

Washington University Law Review

Volume 64

Issue 2 *Corporate and Securities Law Symposium*

1986

Lowe v. SEC: Guaranteeing the Right to Publish Investment Newsletters Through Statutory Construction

Robert G. Oesch

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [First Amendment Commons](#)

Recommended Citation

Robert G. Oesch, *Lowe v. SEC: Guaranteeing the Right to Publish Investment Newsletters Through Statutory Construction*, 64 WASH. U. L. Q. 577 (1986).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol64/iss2/9

This Symposium Recent Development is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

LOWE v. SEC: GUARANTEEING THE RIGHT TO PUBLISH INVESTMENT NEWSLETTERS THROUGH STATUTORY CONSTRUCTION

In a recent series of cases culminating with *Lowe v. SEC*,¹ federal courts have considered whether one must register as an investment adviser with the SEC before publishing a newsletter containing nonindividualized investment advice. Within this issue lies a fundamental tension between the first amendment guarantee of freedom of speech, and the federal securities laws inhibiting this freedom in order to protect investors. In *Lowe*, a majority of the Supreme Court avoided complex constitutional questions by holding that a *nonregistered* publisher's publication of investment newsletters not offering personalized advice falls within a statutory exclusion of the Investment Advisers Act of 1940.² The concurring Justices agreed that the publisher need not register the publication, but based their conclusion on the constitutional right of free speech.³

Congress enacted the Investment Advisers Act of 1940⁴ ("IAA" or "Act") as part of a series of statutes intended to protect investors from abuses in the securities industry,⁵ such as malpractice by persons paid for

1. 105 S. Ct. 2557 (1985).

2. *Lowe*, 105 S. Ct. at 2573-74. See also *infra* notes 37-43 and accompanying text. Justice Stevens wrote the majority opinion, in which Justices Blackmun, Brennan, Marshall and O'Connor joined. Justice Powell did not participate in the decision.

3. *Id.* at 2574. See also *infra* notes 44-52 and accompanying text. Justice White wrote the concurring opinion, in which Justices Burger and Rehnquist joined.

4. Ch. 686, tit. 2, 54 Stat. 847 (1940) (codified as amended at 15 U.S.C. §§ 80b-1 to 80b-21 (1982)). For discussion of the Act's background and the history of its passage and amendment, see Comment, *The Investment Advisers Act of 1940 and the Supreme Court: Private Rights of Action Under the New Court Test*, 6 DEL. J. CORP. L. 54 (1981). For criticisms and recommended changes in the Act, see Ahart, *Suggested Amendments to the Investment Advisers Act*, 6 SEC REG. L.J. 226 (1978); Rosenblatt & Lybecker, *Some Thoughts on the Federal Securities Laws Regulating External Investment Management Arrangements and the ALI Federal Securities Code Project*, 24 U. PA. L. REV. 587 654-80 (1976).

5. SEC v. Capital Gains Bureau, 375 U.S. 180, 186 (1963). Preceding the IAA were: the Securities Act of 1933, 15 U.S.C. §§ 77a-77aa (1982); the Securities and Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1982); the Public Utility Holding Company Act of 1935, 15 U.S.C. §§ 79-79z-6 (1982); the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa-77bbb (1982); and the Investment Company Act of 1940, 15 U.S.C. §§ 10a-1 to 80a-64 (1982). The basic purpose of these acts was the substitution of a philosophy of full disclosure for that of *caveat emptor*, thus creating a higher standard of ethics in the securities industry. *Capital Gains Bureau*, 375 U.S. at 186. Past abuses in the industry have been perceived to be contributing factors in the 1929 stock market crash and the subsequent Depression. *Id.* See generally Ahart, *Advising the Individual Investor: Comparing the*

their investment advice.⁶ The Act prohibits persons within its broad definition of "investment advisers"⁷ from conducting business unless they register with the SEC.⁸ The Act also prohibits advisers from engaging in fraudulent, deceptive, or manipulative acts⁹ at the risk of revocation of their registration,¹⁰ injunctive proceedings¹¹ and criminal penalties.¹²

Federal Regulation of Investment Advisers, Banks and Broker-Dealers, 6 PEPPERDINE L. REV. 31 (1978) (comparing the federal regulations governing the conduct of banks, broker-dealers and investment advisers rendering investment advice to individuals).

6. As summarized by the Senate Report on the 1960 amendments to the IAA, the general objective of the Act is "to protect the public and investors against malpractices by persons paid for advising others about securities." S. REP. NO. 1760, 86th Cong., 2d Sess. 1 (1960). See also *Abrahamson v. Fleschner*, 568 F.2d 862, 870-73 (2d Cir. 1977) (IAA shows legislation was needed to control problems with advisory services); 1 T. FRANKEL, *THE REGULATION OF MONEY MANAGERS* 149-93 (1978) (discussing the definition of an investment adviser and the regulation to which one is subjected); L. LOSS, *FUNDAMENTALS OF SECURITIES REGULATION* 733-48 (1983) (discussing the regulation of investment advisers); Note, *The Regulation of Investment Advisers*, 14 STAN. L. REV. 837 (1962) (discussing the operation of investment advisers under existing legislation and the need for more stringent regulation).

7. 15 U.S.C. § 80b-2(a)(11) (1982) defines "investment adviser" as

any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities. . . .

The Act provides several exclusions from this definition. See *infra* notes 13-16 and accompanying text.

8. The Act makes it unlawful to use the mails or any instrumentality of interstate commerce in connection with the business of investment advising unless one is registered as an investment adviser. 15 U.S.C. § 80b-3(a) (1982).

Registration entails substantial burdens. An application for registration must contain information about, *inter alia*, the applicant's education, business affiliations for the past ten years, the manner of giving investment advice and rendering analyses, and the applicant's finances. *Id.* at § 80b-3(c)(1) (A)-(H). Registered investment advisers must maintain numerous records of their assets, liabilities, income, capital and more. 17 C.F.R. § 275.204-2 (1985) (regulation enacted by SEC pursuant to 15 U.S.C. § 80b-4).

Certain investment advisers, such as those advising only insurance companies, may not have to register. *Id.* at § 80b-3(b). The SEC must grant registration unless it finds, after notice to the applicant and a hearing, that the applicant has committed certain offenses. *Id.* at §§ 80b-3(c)(2) & 80b-3(e). See generally Lovitch, *The Investment Advisers Act of 1940—Who is an "Investment Adviser?"*, 24 U. KAN. L. REV. 67 (1975) (discussing applicability and requirements of the Act).

9. 15 U.S.C. § 80b-6(1)-(3) (1982). The Act also prohibits certain types of investment advisory contracts, such as those providing for fees based upon capital gains or appreciation of the client's portfolio (although compensation based on the total value of a fund averaged over a definite period is permissible). *Id.* at § 80b-5.

10. The SEC can deny, suspend, or revoke one's registration for any of several enumerated offenses, including violation of the IAA. *Id.* at § 80b-3(e).

11. The SEC can sue to enjoin actual or potential violation of the Act. *Id.* at § 80b-9(3).

The SEC has exerted increased pressure over the past few years on publishers of investment newsletters to register by bringing civil and administrative actions. Ingersoll, *Regulating Advice: Finan-*

A publisher of an investment newsletter, however, may avoid registering as an "investment adviser" by qualifying for one of the Act's numerous exclusions.¹³ One exclusion is for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation."¹⁴ While many courts have addressed the "investment adviser" issue,¹⁵ few have interpreted the bona fide publication exclusion.¹⁶ To determine whether publication of nonregistered investment newsletters is permissible, courts have applied either the IAA's

cial Newsletters Face Growing Pressure to Register with SEC, Wall St. J., Nov. 15, 1984, at 1, col. 6, 20, col. 1.

12. The Act provides for a fine of up to \$10,000 or a prison sentence of five years or both upon conviction for willfully violating the Act or any rule promulgated thereunder. 15 U.S.C. at § 80b-17 (1982).

The possibility of private civil actions under the Act for violations of the Act is limited. The Supreme Court held in *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11 (1979), that a private right of action may be implied under § 215 of the Act, *id.* at § 80b-15, to void an investment adviser contract, but declared the Act conferred no other private causes of action. *Transamerica Mortgage Advisors*, 444 U.S. at 24. See generally Comment, *The Investment Advisers of 1940 and the Supreme Court: Private Rights of Action Under the New Cort Test*, 6 DEL. J. CORP. L. 54 (1981).

13. The Act's definition of "investment adviser" does not include:

(A) a bank . . . ; (B) any lawyer, accountant, engineer, or teacher whose performance of such services is solely incidental to the practice of his profession; (C) any broker or dealer whose performance of such services is solely incidental to the conduct of his business as a broker or dealer and who receives no special compensation therefor; (D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation; (E) any person whose advice, analyses, or reports relate to no securities other than securities which are direct obligations of . . . the United States . . . ; (F) such other persons not within the intent of this paragraph, as the Commission may designate by rules and regulations or order.

15 U.S.C. § 80b-2(a)(11) (1982). Qualifying for one of these exclusions relieves one of the Act's requirements, as only "investment advisers" need register under the Act. *Id.* at § 80b-3(a).

14. *Id.* at § 80b-2(a)(11)(D). This exclusion is hereinafter referred to as the "bona fide publication exclusion." For comprehensive discussions of this exclusion, see Harroch, *The Applicability of the Investment Advisers Act of 1940 to Financial and Investment Related Publications*, 5 J. CORP. L. 55 (1979); Lovitch, *supra* note 8; *cf.* FEDERAL SECURITIES CODE § 202(78)(B)(iv) (1980) (excluding "a publisher of a bona fide newspaper or periodical of general and regular circulation, or an owner or operator of a radio or television station" from the definition of "investment advisor.").

15. See, e.g., *Zinn v. Parrish*, 644 F.2d 360, 364 (7th Cir. 1981) (professional football player's agent was not an "investment adviser" under the IAA). See also Annot., 5 A.L.R. FED. 255-56 (1970) & 30-31 (1985 Supp.) (collecting investment adviser cases).

16. See *SEC v. Lowe*, 105 S. Ct. 2557 (1985) (exclusion held applicable); *SEC v. Suter*, 732 F.2d 1294 (7th Cir. 1984) (exclusion not applicable); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970) (interpreting language of exclusion); *SEC v. Wall St. Publishing Inst., Inc.*, 591 F. Supp. 1070 (D.D.C. 1984) (exclusion not applicable), *motion for stay pending appeal granted*, FED. SEC. L. REP. (CCH) § 91,635, at 99,219-20 (D.C. Cir. Aug. 10, 1984); *SEC v. Blavin*, 557 F. Supp. 1304 (E.D. Mich. 1983) (exclusion not applicable), *aff'd*, 760 F.2d 706 (6th Cir. 1985); *Person v. New York Post Corp.*, 427 F. Supp. 1297 (E.D.N.Y.) (exclusion applicable), *aff'd. mem.*, 573 F.2d 1294 (2d Cir. 1977).

bona fide publication exclusion or a first amendment analysis.¹⁷

The Second Circuit Court of Appeals first construed the bona fide publication exclusion in *SEC v. Wall Street Transcript Corporation*.¹⁸ The Securities Exchange Commission (SEC) charged that the *Wall Street Transcript*, a weekly tabloid containing reports on specific securities as well as verbatim speeches and interviews, could not be circulated unless its publisher first registered under the IAA.¹⁹ The court held that application of the bona fide publication exclusion depended upon the substance and content of the publication rather than the formal "indicia" of a newspaper. The court determined that the *Transcript's* emphasis on particular securities raised doubts about its qualifying for the exclusion, and remanded for further proceeding.²⁰ On remand the district court found that the *Transcript* fell within the bona fide publication exclusion.²¹

While the Second Circuit relied on the IAA's statutory exclusion, the Seventh Circuit, in *SEC v. Suter*,²² based its decision on a first amendment analysis.²³ The *Suter* court upheld an injunction limiting publication of an investment newsletter, rejecting the publisher's contention that the first amendment guarantees the right to publish.²⁴ Using the

17. The only two cases expressly interpreting the language of the bona fide publication exclusion are: *SEC v. Lowe*, 105 S. Ct. 2557 (1985) (majority opinion using statutory analysis and concurring opinion using first amendment analysis); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970).

18. 422 F.2d 1371 (2d Cir.), *cert. denied*, 398 U.S. 958 (1970).

19. *Id.* at 1374. The *Transcript* typically contained brokerage house reports, reproduced verbatim or in summary form, on past performances and future prospects for specific corporations and their securities. These reports usually contained specific buy and sell recommendations. The *Transcript* also contained records of panel discussions and interviews the publisher conducted, as well as speeches by corporate executives concerning past and future performances of stocks. *SEC v. Wall St. Transcript Corp.*, 454 F. Supp. 559, 562-63 (S.D.N.Y. 1978).

20. 422 F.2d at 1378.

21. 454 F. Supp. at 567.

22. 732 F.2d 1294 (7th Cir. 1984).

23. See Note, *The Federal Securities Law, the First Amendment and Commercial Speech: A Call For Consistency*, 59 ST. JOHN'S L. REV. 57, 66-77 (1984) (analyzing the IAA under first amendment law and concluding that SEC prior restraint is unconstitutional); Comment, *SEC v. Lowe: The Constitutionality of Prohibiting Publication of Investment Newsletters Under the Investment Advisers Act*, 69 MINN. L. REV. 937, 954-59 (1985) (advocating a broad interpretation of the bona fide publication exclusion to avoid conflict with first amendment rights).

The first amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech or of the press." U.S. CONST. amend. I.

24. *Suter*, an investment adviser registered with the SEC, published an investment newsletter recommending buy and sell strategies. He used mass advertising mailings to promote this newsletter. 732 F.2d at 1294. Many representations in these advertisements were blatantly false. *Id.* at

Supreme Court's freedom of commercial speech test expressed in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,²⁵ the *Suter* court found the publication to be misleading. Thus, the first amendment did not guarantee the right to publish.²⁶

The Supreme Court recently addressed the alternative bona fide publication exclusion and first amendment rationales in *Lowe v. SEC*.²⁷ In *Lowe*, the SEC sought to prohibit Christopher Lowe and the corporations he controlled from publishing investment newsletters.²⁸ One of these companies, Lowe Management Corporation, registered with the SEC as an investment adviser pursuant to the IAA.²⁹ The SEC later revoked that registration due to Lowe's conviction of several crimes relating to his investment advising business.³⁰ Lowe ceased offering in-per-

1297. The district court found these advertisements violated the IAA, and issued an injunction prohibiting publication or distribution of future investment advisory publications unless Suter filed copies with the SEC. *Id.* at 1298.

In his defense, Suter argued that he qualified for the bona fide publication exclusion and that the first amendment protected his right to publish without restriction. The court rejected both these contentions. *Id.* at 1298-99.

25. 447 U.S. 557 (1980). The Court has a four-part test for applying the first amendment to regulation of commercial speech:

At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Id. at 566.

26. *Suter*, 732 F.2d at 1299. Suter's "misleading" newsletter failed the initial step of the *Central Hudson* test. *Id.* See *supra* note 25.

27. 105 S. Ct. 2557 (1985).

28. *Id.* at 2560. Lowe served as president and chief shareholder of three corporations: Lowe Management Corporation, Lowe Publishing Corporation, and Lowe Stock Chart Service, Inc. *SEC v. Lowe*, 725 F.2d 892, 894 (2d Cir. 1984). These corporations published the *Lowe Investment and Financial Letter* and the *Lowe Stock Advisory*, and solicited subscriptions for the never-published *Lowe Stock Chart Service*. *Id.* at 895. Lowe served as president, research chairman and editor of all three services. *Id.* Lowe also offered a "hot-line" telephone service to newsletter subscribers. *Id.* See *infra* note 31 for descriptions of these publications.

29. *Lowe*, 105 S. Ct. at 2559. The Investment Advisers Act of 1940 required all persons falling within its definition of "investment adviser" to register with the SEC. See *supra* notes 7 & 8 and accompanying text.

30. 105 S. Ct. at 2559-60. In 1977, the United States Court of Appeals for the Second Circuit convicted Lowe of the misdemeanors of making false representations to a client and failing to register in New York State as an investment adviser. In 1978, the Second Circuit convicted Lowe of the felonies of tampering with physical evidence and third degree larceny. The SEC then instituted administrative proceedings under § 203 of the Investment Advisers Act, 15 U.S.C. § 80b-3(e) & (f) (1982), against Lowe and Lowe Management Corporation. In 1981, after a full hearing before an administrative law judge, the SEC revoked Lowe Management's IAA registration and ordered Lowe

son investment advice, but continued publishing investment newsletters containing analyses and recommendations for buying and selling specific securities.³¹

The SEC brought an action in the United States District Court for the Eastern District of New York alleging that Lowe violated the IAA by engaging in the business of investment advising without being registered.³² The SEC also sought to permanently enjoin Lowe and his corporations from distributing investment advisory newsletters.³³ The district court largely denied the SEC's requested relief,³⁴ but the Second Circuit Court of Appeals reversed.³⁵ On certiorari the United States Supreme Court reversed, holding that the SEC could not prohibit Lowe from publishing nonpersonalized investment analysis and advice, despite nonregistration as an investment adviser, because his publications fell within the statutory exclusion for bona fide publications.³⁶

Justice Stevens' majority opinion noted that the Court granted certio-

not to associate with investment advisers. *In re Lowe Management Corp., SEC Investment Advisers Act of 1940 Release No. 759* (May 11, 1981). Lowe did not seek judicial review of that order. 725 F.2d at 894-95.

31. *Lowe*, 725 F.2d at 895. The *Lowe Investment and Financial Newsletter* typically contained general observations on the securities and bullion markets, market strategies, and specific recommendations for buying and selling securities and bullion. This newsletter had approximately 2,408 subscribers and appeared eight times between May 1981 and August 1982. *SEC v. Lowe*, 556 F. Supp. 1359, 1361 (E.D.N.Y. 1983). The *Lowe Stock Chart Advisory* contained analyses and recommendations of low-cost stocks. The *Advisory* appeared four times between May 1981 and November 1982 and had approximately 675 subscriptions, over half of which were complimentary. The *Lowe Stock Chart Service* advertised as a weekly service with charts on stocks and bullion prices, but no investment advice. This newsletter has never been published although it had about 40 subscribers. *Id.*

32. *Lowe*, 105 S. Ct. at 2560. The SEC's complaint listed Lowe and all three of his publishing corporations as defendants, none of which were registered as investment advisers under the IAA at this time. *Id.*

33. *Id.* The SEC also sought enforcement of its 1981 order, and an order that defendants disgorge all subscription money received since 1981. *Lowe*, 556 F. Supp. at 1362.

34. *Id.* at 1371. The district court concluded that the IAA, construed to avoid impermissible encroachment on first amendment rights, did not authorize a prior restraint on the freedom to publish. *Id.* at 1361. The court thus denied the petition for temporary and permanent injunctions. The court also denied the request for disgorgement of subscription money received. The court did, however, issue an injunction prohibiting Lowe and his corporations from giving securities information by telephone, individual letter or in person. *Id.* at 1371.

35. *SEC v. Lowe*, 725 F.2d 892, 902 (2d Cir. 1984). The court of appeals held that Lowe's newsletters were subject to the registration requirements of the IAA, and that revoking registration and barring future publication of the newsletters did not violate the first amendment. *Id.* at 898, 902. See also Comment, *SEC v. Lowe: The Constitutionality of Prohibiting Publication of Investment Newsletters Under the Investment Advisers Act*, 69 MINN. L. REV. 937 (1985) (criticizing the Court of Appeals' first amendment analysis).

36. *Lowe*, 105 S. Ct. at 2573-74.

rari to decide whether the first amendment precluded an injunction prohibiting Lowe from publishing his newsletter, but quickly subrogated this issue by stating the Court should not decide constitutional issues if another resolution of the case existed.³⁷ Justice Stevens examined the legislative history of the IAA to determine that Congress intended the IAA to apply only to specific advice rendered on an individual basis, thereby avoiding licensing of nonpersonalized investment publications because of first amendment concerns.³⁸

Believing that intent supported an expansive reading of the bona fide publication exclusion, the majority broadly interpreted the language of the exclusion. The majority construed “bona fide” to mean “genuine,” in the sense of containing disinterested commentary and analysis, as opposed to self-promotional “touting.”³⁹ The majority interpreted the phrase “general and regular circulation” to mean “regular” in the securities industry sense of “not timed to affect the market,” rather than in the ordinary sense of “consistent periodic circulation.”⁴⁰ The majority intended this construction to exclude publications merely issued “from time to time” and those put out by “hit and run tipsters.”⁴¹ The majority stressed that specific advice did not give investment advice a personalized character and that Lowe’s publications did not offer individual advice attuned to specific needs.⁴² Thus, the newsletters fit the literal language of the bona fide publication exclusion and Lowe’s unregistered status did

37. *Id.* at 2557, 2562-63, citing *Escambia County v. McMillan*, 104 S. Ct. 1577, 1579 (1984) (per curiam).

38. *Lowe*, 105 S. Ct. at 2563-69. The majority quoted from a number of hearings and reports, repeatedly emphasizing passages suggesting that Congress intended the IAA to apply only to specific advice rendered on an individual basis. In Senate Hearings, one expert witness distinguished investment counseling as “a personal-service profession and depends for its success upon a close and confidential relationship . . . between us and our clients.” *Id.* at 2565-66 (citation omitted). The majority reasoned that “although neither the text of the Act nor its legislative history defines the precise scope” of the bona fide publication exclusion, those two points seem “tolerably clear.” *Id.* at 2570.

39. *Id.* “Touting” refers to promotion of securities in which the touter has some interest. *Id.* at 2571-72.

40. *Id.* at 2573.

41. *Id.* at 2571. The Court uses the term “tipsters” to refer to persons who advertise in newspapers offering to send a list of stocks sure to rise, in return for payment. *Id.* at 2571 n.51 (quoting Senate Hearings, testimony of Douglas T. Johnston).

42. *Id.* at 2572. The majority distinguished its interpretation of the bona fide publication exclusion from that of the court in *SEC v. Wall Street Transcript* by arguing that the court’s interpretation lacked the central thrust of the legislative history—that Congress directed the Act at personalized advice tailored to individual client’s concerns. *Id.*

not justify a prohibition on publication.⁴³

In contrast to the majority opinion's statutory approach, Justice White's concurring opinion adopted a constitutional analysis, stating that the first amendment protected Lowe's right to continue publishing investment newsletters.⁴⁴ After criticizing the majority's avoidance of the constitutional issue on which it granted certiorari, the concurrence considered whether Lowe qualified for the bona fide publication exclusion.⁴⁵ Justice White regarded the majority's interpretation of the exclusion as overly broad,⁴⁶ wrongfully rendering superfluous key language in the IAA's definition of "investment adviser."⁴⁷ The concurrence then viewed the legislative history as revealing a congressional intent for the Act to cover publishers of investment newsletters.⁴⁸ The concurrence concluded its statutory analysis by stating that the majority's exclusion of Lowe's publications from registration is contrary to the statute's language, legislative history and administrative construction,⁴⁹ and that Lowe should have registered the newsletters.⁵⁰

The concurring opinion next considered the constitutional question of whether the first amendment allowed government prohibition of publication of investment advice. Justice White viewed that prohibition as a clear restraint on speech. He acknowledged that some restraints can be permissible, but found the Act, as a ban on speech in the form of newsletters containing investment advice, presumptively invalid as applied to fully protected speech. Moreover, even under the less-protected commercial speech analysis, the concurrence considered the means of regulation too extreme and thus invalid.⁵¹ The concurrence would have held

43. *Id.* at 2572-74. The Court noted this resolution relieved it of the need to address the constitutional question on which it granted certiorari. *Id.*

44. *Id.* at 2575.

45. *Id.*

46. Justice White criticized the majority's interpretation of the bona fide publication exclusion as unworkably broad. *Id.* at 2576-78. He saw the purpose of the exclusion as differentiating between publications devoted wholly or primarily to investment advice and publications with more diversified and general coverage. *Id.* at 2577 n.4.

47. *Id.* at 2576-77. Justice White believes a broad interpretation of the bona fide publication exclusion which covers all publications with advice not personally tailored to an individual client renders superfluous the disjunctive descriptions in the IAA of investment advisers as engaging in the business of giving investment advice, through publications *or* through issuing analyses or reports concerning securities. *Id.*

48. *Id.* at 2578.

49. *Id.* at 2580.

50. *Id.* at 2586.

51. *Id.* at 2585-86.

the IAA inapplicable in precluding publication of impersonal investment advice by nonregistered advisers like Lowe.⁵²

While Justice Stevens' majority opinion reached a desirable result, its analysis is subject to criticism. Justice Stevens' conclusion depends wholly on his construction of the vague and ambiguous language of the bona fide publication exclusion, as guided by his interpretation of the legislative history.⁵³ Justice Stevens' premise contains significant weaknesses.

The legislative history is not clearly indicative of congressional intent. The fact that three of the eight Justices considering the matter reached an opposite interpretation of this history demonstrates the considerable ambiguity of Congress' intent. As Justice White stated, the majority relies too heavily on the "self-serving statements" of securities industry representatives.⁵⁴

The language of the bona fide publication exclusion is of doubtful applicability to Lowe's newsletters. While the majority's interpretation of "bona fide" as "disinterested"⁵⁵ is plausible, an interpretation of "ordinary" or "typical" appears closer to the language's plain meaning. The majority's interpretation of "general and regular circulation"⁵⁶ is more specious. "Ordinary" and "typical" suggest a nonspecialized publication appearing on a consistent schedule. Of Lowe's three publications, one had not yet been published and boasted only forty subscribers. Another advertised as a semimonthly publication but actually appeared only eight times in fifteen months. A third appeared only four times in six months and had only 675 subscriptions, over half of which were complimentary.⁵⁷ These facts stretch the description of "general and regular circulation" beyond semantic resilience.

The majority's questionable statutory analysis resulted from its determination to avoid the constitutional issue on which it granted certiorari. In this case,⁵⁸ the majority's reluctance to interpret the Constitution is not justifiable. Investment advisers have asserted and will continue to

52. *Id.* at 2587.

53. *See supra* notes 38-41 and accompanying text.

54. 105 S. Ct. at 2579 n.7 (White, J., concurring).

55. *See supra* note 39 and accompanying text.

56. *See supra* notes 40-42 and accompanying text.

57. *See supra* note 31. The district court actually described the second publication as "irregular." *SEC v. Lowe*, 556 F. Supp. 1359, 1361 (E.D.N.Y. 1983).

58. Justice White sharply criticized the majority's refusal to consider the constitutional question. 105 S. Ct. at 2575, 2582.

assert first amendment defenses to actions seeking to limit or prohibit publication of investment newsletters.⁵⁹ The federal courts need guidance on this difficult issue, and publishers need to know their specific rights so they can conduct their businesses vigorously within the bounds of the law. The majority opinion gives little guidance or predictability. If Lowe's publications meet the bona fide publication exclusion, then almost any newsletter could—a result that Congress clearly did not intend.

Instead of imputing specialized meaning to vague terms, the concurring opinion interpreted the exclusion's language in a more restrictive manner.⁶⁰ Justice White found that Lowe's publications lacked the "bona fide" and "general and regular" nature that the bona fide publication exclusion requires.

The concurrence based its conclusion instead on an acceptable constitutional analysis, noting that the IAA's registration requirements do restrict freedom of expression. The concurrence correctly narrowed its consideration to whether this restriction was permissible in this case.⁶¹ Although Justice White summarily distinguished between fully protected speech and commercial speech,⁶² his conclusion is correct. Prohibiting Lowe from publishing newsletters would impermissibly restrict his free speech and publication rights. While the SEC must afford adequate protection to investors, the Commission should note that none of Lowe's subscribers have complained of any wrongdoing.⁶³ The purpose of the securities laws is to ensure full and adequate disclosure,⁶⁴ not to infringe on fundamental first amendment rights. There is no need for governmental infringement of basic rights to protect investors from nonexistent problems.

Moreover, both the majority and concurring opinions fail to consider two public policy concerns that support their conclusions. First, both the majority and concurring analyses open the door for increased compe-

59. Three cases have directly considered the issue. See *SEC v. Lowe*, 105 S. Ct. 2557 (1985); *SEC v. Suter*, 732 F.2d 1294 (7th Cir. 1984); *SEC v. Wall St. Transcript Corp.*, 422 F.2d 1371 (1970), *cert. denied*, 398 U.S. 958. One commentator has noted the "inherent tension" between the first amendment and the securities laws. See Fried, *Convicted Analyst Gets Right to Publish Advice*, N.Y. Times, Feb. 2, 1983, at D1, col. 1, D19, col. 3 (quoting former SEC Commissioner Richard Smith).

60. See *supra* notes 46-50 and accompanying text.

61. See *supra* notes 50-52 and accompanying text.

62. See 105 S. Ct. at 2586 (not necessary to determine whether newsletter contained fully protected or commercial speech).

63. *Id.* at 2661.

64. See *supra* note 5.

tition in the investment publications market.⁶⁵ In a field in which successful prediction and analysis are readily measurable, increased competition offers investors a discernable choice of investment assistance. Increased competition should also serve to raise the cumulative quality level of these publications. Lack of demand will curtail publication of newsletters proving to be inaccurate or less helpful than others.⁶⁶ Second, private actions under section 10(b) of the 1934 Securities Exchange Act⁶⁷ and rule 10(b)-5⁶⁸ already provide aggrieved buyers and sellers with adequate remedies for manipulative or deceptive investment publications.⁶⁹

Although the *Lowe* Court reached a proper conclusion, a first amendment rationale would have provided a stronger foundation. If the Supreme Court does decide the constitutional question that it sidestepped in *Lowe*, the Court will have sound guidance in Justice White's concurring opinion.

Robert G. Oesch

65. A former SEC attorney has noted the *Lowe* decision "will prompt a great deal of entrepreneurial activity" in investment newsletters. See Wermeil, *High Court Rules Certain Newsletters Are Exempt From Regulation By SEC*, Wall St. J., June 11, 1985, at 3, col. 2 (quoting Harvey Pitt).

66. Although it is conceivable the increased number of newsletters could dilute the investment newsletter field with lower quality advice, this seems less likely than a general rise in the amount and quality of the newsletters on the market, as higher levels of helpfulness or accuracy should be rewarded with increased subscriptions.

67. Section 10b of the Securities Exchange Act of 1934, codified at 15 U.S.C. § 78f(b) (1982), provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, . . . (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Id.

68. Rule 10b-5, promulgated by the SEC pursuant to § 10b and codified at 17 C.F.R. § 240.10b-5 (1985), provides in pertinent part:

It shall be unlawful for any person, directly or indirectly, . . . (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Id.

69. See, e.g., *SEC v. Blavin*, 557 F. Supp. 1304 (E.D. Mich. 1983) (publisher of investment advisory newsletter found in violation of § 10b and rule 10b-5), *aff'd*, 760 F.2d 706 (6th Cir. 1985).