

# STATE OF COLORADO

**Division of Securities  
Department of Regulatory Agencies**

1560 Broadway, Suite 900  
Denver, CO 80202  
Phone: (303) 894-2320  
Fax: (303) 861-2126  
TDD/V: (303) 894-7880

Fred J. Joseph  
Securities Commissioner



Bill Ritter, Jr.  
Governor

D. Rico Munn  
Executive Director

April 13, 2007

Cisco Quintero  
1725 Walker Street  
Erie, Colorado 80516

**RE: Surf Index USA  
Our File No. B-07-007**

Dear Mr. Quintero:

The staff of the Division of Securities ("Staff") is in receipt of your letter dated March 19, 2007 regarding the above-referenced matter. You have requested confirmation from the Staff as to whether engaging in such activities as described in your correspondence would require licensing as investment adviser or otherwise under the Colorado Securities Act ("Act").

Based upon the representations provided in your letter, we understand that your web site uses a mathematical model which draws information from approximately four thousand corporate stocks. The model analyzes such data with certain formulas and calculations based on variables in market trends and company fundamentals such as earnings, profit margin, return on assets, revenue per share, earnings growth, price performance, and technical analysis.

Based upon this analysis, the program then generates information which users of the web site access and use to determine which stocks to buy, and when to sell, depending on whether a user has selected a "Growth, Moderate Growth, or Aggressive Growth risk level." The users view the information via the internet, and there is no "person-to-person" contact. The only information provided is output from the mathematical program.

Currently, you are allowing users free access to the information provided by the web site, but it is your intent to require users to make monthly fee payments in order to access the information.

Based on the facts and representations in your letter, it is the position of the Staff that the proposed business of Surf Index USA would require licensing of the company as an investment adviser. Specifically, §11-51-201(9.5)(a)(I), C.R.S., defines an investment adviser as:

[A]ny 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.

Section 11-51-201(9.5)(b) states that the definition of an “investment adviser” does **not** include:

- (II) A publisher of a bona fide newspaper, magazine, or business or financial publication with a regular paid circulation;
- (III) A publisher of a securities advisory newsletter with a regular and paid circulation who does not provide advice to subscribers on their specific investment situations.

Since it is clear that through Surf Index USA, you (1) provide advice concerning securities; (2) are in the business of providing such advice; and (3) provide such advice for compensation, that you meet the definition of an “investment adviser.” The issue is whether one of the exclusions under §11-51-201(9.5)(b) (the “publisher’s exclusion”) applies to your business operation.

The U.S. Supreme Court in *Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) addressed the definition of an investment adviser and the publisher’s exclusion.<sup>1</sup> In *Lowe*, the SEC alleged that Lowe had violated the registration provision of the Advisers Act by failing to register as an investment adviser prior to his publishing certain investment newsletters. *Id.* at 184 (citing Section 203(a) of the Advisers Act [15 U.S.C. §80b-3(c)]). The Supreme Court found that Lowe was not an “investment adviser” as defined in the Advisers Act and that, therefore, his failure to register could not have violated the registration provision of the Act. *Id.* at 211.

In discussing the publisher’s exclusion, the Court held that this exclusion “encompasses any newspaper, business publication, or financial publication **provided that two conditions are met**. The publication must be ‘bona fide’ and it must be ‘of regular and general circulation.’” (Emphasis supplied.) *Id.* at 207 n.53. In discussing these two conditions, the Court held that 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 206. As for the second requirement, the Court held that a publication “timed to specific market activity or to events affecting or having the ability to affect the securities industry would **not** be ‘of general and regular circulation,’ and thus would not meet the second condition. *Id.* at 209; *see also id.* 206 (“[P]ublications with a ‘general and regular circulation’ would not include people who send out bulletins from time to time on the advisability of buying and selling stocks or hit and run tipsters.”

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<sup>1</sup> Federal authorities are highly persuasive when, as here, the Colorado Securities Act parallels federal enactments. *Lowery v. Ford Hill Investment Co.*, 192 Colo. 125, 556 P.2d 1201 (1976).

The Colorado Securities Act must always be viewed in light of its express legislative purpose. The purposes of the Act are:

[T]o protect investors and maintain public confidence in the securities markets while avoiding unreasonable burdens on participants in the capital markets. This article is remedial in nature and is to be broadly construed to effectuate its purposes. §11-51-101(2), C.R.S.

In construing the Act broadly in order to effectuate its purpose, the determination should be whether the publication is designed for the giving of investment advice, or whether the scope of the publication is different, broader or only incidentally related to matters that might be categorized as “investment advice.” This test is necessarily factual in nature, and so a brief review of Surf Index web site is required.

A cursory review of the Surf Index web site shows the following characteristics. Surf Index purports to use a mathematical model that “analyzes the stocks data ... relating to market trends and company fundamentals.” The web site heavily promotes past performance results. For example, in bold letters the site proclaims that “Surf Index climbed 212% during the last 34 months, outpacing four major market indexes.” The web site contains numerous testimonials, i.e., “Your website is remarkable!” and, “Surfindex has totally surpassed my expectations” and, “I don’t know how you guys can keep beating the S&P.” The program generates information to the user of which stock to buy, and when to sell, depending on whether the user has selected a “Growth, Moderate Growth, or Aggressive Growth risk level.” The site advises users to “[f]ollow the recommended percentages!”

In employing the boarder test, whether the publication is designed for the giving of investment advice, or some broader purpose where advice is only incidental to the publication, it is fairly clear that the web site is designed to give investors specific advice as when to buy and sell particular stocks based on current market trends. The advice is also designed to fit different investment purposes of each investor, whether the investor is interested in growth stocks, or a more risky aggressive growth level. In addition, promoting past performance results and using glowing testimonials can be easily manipulated to contain false and misleading information, to the detriment of the investing public. The advice is not incidental to the publication of the web site, and the way the web site is promoted is not conducive to the protection of investors.

In reviewing whether the site meets the conditions of the publisher’s exclusion as set forth in *Lowe*, it appears that the web site is neither “bona fide” or of a “regular or general publication.” The primary focus of the web site is to promote the results of the model used to analyze market trends. Disinterested commentary would appear to be only incidental to the purpose of the web site. Thus, the web site does not appear to qualify as a “bona fide” publication. Further, the web site is tied directly to interpreting market trends, and advising investors when to buy and sell based upon its interpretation of these market trends. Thus, the recommendations are made to users based only on the criteria used in the mathematical model. The recommendations are timed to particular market

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activity and are not “regularly disseminated.” Neither condition spelled out in *Lowe* appear to apply to the site.

Since the publication of the web site falls within the definition of investment adviser under the statute, and the publisher’s exclusion does not apply, it will be necessary for you to comply with the licensing requirements of the Act found at § 11-51-401, C.R.S. Based upon the facts presented in your letter, the Staff is unable to determine whether any exemption from licensing would be available.

It should be noted that this letter expresses the position of the Staff with regard to the applicability of the Act to the description of the proposed business as presented in your letter, and should not be construed as expressing any opinion or conclusion as to the questions presented. Further, the position expressed in this letter is based on the facts as presented, and that any change in the facts or circumstances may require a different response.

If there are any questions, please contact the undersigned at (303) 894-2320.

Sincerely,

A handwritten signature in cursive script, appearing to read "Gerald Rome".

Gerald Rome  
Deputy Securities Commissioner