any particular presentation of the performance of an adviser's other accounts.

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June 30, 1996

ACT ICA / IAA
SECTION 34(b) / 206
RULE _____
PUBLIC _____
AVAILABILITY 8/7/96

Jack W. Murphy, Associate Director
and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, NW
Washington, DC 20549

Dear Mr. Murphy:

Background

We are counsel to Bramwell Capital Management, Inc., a Delaware corporation ("BramCap"), which is registered under the Investment Advisers Act of 1940, as well as to The Bramwell Funds, Inc., a Maryland corporation, which is registered as an open-end series management investment company under the Investment Company Act of 1940.

The Bramwell Growth Fund is an open-end diversified mutual fund whose shares of common stock constitute a series of shares issued by The Bramwell Funds, Inc. Shares of The Bramwell Growth Fund were first sold to the public pursuant to a prospectus dated August 1, 1994. Pursuant to an Investment Advisory Agreement between BramCap and The Bramwell Funds, Inc., Elizabeth R. Bramwell, the founder and Chief Investment Officer of BramCap, manages the investment portfolio of The Bramwell Growth Fund and is responsible for the day-to-day management of its portfolio. Prior to forming BramCap, she was President, Chief Investment Officer, Portfolio Manager and Trustee of The Gabelli Growth Fund from its inception on April 10, 1987, through February 9, 1994, where she

was also responsible for the day-to-day management of the portfolio of that fund.¹ During her tenure, no other person played any significant role in managing The Gabelli Growth Fund portfolio. Furthermore, Ms. Bramwell did not, while managing The Gabelli Growth Fund, manage any other registered investment company with investment objectives and policies similar to the investment objectives and policies of The Gabelli Growth Fund or private accounts that were comparable.

It should be noted that both The Bramwell Growth Fund and The Gabelli Growth Fund are registered under the Investment Company Act of 1940 as open-end, diversified management investment companies and that their investment objectives and strategies are similar in all material respects: both funds cite capital growth or capital appreciation as a primary investment objective; both funds rely on macro and micro analysis with an emphasis on primary research; and both seek to identify companies thought to be positioned to realize unit and earnings growth.

In addition to performance data for The Bramwell Growth Fund covering periods from August 1, 1994, the prospectus of The Bramwell Growth Fund, in a different section, currently includes performance data for The Gabelli Growth Fund for the one, three and five year periods ended December 31, 1993, and for the period from its inception through February 9, 1994, the last date Ms. Bramwell was associated with that fund.

Request

As counsel to BramCap and The Bramwell Funds, Inc., we hereby request assurance from the Staff of the Securities and Exchange Commission that it would not recommend enforcement action to the Commission under Section 206(4) of the Investment Advisers Act or Section 34(b) under the Investment Company Act of 1940 if The Bramwell Growth Fund continues to include (in addition to its own performance data) The Gabelli Growth Fund performance data in its prospectus.

In this connection, the performance data of the two funds would continue to be shown as compared with the performance of the Standard & Poor's 500 Corporate Stock Price Index and would continue to be calculated in accordance with the provisions of Item 22(b) of Form N1-A. Moreover, rather than including The Gabelli Growth Fund performance data as part of the financial highlights section of the prospectus, The Gabelli Growth Fund data would appear in a separate section of the prospectus covering the

¹ The prospectus of The Gabelli Growth Fund, dated May 3, 1993, disclosed that the investment program of the Fund was managed principally by Mrs. Bramwell. No other person was identified as having any degree of primary responsibility for the day-to-day management of the Fund's portfolio.

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management of the fund, and would not be given greater prominence than the performance data of The Bramwell Growth Fund.

The prospectus would also disclose that the two funds are separate funds and, should material differences develop in the investment objectives and strategies of The Bramwell Growth Fund from those investment objectives and strategies employed during Ms. Bramwell's tenure with The Gabelli Growth Fund, the prospectus would disclose such differences.

Finally, the continued use of such data would be subject to periodic review by the Fund's Board of Directors in order to insure its relevance to shareholders of the Fund.

Analysis

Section 206 of the Investment Advisers Act of 1940 (the "Advisers Act") broadly prohibits as unlawful activities by any investment adviser which are fraudulent, deceptive or manipulative. The publication of material misrepresentations concerning an investment adviser's performance by means of a prospectus, advertisement or otherwise would run afoul of Sections (1), (2) and (4) of Section 206, as well as Section 34(b) of the Investment Company Act of 1940 (the "1940 Act"). However, based upon the facts set forth above, as well as a review of the policies underlying the presentation of performance data found in Form N1-A, Rule 482 and in extant no-action letters, we believe that continued reference to the Gabelli Fund performance data on the terms described in the Request will not violate Section 206 of the Advisers Act or Section 34(b) of the 1940 Act.

The commission recognizes that the identity and business background of those responsible for portfolio management is of relevance to investors. Effective July 1, 1993, Item 5 of Form N1-A was amended to require open-end funds to disclose the name and title of each person employed by or associated with either a fund's investment adviser or the fund itself who is "primarily responsible for the day-to-day management of the fund's portfolio." Item 5 was also amended to require prospectus disclosure of the length of time those responsible for day-to-day portfolio management had held such responsibility and their business experience during the past five years.

At the same time Item 5 was amended, a new provision, Item 5A of Form N1-A, was also added to require disclosure of historical fund performance to give context to management's discussion of current performance. In order to provide a setting for the discussion of current performance, Item 5A requires that a fund provide a line graph comparing its initial account value and subsequent account values over the most recent 10 years of a fund's history, together with average annual total returns for a one, five and ten year period. The Item 5A requirement to present average annual total returns over a period of up to 10 years derives from Rule 482. In adopting that rule, the Commission noted that

presentation of data over a 10 year period would permit investors to evaluate fund performance over different phases of business cycles and to assess fund volatility.

Significantly, Instruction 6 to Item 5A provides that if a fund has not had the same investment adviser during the most recent 10 years period, it may begin the line graph on the date the current adviser began to provide advisory services, provided that there is no control relationship between the current adviser and any affiliate and the previous adviser and that the current adviser does not employ any officer of the previous adviser or any employees of the previous adviser who were responsible for providing investment advisory or portfolio services to the fund.

The clear intent of Items 5(c) and 5A is to aid investors in making an investment decision by providing information as to the identity and business background of those who are primarily responsible for portfolio management and by providing relevant prior performance data. In permitting funds to eliminate prior performance history when a fund engages an entirely new adviser, Instruction 6, in effect, codifies earlier no-action letters which recognized that prior investment performance may be irrelevant, or confusing, when there has been a complete change in the identity of those persons who manage a fund's portfolio.²

The converse of this position is equally apparent: the prior performance of a portfolio manager at another fund may be relevant where, as in the instant case, the person responsible for the management of both funds' portfolios is the same person and when, as is the case with respect to The Bramwell Growth Fund and The Gabelli Growth Fund, the funds in question are comparable in terms of their Investment Company Act classifications and in their investment objectives and investment policies.

The concept of continuity of the identity of a portfolio manager is also found in the response of the Staff of the Commission to a no-action request made in 1991 by Great Lakes Advisors, Inc.³

²See, Investment Trust of Boston Funds, Back Bay Advisers, Inc., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 579; Philadelphia Fund, Inc., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 1076; and Zweig Series Trust, SEC No-Action Letter, 1990 SEC No-Act. LEXIS 48.

³SEC No-Action Letter, 1992 SEC No-Act. LEXIS 643.

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In that letter, referring to two earlier no-action letters⁴, the Staff of the Commission acknowledged that,

The staff previously has taken the position that it may not be misleading for an adviser to use performance data of a predecessor if (1) no individual other than the successor's portfolio manager played a significant part in the performance of the predecessor's accounts that were transferred to the successor adviser; and (2) the performance of the predecessor's accounts that were not transferred to the successor adviser did not differ materially from the performance of the transferred accounts.

Finally, the position of the Association for Investment Management and Research reflected in the AIMR Performance Presentation Standards formulated by that group and its subsidiary organizations, the Financial Analysis Federation and the Institute of Chartered Financial Analysts, is also relevant.

Appendix F to the AIMR Performance Presentation Standards adopted in 1993 which relates to "portability of investment results" does not condone melding prior performance at a predecessor entity with the successor so as to produce composite data. But, recognizing the Great Lakes Advisors position, it takes the view that performance data from a prior firm can be used supplementally if the manager gives credit for the performance to the prior affiliation and describes his or her responsibilities at the previous employer.

In such case, the AIMR affirms, "If the responsibilities are accurately portrayed, the market will determine how the record should be interpreted in light of the new affiliation or entity."

The approach advocated by the AIMR is precisely the manner in which information is currently presented in the prospectus for The Bramwell Growth Fund and it is the way it and BramCap wish to continue to present such information in the future.

Conclusion

Given the comparability of Ms. Bramwell's role in the management of The Bramwell Growth Fund and The Gabelli Growth Fund portfolios, the similarity of the two funds in terms of their investment objectives and policies and the fact that the current and proposed disclosure clearly set forth the performance of each fund, making no attempt to

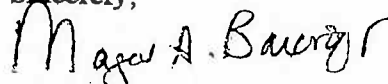
⁴Fiduciary Management Associates, Inc., SEC No-Action Letter, 1984 SEC No-Act. LEXIS 1962; and Conway Asset Management, Inc., SEC No-Action Letter, 1989 SEC No-Act. LEXIS 87.

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provide a composite picture, we are of the opinion that continued use of the performance data of The Gabelli Growth Fund by The Bramwell Growth Fund and BramCap under the circumstances reflected in the Request does not violate Section 206 of the Advisers Act or Section 34(b) of the 1940 Act.

If you have any questions or wish to discuss this request further, please do not hesitate to contact the undersigned at the offices of Dechert Price & Rhoads, 477 Madison Avenue, New York, New York, 10022, or by telephone at 212-326-3590.

Sincerely,



Margaret A. Bancroft

MAB/cm