



# KANSAS

OFFICE OF THE SECURITIES COMMISSIONER

KATHLEEN SEBELIUS, GOVERNOR  
CHRIS BIGGS, COMMISSIONER

October 16, 2008

Jane L. Stafford, Esq.  
Stafford & Associates, LLC  
4600 Madison, Suite 150  
Kansas City, Missouri 64112

RE: Interpretive Opinion No. 2009-002.  
Cottonwood Research Group, LLC  
File No. 2008X0000008

Synopsis: A research analyst who provides advice concerning securities that is not individually tailored to clients nor timed to specific market activity is not an investment adviser as defined in the Kansas Uniform Securities Act.

Dear Ms. Stafford,

In your letter dated June 19, 2008, as supplemented on August 29, 2008, you have requested confirmation that your client, Cottonwood Research Group, LLC (“Cottonwood”) is not an investment adviser as defined in K.S.A. 17-12a102(15) because its activities fall within the exclusion for publishers.

Pursuant to K.S.A. 17-12a102(15), an investment adviser is defined as “a person that, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.” However, “a publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation” is excluded from the definition.

In Lowe v. SEC, 472 U.S. 181, 105 S.Ct. 2557 (1985), the United States Supreme Court held that the publisher exclusion applied to an investment newsletter containing general commentary about securities markets, reviews of investment strategies, and specific recommendations for buying, selling, or holding stocks. According to the Court, “[p]resumably a ‘bona fide’ publication would be genuine in the sense that it would contain disinterested

commentary and analysis as opposed to promotional material disseminated by a ‘tout.’” Id. at 204, 2570. The Court noted that “general and regular circulation” means the publication must be distributed on a regular schedule and cannot be timed to specific market activity. Id. In addition, the Court indicated that the communication between a publisher and subscriber could not involve extensive person-to-person communication that would be characteristic of an investment adviser-client relationship. Id. at 209, 2572.

Although the Lowe decision interprets the federal definition of investment adviser, the official comments to the Uniform Securities Act (2002), upon which the Kansas Uniform Securities Act is based, states that the drafters intend that the state-level definition should be construed uniformly with the federal definition. In Kansas, we have followed the Lowe decision since 1987 in determining the contours of the publisher exclusion. See Interpretive Opinion No. 87-016, in re: Investment Adviser Registration of Swingtrend Publications, Inc., May 11, 1987.

According to your letter, Cottonwood is a Kansas limited liability company that conducts research analysis of companies in the health care industry. Cottonwood sells the research to broker-dealers who, in turn, provide it to institutional investment managers under soft dollar arrangements meeting the requirements of section 28(e) of the Securities Exchange Act of 1934.<sup>1</sup> In some instances, Cottonwood provides the research directly to investment managers who subscribe to Cottonwood’s services using hard dollars.

Cottonwood provides its research to subscribers via written communications and through a website designed to be accessed only by subscribing clients. Subscribers may also seek additional information from Cottonwood through oral communication. The research is provided on a regular basis and is not timed to specific market activity or events affecting the securities market. Furthermore, Cottonwood does not hold a position in any security it covers and does not accept any remuneration from any issuer.

As part of its service, Cottonwood makes recommendations to buy or sell certain securities. However, as more fully described in your letter and the supplemental material, the advice is based upon the merits of the securities and issuers, and Cottonwood does not tailor its analysis or recommendations on the basis of the individual circumstances of any subscriber. For example, Cottonwood does not consider the suitability of an investment for a particular subscriber, the soundness of the subscriber’s financial objectives, the merits of purchasing or selling the securities within a specific client’s portfolio, etc. Subscribers themselves ultimately decide whether to follow the recommendations based on their own internal needs, objectives, and desires.

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<sup>1</sup> Cottonwood did not seek an opinion, and we do not express one, on the appropriateness of the soft dollar arrangement.

Based on the present law and the facts expressed in your letter, staff for the Office of the Securities Commissioner concludes that Cottonwood falls within the exclusion for publishers and is not an investment adviser as defined by the Kansas Uniform Securities Act. Therefore, staff will recommend no enforcement action against Cottonwood if it acts in accordance with your letters. However, this opinion is based on the written representations provided by you and it does not extend to any other similar fact situation. Any variance from the facts expressed in your letter could result in a different conclusion.

This opinion is intended solely as an expression of enforcement policy, and its legal conclusions are not binding on any court, legal tribunal, or any other person. Please note that other states may disagree with our interpretation of the publisher exclusion.

Sincerely,



Rick A. Fleming  
General Counsel