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January 19, 2005

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VIA ELECTRONIC MAIL

CFA Institute
CFA Centre for Financial Market Integrity
Reference: Guidance Statement on Wrap Fee/SMA Performance
P.O. Box 3668
Charlottesville, Virginia 22903

Ladies and Gentlemen:

On behalf of our client, an investment management firm and a manager in various separately managed account (“SMA”) programs, we appreciate the opportunity to comment on the proposed Guidance Statement on Wrap Fee/SMA Performance (the “Guidance Statement”). Our client strongly supports the principles underlying the Guidance Statement and the framework for fair representation and full disclosure that they represent, but would appreciate clarification of the following issues addressed in the Guidance Statement:

1. Simulated Performance History. Please clarify the circumstances under which the Guidance Statement would allow a firm to show simulated performance.

- Please clarify how “simulated performance” is defined. Our understanding is that simulated performance is limited to subtracting a “simulated” wrap fee from the *actual* performance of non-SMA accounts, and would not include the use of hypothetical or model returns.
- The Guiding Principles allow a firm to show simulated SMA performance for periods prior to “the acquisition of actual SMA portfolios,” at which time the firm must present actual SMA performance.¹ Can a firm that has acquired actual SMA portfolios but no actual SMA portfolios *in a particular composite or style* provide simulated performance history for such composite or style?
- The Guidance Statement further clarifies that simulated historical performance is permitted “provided it is permissible under the definition

¹ Guidance Statement p. 6.
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of the firm chosen,”² and notes that for an SMA division defined as a firm the non-SMA performance must not be linked prospectively to the SMA firm’s performance.³ Can a firm provide simulated SMA performance history of an *affiliated* but separate firm, including the performance of mutual funds managed by an affiliated but separate firm, as *supplemental* information, assuming adequate disclosure is made and such simulated performance is not linked to the firm’s actual performance? If so, please provide further guidance as to recommended disclosure.

- Has the CFA Institute received any guidance from the SEC staff as to the Guidance Statement, particularly with respect to the staff’s views on linking performance, such as linking actual and simulated performance? If not, we recommend that the CFA Institute consult with the SEC staff to confirm that it does not hold a different view.

2. SMA Results for Current Clients. The Guidance Statement allows a firm to choose whether to show returns on a gross-of-fee or net-of-fee basis when reporting performance to an *existing* SMA sponsor or an *existing* SMA client for the purpose of “generating additional investment management business.”⁴ However, if such presentations will be provided directly or indirectly to *prospective* SMA clients then net-of-fee performance is required.⁵

- Please clarify the meaning of an “existing SMA client.” For example, may a client with an existing agreement with an SMA sponsor and/or a firm be provided gross-of-fee returns for a product or style offered by such firm but not currently managed for such client?
- Is the option to provide gross-of-fee returns intended to be limited to one-on-one presentations only? A presentation made to existing SMA clients for the purpose of generating additional management business could be construed by the SEC as an “advertisement” and thus require net-of-fee performance unless otherwise permitted under *Clover Capital* and related no-action letters.⁶ The Guidance Statement could avoid potential confusion by more closely tracking existing SEC guidance.

² Id. p.10.

³ Id. p. 9.

⁴ Guidance Statement p. 11.

⁵ Id.

⁶ Clover Capital Management, Inc., SEC No-Action Letter (Oct. 28, 1986); *see also* Investment Company Institute, SEC No-Action Letter (Sept. 23, 1988), Association for Investment Management and Research, SEC No-Action Letter (Dec. 18, 1996).

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Our client appreciates having the opportunity to provide these comments on the Guidance Statement. If you have any questions or want additional information regarding any aspect of this letter, please contact David A. Hearth at (415) 856-7007.

Very truly yours,

/s/ David A. Hearth
of PAUL, HASTINGS, JANOFFSKY & WALKER LLP