

ACT 11A
SECTION 204
RULE 204-2(a)(16)
PUBLIC
AVAILABILITY 7/23/99

PUBLIC

July 23, 1999
Our Ref. No. 98-680
Salomon Brothers
Asset Management Inc
and Salomon Brothers
Asset Management Asia
Pacific Limited
File Nos. 801-32046
and 801-51393-

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Your letter dated November 11, 1998 on behalf of Salomon Brothers Asset Management Inc ("SBAM") and Salomon Brothers Asset Management Asia Pacific Limited ("SBAM AP") requests that we confirm that published materials listing the net asset values of a managed account, together with worksheets that demonstrate the calculation of performance information based on those net asset values, could form the basis for, or demonstrate the calculation of, performance information under Section 204 of the Investment Advisers Act of 1940 (the "Advisers Act") and Rule 204-2(a)(16) thereunder.

Facts

You state that SBAM and SBAM AP are registered as investment advisers under the Advisers Act. You state that Mr. Giampaolo Guarnieri is employed by SBAM AP as a portfolio manager, and he currently manages, among other accounts, Salomon Brothers Asia Growth Fund (the "Asia Growth Fund"). The Asia Growth Fund is a portfolio of Salomon Brothers Series Funds Inc (the "Company"), which is registered with the Commission as an open-end investment company. SBAM serves as investment adviser to the Asia Growth Fund and SBAM AP serves as subadviser. You state that SBAM AP exercises all investment discretion with respect to the Asia Growth Fund. You represent that since the commencement of investment operations of the Asia Growth Fund on May 6, 1996, Mr. Guarnieri has been primarily responsible for its day-to-day management, and no other person plays a significant role in its day-to-day management.

You state that prior to joining SBAM AP, Mr. Guarnieri was employed by Credit Agricole Asset Management (South East Asia) Limited ("Credit Agricole"), an investment advisory firm that is unaffiliated with SBAM or SBAM AP. You represent that during the period from January 1, 1992 through March 1, 1995 (the "Relevant Period"), Mr. Guarnieri was primarily responsible for the day-to-day management of the Mosais Actions du Bassin Pacifique (the "Pacific Mosais Fund"), a series of the Mosais Fund, an open-end collective investment vehicle registered in Luxembourg and managed by Credit Agricole. You represent that no person other than Mr. Guarnieri played a significant role in the day-to-day management of the Pacific Mosais Fund during the Relevant Period. You state that the Pacific Mosais Fund is not registered as an investment company under the Investment Company Act of 1940 (the

"1940 Act"). You state that, according to the Pacific Mosais Fund's prospectus, the fund offered to redeem and sell its shares daily during the Relevant Period.¹

You state that SBAM and SBAM AP wish to use the Pacific Mosais Fund's performance information for the Relevant Period in marketing materials distributed to U.S. clients and potential U.S. clients. In particular, SBAM and SBAM AP wish to use this information in the prospectuses and marketing materials relating to the Asia Growth Fund.²

You represent that the following procedures were used by SBAM and SBAM AP to calculate the performance results of the Pacific Mosais Fund for the Relevant Period. At the request of SBAM and SBAM AP, PricewaterhouseCoopers LLP ("PWC"), the Company's independent auditors, obtained the net asset values of the Pacific Mosais Fund for the first and last day of each calendar year during the Relevant Period and at March 1, 1995 as reported during the Relevant Period in the International Herald Tribune (the "Tribune"). Based upon these publicly reported net asset values, PWC calculated the annualized and aggregate total returns of the Pacific Mosais Fund for the Relevant Period. You further represent that, according to Mr. Guarnieri, no dividend payments or distributions were made to shareholders of the Pacific Mosais Fund during the Relevant Period.³

¹ Telephone conversation between David Shevlin of Simpson Thacher & Bartlett and Alison Fuller of the staff on March 2, 1999.

² You assert that the use of the Pacific Mosais Fund's performance information would not violate Section 206(4) of the Advisers Act, Rule 206(4)-1 thereunder, or Section 34(b) of the 1940 Act, and that such use is consistent with recent no-action positions of the staff in this regard, citing Bramwell Growth Fund (pub. avail. Aug. 7, 1996), Nicholas-Applegate Mutual Funds (pub. avail. Aug. 6, 1996), and Growth Stock Outlook Trust, Inc. (pub. avail. Apr. 15, 1986). You state that you are not seeking the staff's assurance with respect to those provisions. You should note that if differences exist between an unregistered fund and a registered fund, the use of the unregistered fund's performance in the sales materials of the registered fund could be fraudulent under Section 206 of the Advisers Act and materially misleading under Section 34(b) of the 1940 Act (e.g., if differences in the valuation methods of the relevant funds would result in materially different performance).

³ We note that calculating performance results of a fund based upon published net asset values may be problematic if the amounts and payment dates of any dividend payments or distributions made by the fund are not known. An advertisement for a registered fund that contains total returns of a second

To ensure the accuracy of the Pacific Mosais Fund's net asset values that were reported by the Tribune, PWC compared them with the Pacific Mosais Fund's net asset values, as provided to PWC by SBAM AP, that were reported during the Relevant Period by Standard & Poor's Micropal ("Micropal"). Micropal is an independent organization that reports performance information regarding offshore mutual funds. Based on PWC's calculations made according to the described procedures, SBAM and SBAM AP concluded that there were no material discrepancies between the total returns derived from the net asset values reported by the Tribune and the total returns derived from the net asset values reported by Micropal.

You state that SBAM and SBAM AP propose to maintain only the following materials under Rule 204-2(a)(16) with respect to the Pacific Mosais Fund's performance information: (1) copies of the published net asset values reported by the Tribune and Micropal; and (2) the worksheets that PWC prepared in connection with the procedures described above. You state that Credit Agricole reported the net asset values to the Tribune and Micropal contemporaneously with the management of the Pacific Mosais Fund by Mr. Guarnieri. You state that the net asset values were not generated for the express purpose of reporting the performance information that SBAM and SBAM AP now seek to use.

Analysis

Section 204 of the Advisers Act and Rule 204-2(a)(16) thereunder generally require registered investment advisers to maintain "all accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts or securities recommendations" contained in any advertisement or other communication distributed to ten or more persons. Rule 204-2(a)(16) was designed to allow the Commission's inspection staff to evaluate more effectively an investment adviser's compliance with Rule 206(4)-1 under the Advisers Act which, among other things, prohibits the use of false or misleading advertisements by investment advisers.⁴

fund that were calculated based upon published net asset values, and using incorrect assumptions regarding the amounts and payment dates of the second fund's dividends and distributions, could be fraudulent under Section 206 of the Advisers Act and materially misleading under Section 34(b) of the 1940 Act.

⁴ See Investment Advisers Act Release No. 1093 (Nov. 5, 1987) (proposing the addition of paragraph (a)(16) to Rule 204-2) (the "proposing release").

Rule 204-2(a)(16) provides that an investment adviser shall be deemed to have satisfied the requirements of the rule if, with respect to the performance of its managed accounts, the investment adviser retains all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement ("account statements"), and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts ("worksheets").⁵ Neither Rule 204-2(a)(16) nor the proposing or adopting releases, however, states that retaining account statements and worksheets is the exclusive method of complying with the rule.

You argue that the Commission contemplated that data published or generated subsequently but accumulated contemporaneously with the management of an account could be used to form the basis for, or demonstrate the calculation of, performance information under Rule 204-2(a)(16). You note that the Commission stated in the adopting release that:

[s]upporting records for advertised performance must be made contemporaneously with the recommendations or assumptions made. However, data published or generated subsequently but accumulated contemporaneously with the events could be used to compute and substantiate advertised adviser performance....⁶

You assert that, in light of the Commission's statement, the records that SBAM and SBAM AP propose to maintain are sufficient to satisfy Rule 204-2(a)(16) because, among other things, the net asset values that were reported by Micropal and the Tribune were accumulated and reported by Credit Agricole to Micropal and the Tribune contemporaneously with the management of the account by Mr. Guarnieri.

⁵ The reference to account statements and worksheets was included in paragraph (a)(16) of the rule in response to concerns expressed by certain commenters that the rule, as proposed, might require investment advisers that advertise the performance of managed accounts to keep all documents of original entry from which information is inputted into the adviser's client accounting system. See Investment Advisers Act Release No. 1135 (Aug. 17, 1988) (adopting the addition of paragraph (a)(16) to Rule 204-2) (the "adopting release"). Thus, the rule specifically provides one alternative to the retention by an investment adviser of all of its documents of original entry, but contemplates that the retention of other records also could satisfy the requirements of the rule.

⁶ Adopting release at n.6.

We believe that copies of published materials listing the net asset values of a managed account (including an offshore fund) could form the basis for performance information under Section 204 of the Advisers Act and Rule 204-2(a)(16) thereunder, provided that the net asset values were accumulated contemporaneously with the management of the account.⁷ In addition, we believe that worksheets that are generated by an entity other than adviser, subsequently to the management of the account, could demonstrate the calculation of performance information under the rule, provided that the worksheets are supported, in turn, by records that form the basis of the performance information.

We note that as a matter of policy the staff will not provide no-action assurances under Rule 204-2(a)(16) regarding whether an adviser's records are sufficient to form the basis for, or demonstrate the calculation of, the investment performance of an investment adviser's managed accounts or securities recommendations.



Alison M. Fuller
Assistant Chief Counsel

⁷ In connection with the use in an advertisement of the performance of a managed account (such as a registered or unregistered fund) that was achieved by a portfolio manager, net asset values of the account would be deemed to be accumulated contemporaneously with the portfolio manager's management of the account if they were calculated contemporaneously with his or her management of the account. The publication of the account's net asset values contemporaneously with the management of the account by the portfolio manager would show that the published net asset values were accumulated contemporaneously.

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E-MAIL ADDRESS

November 11, 1998

Douglas J. Scheidt, Esq.
Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, NW
Mail Stop 5-6
Washington, DC 20549

Dear Mr. Scheidt:

On behalf of Salomon Brothers Asset Management Inc ("SBAM") and Salomon Brothers Asset Management Asia Pacific Limited ("SBAM AP"), we hereby request that the staff of the Division of Investment Management (the "Staff") of the Securities and Exchange Commission confirm that published materials listing the net asset values of a managed account, together with worksheets that demonstrate the calculation of performance based on those net asset values, could form the basis for or demonstrate calculation of performance information under Section 204 of the Investment Advisers Act of 1940 (the "Advisers Act") and Rule 204-2(a)(16) thereunder.

FACTS

SBAM and SBAM AP are registered as investment advisers under the Advisers Act. SBAM AP is also registered as an investment adviser with the Hong Kong Securities and Futures Commission. Mr. Giampaolo Guarnieri is employed by SBAM AP as a

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portfolio manager, and he currently manages, among other accounts, Salomon Brothers Asia Growth Fund (the "Asia Growth Fund"). The Asia Growth Fund is a portfolio of Salomon Brothers Series Funds Inc (the "Company"), which is registered with the Commission as an open-end investment company. SBAM serves as investment adviser to the Asia Growth Fund and SBAM AP serves as subadviser. SBAM AP, however, exercises all investment discretion with respect to the Asia Growth Fund. Since the commencement of investment operations of the Asia Growth Fund on May 6, 1996, Mr. Guarnieri has been primarily responsible for its day to day management and no person other than Mr. Guarnieri plays a significant role in its day to day management.

Prior to joining SBAM AP, Mr. Guarnieri was employed by Credit Agricole Asset Management (South East Asia) Limited ("Credit Agricole"), an investment advisory firm that is unaffiliated with SBAM or SBAM AP and was registered with the Hong Kong Securities and Futures Commission. During the period January 1, 1992 through March 1, 1995 (the "Relevant Period"), Mr. Guarnieri was primarily responsible for the day to day management of the Mosais Actions du Bassin Pacifique (the "Pacific Mosais Fund"), a series of the Mosais Fund, an open-end collective investment vehicle registered in Luxembourg and managed by Credit Agricole.^{1/} The Pacific Mosais Fund is not registered as an investment company under the Investment Company Act of 1940, as amended (the "Investment Company Act"). No other person played a significant role in the day to day

^{1/} It is our understanding that Credit Agricole is not registered as an investment adviser with the Commission.

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management of the Pacific Mosais Fund during the Relevant Period. SBAM and SBAM AP wish to use the Pacific Mosais Fund's performance information for the Relevant Period in marketing materials distributed to U.S. clients and potential U.S. clients. In particular, SBAM and SBAM AP wish to use this information in the prospectuses and marketing materials relating to the Asia Growth Fund.^{2/}

To calculate the performance results of the Pacific Mosais Fund for the Relevant Period, the following procedures were followed by SBAM and SBAM AP. At the request of SBAM and SBAM AP, PricewaterhouseCoopers LLP, the Company's independent auditors ("PWC"), obtained the net asset values of the Pacific Mosais Fund for the first and last day of each calendar year during the Relevant Period and at March 1, 1995 as reported during the Relevant Period in the International Herald Tribune (the "Tribune"). Based upon these publicly reported net asset value figures, PWC calculated annualized and aggregate total returns of the Pacific Mosais Fund for the Relevant Period.^{2/} In order to ensure no inaccuracies in the reporting by the Tribune, PWC compared these net asset values to net asset values provided to them by SBAM AP, which were reported during the Relevant

^{2/} We are of the view that the use of the performance information described herein would not violate Section 206(4) of the Advisers Act and Rule 206(4)-1 thereunder, nor Section 34(b) of the Investment Company Act, and that such use is consistent with the Staff's recent positions in this regard. See Bramwell Growth Fund (publicly available August 7, 1996); Nicholas-Applegate Mutual Funds (publicly available August 6, 1996); and Growth Stock Outlook Trust, Inc. (publicly available April 15, 1986). Accordingly, we are not seeking the assurance of the Staff with respect to the aforementioned sections and rule.

^{2/} According to Mr. Guarnieri, no dividend payments or distributions were made to shareholders of the Pacific Mosais Fund during the Relevant Period.

Period by Standard and Poor's Micropal ("Micropal"), an independent organization that reports performance information regarding offshore mutual funds. Based on PWC's calculations made according to the described procedures, SBAM and SBAM AP concluded that there were no material discrepancies between the return figures derived from the net asset value figures reported by the Tribune and the return figures derived from the net asset value figures reported by Micropal. Accordingly, the records SBAM and SBAM AP intend to rely on in order to comply with Section 204 are copies of the published net asset value figures reported by the Tribune and Micropal and the worksheets PWC prepared in connection with the procedures described above.^{4/}

ANALYSIS

Section 204 of the Advisers Act requires registered investment advisers to keep certain records, which are subject to reasonable examinations by the Commission, as prescribed by rule by the Commission. Rule 204-2(a)(16) requires that an investment adviser retain the books, records or other documents "necessary to form the basis for or demonstrate the calculation of the performance or rate of return of any or all managed accounts" in any advertisement or other communication distributed to ten or more people.

^{4/} Neither SBAM nor SBAM AP is now, or was at the time the net asset value figures were reported to and published by the Tribune and Micropal, "affiliated persons" (as defined under the Investment Company Act) of any of the Tribune, Micropal or Credit Agricole. In addition, neither Mr. Guarneri, nor to the knowledge of SBAM and SBAM AP, Credit Agricole, were affiliated persons of the Tribune or Micropal at the time the net asset value figures were reported to and published by the Tribune and Micropal.

The Rule does not specify precisely what type of records constitute sufficient documentation. The adopting release for the Rule, however, states that "[s]upporting records for advertised performances must be made contemporaneously with the recommendations or assumptions made. However, data published or generated subsequently but accumulated contemporaneously with the events could be used to compute and substantiate advertised adviser performance."^{5/} Therefore, it appears that the Commission contemplated that data published or generated subsequently but accumulated contemporaneously with the management of an account could be used to form the basis for or demonstrate the calculation of performance information under this Rule.

In light of this interpretive language, it seems clear that the records used by SBAM and SBAM AP to form the basis for the calculation of the performance information for the Pacific Mosais Fund, namely the net asset values reported by the Tribune and Micropal along with the worksheets prepared by PWC, are sufficient to satisfy the Rule. The net asset values reported by Micropal and the Tribune were accumulated and independently reported by Credit Agricole to Micropal and the Tribune contemporaneously with the management of the Pacific Mosais Fund by Mr. Guarnieri. These net asset values were not generated for the express purpose of reporting the performance information that SBAM and SBAM AP now seek to use. Furthermore, the net asset value figures were not generated or reported to the Tribune or Micropal for the purpose of enabling SBAM, SBAM AP or any other investment adviser to maintain records under Rule 204-2(a)(16).

^{5/} IA Rel. No. 1135 (Aug. 17, 1988).

Furthermore, as discussed above, SBAM, SBAM AP and PWC undertook significant due diligence procedures in an effort to ensure that these net asset values are accurate and that the performance information derived from them is correct. Since the Commission's stated purpose in promulgating the Rule was to "deter the use of false or misleading performance information by advisers,"^{6/} these procedures should provide the Staff with additional comfort that the Rule has been satisfied.

Additionally, since the Pacific Mosais Fund is managed by a Hong Kong registered investment adviser, the Commission should have access to the Pacific Mosais Fund's records and documents under the Memorandum of Understanding signed between the United States and Hong Kong in 1995^{7/} (the "Memorandum of Understanding"). The Memorandum of Understanding requires the authorities of both countries to provide each other with the "fullest mutual assistance" in enforcing each country's securities laws and regulations. Specifically mentioned as one of the primary means of providing such assistance is "obtaining information and documents from persons." Thus, if the Commission determines that it is necessary or appropriate to review the records of the Pacific Mosais Fund, it should have the assistance of the Hong Kong authorities in obtaining access to those records under the Memorandum of Understanding.

^{6/} Id.

^{7/} Memorandum of Understanding between the United States Securities and Exchange Commission and the Hong Kong Securities and Futures Commission Concerning Consultation and Cooperation in the Administration and Enforcement of Securities Laws. (October 5, 1995).

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CONCLUSION

Based on the text of Rule 204-2(a)(16) of the Advisers Act, the interpretive language in the adopting release to the Rule and the procedures pursuant to which SBAM AP calculated the performance information regarding the Pacific Mosais Fund, we are of the view, and request that the Staff confirm, that the records used by SBAM AP to form the basis for or demonstrate the calculation of this performance information, namely the published net asset value figures reported by the Tribune and Micropal and the related worksheets prepared by PWC, are sufficient to satisfy Section 204 of the Advisers Act and Rule 204-2(a)(16) thereunder.

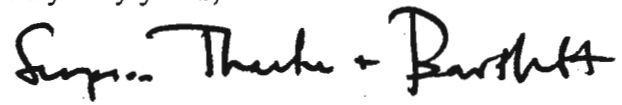
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Should you require additional information or further assistance, please call Gary Schpero (212-455-3665) or David Shevlin (212-455-3682) of this firm. We thank you for your prompt consideration of this matter.

Very truly yours,

A handwritten signature in cursive script that reads "Simpson Thacher & Bartlett". The signature is written in dark ink and is positioned above the printed name of the firm.

SIMPSON THACHER & BARTLETT

cc: Michael F. Rosenbaum
Robert A. Vegliante