

information are subject to rule 482 and, as a result, to liability under section 12(a)(2) of the Securities Act.²⁰

A number of commenters opposed the elimination of funds' ability to rely on rule 134, objecting to the application of the more stringent liability standard under section 12(a)(2) of the Securities Act to fund advertisements that have in the past fallen within the scope of rule 134. Commenters argued that the limitations on the type of information that may be included in rule 134 advertisements provide sufficient protection against fraud or misleading statements so that the more rigorous liability standard under section 12(a)(2) is not necessary. In addition, they argued that, in the absence of evidence of significant abuse, there is no reason to eliminate funds' ability to rely on rule 134 and impose the burden of increased liability.

We are not persuaded by these comments because we believe that the standard of liability that attaches to a fund advertisement should not depend on the content of the advertisement. Nor do we believe that exactly the same content should be subject to different liability standards depending on whether that content is included in a rule 134 advertisement or a rule 482 advertisement. Assuming that commenters are correct that the limitations on the type of information that may be included in rule 134 advertisements provide protection against fraud, then it should not be problematic to apply a more rigorous liability standard to this information. Further, our elimination of funds'

ability to rely on rule 134 is not intended to address significant past abuses, but to help to prevent false and misleading advertisements in the future. Finally, excluding investment companies from rule 134 is consistent with the goal of regulatory simplification. With the elimination of the "substance of which" requirement from rule 482, any advertisement that could be presented under rule 134 may also be presented under rule 482. The elimination of funds' ability to rely on rule 134 will eliminate unnecessary complexity in the regulation of fund advertising.

B. Applicability of Antifraud Provisions to Fund Advertising

We are adopting, with modifications suggested by the commenters, amendments to the fund advertising rules that are intended to reemphasize that fund advertisements are subject to the antifraud provisions of the federal securities laws. When we initially proposed rule 482 in 1977, we indicated that rule 482 advertisements would be subject to section 12(a)(2) of the Securities Act and the antifraud provisions of the federal securities laws.²¹ Since then, we have reiterated that compliance with the "four corners" of rule 482 does not alter the fact that funds, underwriters, and dealers are subject to the antifraud provisions of the federal securities laws with respect to fund advertisements.²²

To emphasize this principle, we are adding a note to newly adopted paragraph (a) of rule 482 that states that an advertisement that complies with rule 482 does not relieve the fund, underwriter, or dealer of any obligations with respect to the advertisement under

the antifraud provisions of the federal securities laws. We also are adding a similar note to the introductory paragraph of rule 34b-1 under the Investment Company Act with respect to supplemental sales literature. These notes include cross-references to rule 156 under the Securities Act, which provides guidance about the factors to be weighed in determining whether statements, representations, illustrations, and descriptions contained in fund advertisements and sales literature are misleading.²³

As proposed, the language of the notes to rules 482 and 34b-1 would have stated that compliance with the rules does not relieve the fund, underwriter, or dealer of the obligation to "ensure" that the advertisement is not false or misleading. One commenter objected to the use of the term "ensure," stating that it could potentially expand the responsibility of funds, underwriters, and dealers because it might imply that they are guarantors of the accuracy of statements contained in advertisements. Our proposal incorporated language, including the term "ensure," similar to that used in an existing note to paragraph (a)(3) of rule 482, and we did not intend to alter existing standards of liability.²⁴ In order to address the commenter's concern, however, we have revised the language of the note to remove the term "ensure" and clarify that compliance with rules 482 and 34b-1 does not relieve the fund, underwriter, or dealer of any obligations with respect to the advertisement under the antifraud provisions of the federal securities laws. This change is intended to clarify that the scope of a fund's, underwriter's, or dealer's obligations under the antifraud provisions is drawn from the federal securities laws and relevant precedents and not from the language of rule 482 or 34b-1 itself.

Two commenters urged the Commission to confirm in the adopting release that, notwithstanding the note to rule 482(a), performance information in a rule 482 advertisement (as opposed to other disclosures included in the advertisement) will not be deemed to be false or misleading if it (i) is computed in accordance with the methodology required by the rule; and (ii) complies with the currentness requirements of the rule. We disagree with this position. An advertisement that complies with rule

²⁰ Because a rule 482 advertisement is a prospectus under section 10(b) of the Securities Act, a rule 482 advertisement is subject to section 12(a)(2) of the Securities Act [15 U.S.C. 77j(a)(2)], which imposes liability for materially false or misleading statements in a prospectus or oral communication, subject to a reasonable care defense. An action under section 12(a)(2) does not require proof of scienter (*i.e.*, an intent to defraud investors), *e.g.*, *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1034 (2d Cir. 1979), or investor reliance on a misleading statement or omission, *e.g.*, *MidAmerica Fed. S. & L. Assoc. v. Shearson/American Express, Inc.*, 886 F.2d 1249, 1256 (10th Cir. 1989); *Sanders v. John Nuveen & Co.*, 619 F.2d 1222, 1225 (7th Cir. 1980), *cert. denied*, 450 U.S. 1005 (1981). In contrast, antifraud claims by investors under section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. 78j(b)] require proof of scienter and investor reliance. Under either type of claim, however, the plaintiff must establish that the misrepresentation or omission is material. Rule 134 advertisements are subject to the antifraud provisions under the Federal securities laws but do not create liability under section 12(a)(2) of the Securities Act because rule 134 advertisements are not considered "prospectuses." Rule 134 was adopted under section 2(a)(10)(b) of the Securities Act [15 U.S.C. 77b(a)(10)(b)], which excepts certain communications from the definition of "prospectus."

²¹ 1977 Advertising Proposing Release, *supra* note, 42 FR at 30380.

²² Investment Company Act Release No. 16245 (Feb. 2, 1988) [53 FR 3868, 3878 n. 51 (Feb. 10, 1988)]. See also Investment Company Act Release No. 24832 (Jan. 18, 2001) [66 FR 9002, 9008 (Feb. 5, 2001)] (compliance with rule 482 is not a safe harbor from antifraud liability); Investment Company Act Release No. 15315 (Sept. 17, 1986) [51 FR 34384, 34391 (Sept. 26, 1986)] (in proposing amendments to rule 482 to require the inclusion of a legend on advertisements, Commission stated that it was "not suggesting that the legend information contains all the material information necessary to prevent an ad from being misleading . . . [and] that whoever sponsors the ad, be it the fund, the underwriter, or the dealer, bears the primary responsibility for assuring that the ad is not false or misleading"); 1977 Advertising Proposing Release, *supra* note, 42 FR at 30380 (advertisements made pursuant to rule 434d (subsequently renumbered as rule 482) would be subject to the antifraud provisions of the securities laws); *In the Matter of The Dreyfus Corporation and Michael L. Schonberg*, Investment Advisers Act Release No. 1870 (May 10, 2000) (advertisements that comply with rule 482 are subject to the general antifraud provisions of the securities laws).

²³ 17 CFR 230.156.

²⁴ Note to current rule 482(a)(3) [17 CFR 230.482(a)(3)] ("The fact that the statements included in the advertisement are included in the section 10(a) prospectus does not relieve the issuer, underwriter, or dealer of the obligation to ensure that the advertisement is not false or misleading.")