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The Brochure Rule And Fund Advisers - This Surely Is Stupid Stuff!

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Seven years ago, the Securities and Exchange Commission [amended](#) Part 2 of Form ADV to require investment advisers to provide new and prospective clients with a brochure and brochure supplements written in plain English. The SEC's stated purpose was "to provide new and prospective advisory clients with clearly written, meaningful, current disclosure of the business practices, conflicts of interest and background of the investment adviser and its advisory personnel". While a brochure delivery requirement might make sense in some situations, it becomes foolish when applied to investment fund advisers.

The story begins in December 2004, when the SEC [promulgated](#) the "hedge fund" rule amendments. These amendments required advisers to count investors in a fund as clients for purposes of the Investment Advisers Act *de minimis* exemption from registration. Phillip Goldstein challenged the equation of "client" with "investor". The D.C. Circuit Court of Appeals vacated the rule, finding it to be an "arbitrary rule". *Goldstein v. Securities and Exchange Commission*, 451 F.3d 873 (D.C. Cir. 2006).

Consistent with the Court of Appeals' holding in *Goldstein*, the SEC staff requires a fund advisers to deliver its brochure to "a legal representative of the fund, such as the fund's general partner, manager or person serving in a similar capacity". *Staff Responses to Questions About Part 2 of Form ADV*, Question III.2. Because the adviser to a fund is the fund's general partner or manager, it is impossible to divine what possible purpose is served by this requirement. The reality is that the disclosures are made to investors as part of the fund's securities offering (typically in the form of a private placement memorandum). Rather than recognize reality, the SEC seems locked in a "one-size-fits-all" approach requiring private fund advisers to make disclosures to themselves. What could possibly be the point of that? To borrow a line from A.E. Houseman, "Terence, this is stupid stuff". Poem LXII, A *Shropshire Lad*.

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