

PUBLIC

ACT Sec. Act. of 1933, ICA
SECTION 34(b)
RULE 482, 34b-1
PUBLIC
AVAILABILITY 2/7/97

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Our Ref. No. 96-583-CC
Nicholas-Applegate
Mutual Funds
File No. 811-7428

Your letter of November 18, 1996 requests assurance that the staff would not recommend enforcement action to the Commission if series of the Nicholas-Applegate Mutual Funds (the "Portfolios") include in advertisements or supplemental sales literature performance information of certain private accounts (the "Private Accounts") that are managed by Nicholas-Applegate Capital Management ("NACM"), under the circumstances described below.

Facts

Each Portfolio is a feeder fund in a master-feeder arrangement and invests all of its assets in a corresponding series ("Fund") of a master trust. NACM manages the assets of each Fund. You state that, in accordance with the terms of the relief granted to NACM and the Portfolios in Nicholas-Applegate Mutual Funds (pub. avail. Aug. 6, 1996) ("Nicholas-Applegate I"), certain Portfolios currently include in their prospectuses information regarding the performance of Private Accounts that have substantially similar investment objectives, policies, and strategies. You request relief so that the Portfolios may include this performance information in advertisements complying with the provisions of Rule 482 under the Securities Act of 1933 (the "Securities Act") and supplemental sales literature complying with the provisions of Rule 34b-1 under the Investment Company Act of 1940 (the "Investment Company Act").

You assert that including in advertisements or sales literature performance information about an adviser's other accounts would provide investors with useful information to consider before investing in a fund. You represent that Private Account performance information would be presented in a Portfolio's Rule 482 advertisements or supplemental sales literature in accordance with the terms and representations made in Nicholas-Applegate I.

In particular, you represent that: (i) advertisements or supplemental sales literature will prominently disclose that the Private Account performance is not the Portfolio's own performance, and should not be considered indicative of the past or future performance of the Portfolio; (ii) advertisements or supplemental sales literature will prominently disclose that Private Account performance should not be considered a substitute for the Portfolio's performance; (iii) with respect to a Portfolio that has its own performance history, the Private Account performance information will be provided in addition to

the performance information of the Portfolio, and will be presented no more prominently than the Portfolio's performance; (iv) advertisements or supplemental sales literature will clearly explain the nature and purpose of the Private Account performance information; (v) advertisements or supplemental sales literature will disclose all material differences between the Private Accounts and the Portfolio and will include any other disclosure that may be necessary to ensure that Private Account performance information is not presented in a misleading manner; and (vi) Private Account performance information will be compared with an appropriate securities index in accordance with Item 5A of Form N-1A, and will be updated at least as frequently as the Portfolio's performance information. 1/

Analysis

In Nicholas-Applegate I, the staff confirmed that neither Section 34(b) of the Investment Company Act nor Section 206 of the Investment Advisers Act of 1940 would prohibit the Portfolios from including in their prospectuses performance information regarding NACM's Private Accounts that have substantially similar investment objectives, policies, and strategies, provided that the information was not presented in a misleading manner and did not obscure or impede understanding of information that is required to be included in the Portfolios' prospectuses (including the Portfolios' own performance information). In Bramwell Growth Fund (pub. avail. Aug. 7, 1996), the staff took the same position with respect to the inclusion in a fund's prospectus of standardized total return information of another registered investment company previously managed by the fund's portfolio manager that had substantially similar investment objectives and policies. 2/ In each of these letters, however, the staff declined to express any view regarding the

1/ Telephone conversation of January 8, 1997 between Sarah A. Wagman and Jane A. Kanter, counsel to the Portfolios.

2/ We note that the facts presented here and in Bramwell differ from those in MassMutual Institutional Funds ("MassMutual") (pub. avail. Sept. 28, 1995). MassMutual addressed the case in which an unregistered account is converted into a registered fund with substantially similar investment objectives, policies, and strategies. In MassMutual, the staff granted no-action relief to a registered fund that sought to include, as part of the fund's own performance information, the performance information of the unregistered account for the period prior to the effectiveness of the fund's registration statement. Here, the Private Accounts are not the predecessors of the Portfolios, so the performance information of the Private Accounts can be presented only in addition to, and not as part of, the Portfolios' own performance information.

inclusion in a fund's Rule 482 advertisements or supplemental sales literature of performance information of other accounts managed by the fund's adviser.

Rule 482 under the Securities Act requires, among other things, that if an open-end management investment company (other than a money market fund) includes fund performance information in an advertisement, it must include standardized total return information in accordance with paragraph (e)(3) of the rule. Rule 34b-1 under the Investment Company Act provides that sales literature containing fund performance information will be deemed misleading unless it includes, among other things, the total return calculations required by paragraph (e)(3) of Rule 482. Rule 482 and Rule 34b-1 are intended to standardize the calculation and presentation of fund performance information in advertisements or supplemental sales literature to prevent the use of misleading information, and to facilitate the comparison of funds by investors. 3/

Neither Rule 482 nor Rule 34b-1 by its terms prohibits a fund from including in its advertisements or sales literature performance information relating to other accounts managed by the fund's adviser, so long as the information is not presented in a misleading manner. The Commission has expressed the view that Rule 482 should be read as precluding "performance information about any related entity to the fund such as its adviser . . . where the use of such performance is intended as a substitute for the performance of the fund." 4/

You maintain that, because a Portfolio may, in accordance with Nicholas-Applegate I, present the performance information of the Private Accounts in the Portfolio's prospectus in a manner that is not misleading, the identical information would be no more likely to mislead investors when presented in the Portfolio's advertisements or sales literature. You also maintain that, with respect to a Portfolio that has its own performance history, the proposal is consistent with Rule 482 because the Private Accounts' performance information would be presented in addition to, rather than as a substitute for, the Portfolio's own performance information, and would be accompanied

3/ See Investment Company Act Release No. 16245 (Feb. 2, 1988) (release adopting amendments to Rule 482 and adopting Rule 34b-1) (the "Adopting Release").

4/ Id. at n.31 (emphasis added).

by prominent disclosure stating that the performance is not the Portfolio's own performance. 5/

You cite a provision of the National Securities Markets Improvement Act of 1996 (the "1996 Act") as additional support for your argument. In particular, you note that the 1996 Act requires the Commission to consider, in determining whether rulemaking under the Investment Company Act is necessary or appropriate in the public interest, whether the rulemaking will promote competition. 6/ You maintain that this provision demonstrates a general Congressional intent that, in administering the Investment Company Act, the Commission consider issues of capital formation and competition, to the extent consistent with investor protection. You maintain that your proposal is consistent with this Congressional intent because it would permit new funds with experienced investment advisers, but limited performance history, to raise capital more readily and compete more effectively with established investment companies, while not misleading investors.

We believe that neither Rule 482, Section 34(b), nor Rule 34b-1 prohibits a Portfolio from including in its advertisements or supplemental sales literature the performance information of Private Accounts that have substantially similar investment objectives, policies, and strategies, provided that the performance is not presented in a misleading manner and is not presented as a substitute for the Portfolio's own performance. Accordingly, we would not recommend enforcement action to the Commission if the Portfolios include performance information of the Private Accounts in advertisements or supplemental sales literature in accordance with your representations. Our conclusion is based particularly on the following facts and representations, each of which is designed to ensure that the Private Account performance information would not be presented as a substitute for the Portfolio's performance information:

5/ As stated above, you represent that when a Portfolio has no performance history of its own, in order to prevent the performance of the Private Accounts from being mistaken for the Portfolio's own performance, the Private Accounts' performance information will be accompanied by prominent disclosure stating clearly that the information presented is NACM's performance with respect to the Private Accounts and not that of the Portfolio, and that the Private Account performance is not intended to be a substitute for the Portfolio's own performance.

6/ See National Securities Markets Improvement Act of 1996, § 106(c), 15 U.S.C. § 80a-2(c) (1996); H.R. 104-622, 104th Cong., 2d Sess. (1996) ("[t]he legislation . . . seeks to promote efficiency, competition, and capital formation in the capital markets without compromising investor protection . . .").

(i) advertisements or supplemental sales literature will prominently disclose that the Private Account performance is not the Portfolio's own performance, and should not be considered indicative of the past or future performance of the Portfolio;

(ii) advertisements or supplemental sales literature will prominently disclose that Private Account performance should not be considered a substitute for the Portfolio's performance;

(iii) with respect to a Portfolio that has its own performance history, the Private Account performance information will be provided in addition to the performance information of the Portfolio, and will be presented no more prominently than the Portfolio's performance;

(iv) advertisements or supplemental sales literature will clearly explain the nature and purpose of the Private Account performance information; and

(v) advertisements or supplemental sales literature will disclose all material differences between the Private Accounts and the Portfolio and will include any other disclosure that may be necessary to ensure that Private Account performance information is not presented in a misleading manner.

You should note that any different facts or representations might require a different conclusion. 7/

This response supersedes positions taken by the Division of Investment Management in 1993 that presenting performance information regarding an adviser's other accounts is inconsistent with the requirements of Rule 482, and that other account performance information may be used in supplemental sales literature only when the fund itself does not have any

7/ This response should not be construed as providing no-action assurance with respect to any particular presentation of the performance of NACM's Private Accounts.

In addition, we note that the National Association of Securities Dealers, Inc. (the "NASD") has taken the position that the use of advertisements and sales literature that include performance information regarding an adviser's other accounts may be a violation of its Conduct Rules. NASD Regulatory and Compliance Alert at 7-8 (June 1992). Our response does not address the status of your proposal under the NASD Conduct Rules.

performance history. 8/ Upon reconsideration, we believe that this earlier position is inconsistent with both the Commission's statement in the 1988 release adopting amendments to Rule 482 9/ and the Commission's long-standing position that whether information in a fund's advertisements or sales literature is misleading, for purposes of the federal securities laws, depends on the totality of the circumstances, including the manner in which it is presented. 10/

Sarah Wagman
Sarah A. Wagman
Attorney

8/ See Letter from Carolyn B. Lewis, Assistant Director, Securities and Exchange Commission, Division of Investment Management, to Registrants (Feb. 22, 1993) (citing footnote 31 of the Adopting Release).

9/ See supra notes 3-4 and accompanying text.

10/ See, e.g., Investment Company Act Release No. 10621 (Mar. 8, 1979) (withdrawing the Commission's Statement of Policy on investment company sales literature) ("[w]hat is or is not misleading in sales literature may depend greatly on the totality of the circumstances, including the context in which it is used and the sophistication of the investor.").

KATTEN MUCHIN & ZAVIS

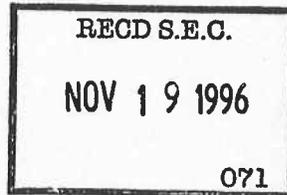
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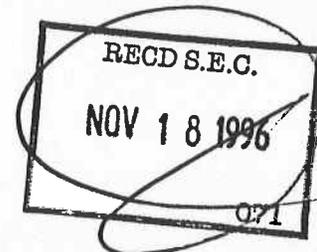


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1933 Act/Rule 482
1940 Act/Section 34(b) and
Rule 34b-1

November 18, 1996



Jack W. Murphy, Esq.
Associate Director and Chief Counsel
Division of Investment Management
Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549

Re: Use of Prior Performance Information regarding Nicholas-Applegate Capital Management ("NACM") in Rule 482 Advertisements and Supplemental Sales Literature by the Nicholas-Applegate Mutual Funds (the "Trust")

Dear Mr. Murphy:

On behalf of the Trust, an open-end management investment company, which is registered under the Investment Company Act of 1940, as amended (the "1940 Act"), and whose shares are registered under the Securities Act of 1933, as amended (the "1933 Act"), NACM, an investment adviser registered under the Investment Advisers Act of 1940; as amended (the "Advisers Act"), and the investment adviser to the Nicholas-Applegate Investment Trust (the "Master Trust"), and Nicholas-Applegate Securities ("NAS"), a broker-dealer registered under the Securities Exchange Act of 1934, as amended, and the distributor of the Trust's shares, we hereby request that the staff of the Securities and Exchange Commission (the "Commission" or "SEC") agree not to recommend any enforcement action to the Commission if the separate investment portfolios of the Trust (each a "Portfolio") include in their Rule 482 advertisements (*i.e.*, advertisements meeting the requirements of Rule 482 under the 1933 Act ("Rule 482")) and supplemental sales literature (*i.e.*, sales literature meeting the requirements of Rule 34b-1 under the 1940 Act ("Rule 34b-1")) information concerning the prior performance of certain advisory accounts that are managed with investment objectives, policies and strategies

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substantially similar to those employed by NACM in managing each of the Portfolios ("NACM's prior performance").

As described in more detail below, by response to a request for no-action relief made publicly available by the Office of Chief Counsel on August 6, 1996 (the "August Letter"), the SEC staff advised the Trust and NACM that the SEC staff would not recommend enforcement action if, under the circumstances described in the August Letter, the Trust included in prospectuses for certain Portfolios of the Trust ("Prospectuses") information concerning NACM's prior performance after the first year of operation of such Portfolios. In the August Letter, the SEC staff did not, however, expressly address whether, both during and after the first year of operation of those Portfolios, NACM's prior performance information could be included in Rule 482 advertisements or supplemental sales literature for those Portfolios. By this letter, the Trust, NACM and NAS seek no-action relief with respect to the inclusion of NACM's prior performance information in the Portfolios' Rule 482 advertisements and supplemental sales literature both during and after the first year of operation of those Portfolios.

I. FACTS

The Trust and the Master Trust were each organized as a business trust under the laws of Delaware in December 1992. Each Portfolio of the Trust invests all of its assets in a corresponding series (a "Fund") of the Master Trust that has the same investment objectives, policies, strategies and restrictions as the Portfolio.^{1/} NACM manages the assets of each Fund, subject to the direction of the Master Trust's Board of Trustees. Since each Portfolio invests all of its assets in a corresponding Fund, the Trust does not have an investment adviser.^{2/}

NACM currently manages over \$32 billion of discretionary assets for numerous clients, including qualified and non-qualified pension and profit-sharing plans ("retirement plans") of corporations, public retirement systems, unions, university endowments, foundations, and other institutional investors, investment companies, and individuals. NACM and its affiliate NAS, the distributor for the Trust, are both California limited partnerships, whose general partner is Nicholas-Applegate Capital Management Holdings, L.P., a California limited partnership of

^{1/}The structure of this master-feeder relationship is described in more detail in our letter dated August 5, 1996 (the "August 5 Letter"), requesting the no-action relief granted in the August Letter.

^{2/}The Board of Trustees of the Trust, however, reviews the actions of the Trust's administrator, Investment Company Administration Corporation ("Administrator"), and NAS, and decides upon general matters of policy with respect to each Portfolio.

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which the general partner is Nicholas-Applegate Capital Management Holdings, Inc., a California corporation owned by Arthur E. Nicholas.^{2/}

Pursuant to the no-action relief granted by the SEC staff in the August Letter, certain Portfolios currently include in their Prospectuses, after their first year of operation, information concerning NACM's prior performance. This performance information is included in the Prospectuses as a complement to, not a substitute for, the Portfolios' own historic performance information, in order to provide investors with a better basis on which to evaluate NACM as the investment adviser for each Fund and to make an informed decision whether to invest in the Portfolios.

The information included in the Prospectuses concerning NACM's prior performance is prepared and presented in accordance with certain representations made by the Trust and NACM in the August 5 Letter and the conditions established by the SEC staff in connection with the issuance of the August Letter. In accordance with those representations and conditions, (i) NACM's prior performance information is prepared and presented in accordance with the detailed standards formulated by the Association for Investment Management and Research ("AIMR"), except that net rather than gross performance is presented, (ii) information concerning the prior performance of each Portfolio and NACM is displayed in the Prospectuses with equal prominence, and is accompanied by disclosure to the effect that NACM's prior performance does not represent the historical performance of the Portfolios and should not be interpreted as indicative of the future performance of the Portfolios, (iii) NACM's prior performance is compared with an appropriate securities index in a manner consistent with Item 5A of Form N-1A, and such index is administered by an entity that is not affiliated with the Trust, NACM or NAS, (iv) information in the Prospectuses concerning NACM's prior performance will be updated no less frequently than annually, but at least as often as the performance information for each Portfolio is updated, (v) the Prospectuses disclose that NACM's private accounts are not subject to certain investment limitations, diversification requirements, and other restrictions imposed by the 1940 Act and the Internal Revenue Code of 1986, as amended, on registered investment companies and that, if applicable, such limitations, requirements, and restrictions might have adversely affected the performance result of such account, and (vi) any other textual explanation or disclosure concerning any facts regarding the prior performance of the Portfolio or NACM's prior performance that should be brought to the attention of prospective investors is so disclosed.

^{2/}Mr. Nicholas is a Trustee and the Chairman of the Board of Trustees of the Trust, a Trustee and the Chairman of the Board of Trustees of the Master Trust, and the Managing Partner and Chief Investment Officer of NACM. Mr. Nicholas is the principal architect of NACM's investment strategies.

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In the August Letter, the SEC staff expressly did not address the issue of whether, both during and after the first year of operation of the Portfolios, NACM's prior performance information may be properly included in Rule 482 advertisements or supplemental sales literature for the Portfolios.^{4/} Moreover, as you are aware, the SEC staff has published statements that have been interpreted to preclude investment companies that have their own performance history from including in their Rule 482 advertisements and supplemental sales literature performance information about a related entity or fund.^{5/} Accordingly, NACM's prior performance information has not been included in the Rule 482 advertisements and supplemental sales literature for the Portfolios.

The Trust, NACM and NAS propose to include information concerning NACM's prior performance in the Rule 482 advertisements and supplemental sales literature for the Portfolios both during and after the first year of their operation. The Rule 482 advertisements would include NACM's prior performance information only in those instances in which the relevant Portfolio's Prospectus contains such information. Supplemental sales literature would include such performance information regardless of whether the relevant Portfolio's Prospectus contains such performance information.

In order to ensure that such materials would be both accurate and not misleading, the Trust, NACM and NAS propose that the presentation of NACM's prior performance information in Rule 482 advertisements and supplemental sales literature for the Portfolios would adhere to the representations and conditions described in the August Letter with respect to the presentation of such information in Prospectuses. Of course, performance information concerning the

^{4/}See August Letter, *supra*, at 2 n.2.

^{5/}See the discussion in Section II.A., *infra*. In addition, in this regard we note that the National Association of Securities Dealers, Inc. ("NASD") has consistently taken the position that inclusion of an adviser's prior performance information in advertisements and supplemental sales literature for a new mutual fund is inappropriate because ". . . it may lead investors to conclude that the new fund would perform as well as the adviser's previous accounts" (See NASD Regulatory Compliance Alert, Vol. 6, No. 2, 7-8 (June 1992).) This position presumably is based on the general prohibitions contained in Rule 2210(d) of the NASD's Conduct Rules regarding misleading advertisements or sales literature. While we are not asking the SEC staff to interpret the NASD's Conduct Rules, we note that the NASD's position also appears to be based on a perception that the SEC prohibits the use of an adviser's prior performance information in Rule 482 advertisements and supplemental sales literature. (See interview of R. Clark Hooper, NASD Regulation, Senior V.P., Office of Disclosure and Investor Protection, in *Compliance Reporter* (Oct. 14, 1996) (Exhibit A hereto) ("Q: Is there any discussion of allowing the use of private account performance in advertising? A: Currently, the SEC doesn't allow private account performance in advertising in [sic] materials that precede the prospectus . . .").) Accordingly, the Trust, NACM and NAS believe that it is also important, in the interest of regulatory consistency, for the SEC staff to clearly express its view with respect to this issue.

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Portfolios included in the Portfolios' Rule 482 advertisements and supplemental sales literature would comply with the requirements of Rule 482 and Rule 34b-1, respectively.^{6f}

The Trust, NACM and NAS believe that many of the same reasons advanced in support of the relief granted by the August Letter also make it appropriate to include NACM's prior performance information in Rule 482 advertisements and supplemental sales literature both during and after the first year of a Portfolio's operation. Among other things, the inclusion of such information in Rule 482 advertisements and supplemental sales materials would provide prospective investors with more complete information on which to base their investment decisions. Moreover, the Trust, NACM and NAS believe that the inclusion of such information in such materials would enable the Portfolios to compete more effectively in the mutual fund market. In addition, the Trust, NACM and NAS believe that the inclusion of such information in the Portfolios' Rule 482 advertisements and supplemental sales literature is consistent with the prior no-action relief granted by the SEC staff with respect to the Portfolios' Prospectuses and the SEC's general policies governing prior performance presentations in prospectuses and supplemental sales literature. Finally, the parties believe that the inclusion of such information in the Portfolios' Rule 482 advertisements and supplemental sales literature would be in accord with the Congressional mandate in Section 106 of the National Securities Market Improvement Act of 1996 (the "1996 Amendments")^{7f} that the Commission take into consideration whether its actions will promote "efficiency, competition, and capital formation."

II. ANALYSIS

Rule 482 provides that an advertisement for an investment company will be deemed to be a prospectus under Section 10(b) of the 1933 Act, for purposes of compliance with Section 5(b)(1) of the 1933 Act, if such advertisement meets the requirements of Rule 482.^{8f} Rule 482

^{6f}Moreover, such Rule 482 advertisements and supplemental sales literature would comply with all other applicable requirements of Rule 482 and Rule 34b-1.

^{7f}104 P.L. 290, 110 Stat. 3416 (1996).

^{8f}Section 10(a) of the 1933 Act contains certain requirements and authorizes the Commission to enact rules regarding the contents of the full prospectus required to be filed with the Commission. Part A of Form N-1A describes the information required to be included in the statutory prospectus for open-end management investment companies under Section 10(a) of the 1933 Act. Section 10(b) of the 1933 Act provides that the SEC may authorize a so-called "omitting prospectus" that "omits in part or summarizes" the information in the full prospectus under Section 10(a) of the 1933 Act. Pursuant to this provision, the SEC adopted Rule 482, which expressly provides that "[a]n advertisement, other than one excepted from the definition of prospectus by Section 2(10) of the [1933] Act and Rule 134 thereunder, shall be deemed to be a prospectus under Section 10(b) of the [1933] Act for the purpose of Sections 5(b)(1) of the [1933] Act," if it meets the requirements set forth in Rule 482. As you are aware, certain investment company advertisements are also excepted from the definition of "prospectus" by Section

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contains certain specific requirements and conditions for the quotation of performance information of an open-end management investment company, such as the Trust, in Rule 482 advertisements.^{2/} In addition, Rule 482(a)(2) provides that a Rule 482 advertisement may only contain information "the substance of which" is contained in the investment company's Section 10(a) prospectus.

Section 34(b) of the 1940 Act makes it unlawful to make any untrue statement of a material fact in any document, including any advertisement or sales literature, that is required to be kept pursuant to Section 31(a) of the 1940 Act or rules promulgated thereunder.^{10/} Rule 34b-1 provides that advertisements and sales literature addressed to or intended to be distributed to prospective investors will be deemed to have "omitted to state a fact necessary to make the statements made therein not materially misleading," unless such advertisement or sales literature contains the disclosures specified in the Rule.^{11/} Among other things, Rule 34b-1 contains specific requirements for advertisements and sales literature that include investment company performance data.^{12/} In this regard, Rule 34b-1(b)(1)(ii) requires that, except in the case of a money market fund, any such advertisement or sales literature must contain the total return

2(10) of the 1933 Act and Rule 134 thereunder. The 1996 Amendments authorized the SEC to enact rules and regulations permitting a Section 10(b) prospectus that contains information that is not included in the Section 10(a) prospectus. See 1996 Amendments, Section 204, adding Section 24(g) to the 1940 Act. Since the SEC has not as yet enacted such rules and regulations, this request does not seek any relief with respect thereto.

^{2/}See, e.g., Rule 482(e)(3). In addition, Rule 482(e)(4) provides that a Rule 482 advertisement may include "any other historical measure of [investment] company performance (not subject to any prescribed method of computation) if such measurement: (i) reflects all elements of return; (ii) is accompanied by quotations of total return as provided for in [Rule 482(e)(3)]; (iii) is set out in no greater prominence than the required quotations of total return; and (iv) identifies the length of and the last day of the period for which performance is measured."

^{10/}Section 34(b) provides, in pertinent part, that "[i]t shall be unlawful for any person to make any untrue statement of a material fact in any registration statement, application, report, account, record, or other document . . . the keeping of which is required pursuant to Section 31(a). It shall be unlawful for any person so filing, transmitting, or keeping any such document to omit to state therein any fact necessary in order to prevent the statements made therein, in the light of the circumstances under which they were made, from being materially misleading." Section 34(b) applies to investment company advertisements and sales literatures because those materials are documents that are required to be kept in accordance with Rule 31a-2(a)(3) under the 1940 Act.

^{11/}See Rule 34b-1(a) and (b).

^{12/}See Rule 34b-1(b)(1) and (b)(2).