Kirkpatrick & Lockhart LLP

599 Lexington Avenue
New York, NY 10022-6030
212.536.3900
www.kl.com

August 29, 2003

Richard D. Marshall
212.536.3941
Fax: 212.536.3901
rmarshall@kl.com

BY FACSIMILE AND FEDEX

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

Re: Wilshire Associates Incorporated:

Dear Mr. Scheidt:

This is to elaborate upon our discussion last week concerning the obligation of Wilshire Associates Incorporated ("Wilshire"), an SEC registered investment adviser and broker-dealer and a member firm of the New York Stock Exchange, Inc. ("NYSE"), to disclose a recent disciplinary action against it by the NYSE (the "NYSE Action"). Although you expressed the tentative view during our telephone conversation that Wilshire might have to disclose the NYSE Action in its Form ADV, Wilshire has asked me to write to you in the hope that my written advocacy will be more successful than my oral advocacy. In any case, my written presentation is necessarily more complete and, thus, may contain information that affects your view of this issue.

We continue to believe that Wilshire does not have to disclose the NYSE Action separately to its advisory clients. This is because of three considerations:

1. The NYSE Action will be publicly disclosed by the NYSE which will be included on its web site; in the CRD system, and therefore available on the NASD web site; and in Wilshire's Form BD, and as a result available in an SEC filing. To add an additional requirement that Wilshire separately disclose the NYSE Action to its advisory clients is both unnecessary and not required by law, for the reasons set forth below.

2. Separate disclosure to advisory clients is unnecessary because the NYSE Action involves allegations that are totally unrelated to Wilshire's advisory business and its advisory clients. Moreover, the alleged infractions are technical and unintentional and never injured any Wilshire clients, whether brokerage or

advisory clients, or put those clients at risk of injury. All of the infractions alleged in the NYSE Action have long ago been voluntarily corrected by Wilshire.

3. Relevant SEC requirements for disclosure of a disciplinary action such as the NYSE Action exempt certain "minor" or "immaterial" disciplinary actions from the disclosure obligation. We believe that current rules support our interpretation that the NYSE Action is "minor" and "immaterial," as to Wilshire's advisory business and, therefore, need not be separately disclosed to Wilshire's advisory clients.

As you know, the SEC staff has discouraged requests for no-action relief in this area.[1] Since formal, written interpretive confirmation of our opinion is unlikely to be forthcoming, we are writing to inform you of our advice to Wilshire that disclosure of the NYSE Action is not required under the Investment Advisers Act of 1940, as amended ("Advisers Act"), and the rules and forms promulgated thereunder. Unless we are advised to the contrary, on our advice, Wilshire will not separately disclose the NYSE Action to its advisory clients.

Background Facts: The NYSE Action

After a routine inspection, the NYSE commenced an inquiry into certain issues identified during the inspection. Wilshire voluntarily cooperated with that inquiry, as it did with the inspection. Although the issues identified were not major and technical, the NYSE nonetheless threatened to commence an enforcement action. Wilshire settled that action with a Stipulation of Facts and Consent to Penalty (the "Stipulation"), which is subject to acceptance by the NYSE board (although it has been accepted by the NYSE staff). According to the Stipulation, the complete text of which is attached, Wilshire was alleged to have violated the following NYSE rules:

> During the Relevant Period, the Firm failed to provide reasonable supervision of certain business activities, including the qualification and registration of various Firm employees and the review of electronic communications. Between April 1995 and April 2000, the Firm failed to provide the Exchange with written notice of material changes in the stockholdings of certain of the Firm's allied members, and to furnish the Exchange with an opinion of counsel in the form and substance satisfactory to the Exchange with respect to the issuance of its corporate stock.

None of the alleged conduct violates the federal securities laws or any state laws. Most important, none of the alleged conduct threatened injury to Wilshire's advisory clients or in any

---

[1] *See* Douglas Capital Management, Inc. SEC No-Action Letter (pub. avail. Jan. 11, 1988).

way related to its advisory business. Although Wilshire argued vigorously that the alleged conduct was minor and inadvertent, did not result in any injury to the investing public, and would not historically have been punished with anything more than a token fine, the NYSE, based upon new a sanctions policy, imposed a censure and $50,000 fine.

Possible Legal Obligations under the Advisers Act to Disclose the NYSE Action

There are two possible sources of an obligation under the Advisers Act for Wilshire to disclose the NYSE action. The first, Form ADV, Part I, Item 11.E(2), requires disclosure of any action in which "any self-regulatory organization . . . ever . . . found you . . . to have been involved in a violation of its rules (other than a violation designated as a '***minor*** rule violation' under a plan approved by the SEC)." Item 21 of the Glossary of Terms for Form ADV, Part I states that "[a] rule violation ***may*** be designated as 'minor' under a plan if the sanction imposed consists of a fine of $2,500 or less, and if the sanctioned person does not contest the fine." If the NYSE Action must be disclosed on Form ADV, Part I, a Regulatory Disclosure Reporting Page would have to be filed with Form ADV disclosing the allegations, the sanctions imposed, and a summary of the disposition of the action.

The second possible source of an obligation under the Advisers Act for Wilshire to disclose the NYSE action would arise from Rule 206(4)-4(a)(2) under the Advisers Act. That Rule requires an adviser to disclose "[a] legal or disciplinary event that is ***material*** to an evaluation of the adviser's integrity or ability to meet contractual commitments to clients." Rule 206(4)-4(b) provides that "[i]t shall constitute a ***rebuttable*** presumption" that certain disciplinary actions are material, including a "self-regulatory organization proceeding in which the person . . . [w]as found to have been involved in a violation of the SRO's rules and was the subject of an order by the SRO . . . fining the person more than $2,500."[2]

Disclosure of the NYSE Action Is Not Required by the Advisers Act

As summarized above, we have advised Wilshire that separate disclosure of the NYSE Action to its advisory clients is not required for three reasons.

First, neither Form ADV nor Rule 206(4)-4 mandates disclosure of the NYSE Action against Wilshire.

Form ADV excludes from the disclosure obligations "minor rule violations," which the Glossary to Form ADV provides "may," but not must, be defined as proceedings resulting on fines of $2,500 or less. The preamble to the Item 11 disclosure states that the SEC "use[s] this information to . . . decide whether to revoke your registration or to place limitations on your

[2] Rule 206(4)-4(b)(3)(ii).

activities as an investment adviser, and to identify potential problem areas to focus on during our on-site inspections." In our opinion, the language of the Form permits an adviser to omit a "minor" SRO action from the Form and sets forth purposes for the disclosure which are not implicated by the NYSE Action, which is totally unrelated to Wilshire's advisory business.

Rule 206(4)-4 requires disclosure of "material" disciplinary actions, with a "rebuttable presumption,"[3] which clearly is subject to rebuttal in appropriate cases, that an action in which an SRO fines an adviser more than $2,500 is "material." In the release adopting this Rule, the SEC identified four factors that would support a conclusion that a disciplinary action was immaterial:

1. The distance of the entity or individual involved in the disciplinary event from the advisory function;

2. The nature of the infraction that led to the disciplinary event;

3. The severity of the disciplinary sanction; and

4. The time elapsed since the date of the disciplinary event.[4]

All of these factors, except the last (the time elapsed since the date of the event), support our opinion that the NYSE Action is immaterial under Rule 206(4)-4.

Moreover, we do not believe that the SEC ever intended to require disclosure of minor SRO actions such as the NYSE Action against Wilshire. Rule 206(4)-4 was first adopted in 1987 and the new Form ADV, Part I was adopting on September 12, 2000; however, the Form was proposed on April 5, 2000 and the final rule was adopted without change to the disclosure obligations relating to SRO proceedings that were included in the proposed rule. Thus, these disclosure requirements were drafted before the NYSE changed its policy towards penalties for minor infractions of its rules, undoubtedly in response to the SEC enforcement action against the NYSE for failure to enforce its rules, which was instituted on June 29, 1999.[5] Historically, minor NYSE rule infractions such as those alleged against Wilshire would not have been

---

[3] In adopting this language, the SEC stated that "[b]y creating a presumption of materiality, Rule 206(4)-4 will provide . . . guidance while preserving flexibility for advisers able to rebut the presumption based upon a particular fact situation." Advisers Act Rel. No. 1083 (Sept. 25, 1987).

[4] Advisers Act Rel. No. 1083 (Sept. 25, 1987). The SEC stated in this Release that "[w]hile there may be particular instances where a single factor is dispositive, all four factors should be considered because in most instances no single factor will be controlling."

[5] *See* In the Matter of New York Stock Exchange, Inc, Exchange Act Rel. No. 41574 (June 29, 1999).

punished with as large a fine as that imposed in the Stipulation. We believe that when the SEC drafted the new Form ADV, Part I and Rule 206(4)-4, its expectation was that historical patterns of sanctioning by the NYSE would continue to be followed and that minor rule infractions such as those alleged against Wilshire would not be punished with fines that would trigger separate disclosure to advisory clients.

Second, the NYSE Action is immaterial to Wilshire's advisory clients because the alleged infractions of NYSE rules are totally unrelated to Wilshire's advisory business, do not implicate the Advisers Act, and never placed Wilshire's advisory clients at risk of injury. Moreover, the alleged infractions are technical and were unintentional. Wilshire voluntarily corrected these issues before the NYSE brought the Action. There is no basis whatsoever to believe that the NYSE Action is material to Wilshire's advisory clients.

Third, our advice that Wilshire does not have to disclose the NYSE Action separately to its advisory clients is given in the context of the disclosure of the NYSE Action in numerous public files. The proceeding will be published by the NYSE, making it publicly available on its web site; will be entered into the CRD system, making its publicly available on the NASD web site; and will be disclosed in Wilshire's Form BD, making it publicly available in an SEC filing. Additional, separate disclosure to Wilshire's advisory clients is, in our opinion, not required by law and serves no purpose.

* * *

Please contact me at your earliest convenience to discuss this letter. Until we hear from you to the contrary, Wilshire will rely upon our advice and omit the NYSE Action from its Form ADV, Part I and will interpret Rule 206(4)-4 as not requiring disclosure of the NYSE Action to its advisory clients.

Sincerely,

Richard D. Marshall

Richard D. Marshall

Attachment: NYSE Stipulation

cc: Alan L. Manning, Esq.
Vice President and General Counsel
Wilshire Associates, Inc.
1299 Ocean Avenue
Suite 700
Santa Monica, California 90401-0926

Rex W. Mixon, Jr., Esq.
Vice President
Division of Enforcement
New York Stock Exchange, Inc.
20 Broad Street
New York, New York 10005