



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

PUBLIC

ION OF  
VES. ENT MANAGEMENT

July 18, 1995

Mr. George Colman  
44 Fox Hill Road  
Framingham, Massachusetts 01701

File #	IAA - 40
Section	205(a)(1)
File	
Public	
Availability	7/18/95

RE: Refund of Advisory Fees

Dear Mr. Colman:

I am writing in response to your letter of June 27, 1995. You state in your letter that you recently terminated a contract with an investment adviser because of poor performance, and requested that the adviser refund the advisory fee. You state that the adviser refuses to refund the fee on the basis that the Investment Advisers Act of 1940 ("Advisers Act") prohibits fee waivers related to the performance of an account. You question the adviser's reasoning and ask whether the Advisers Act actually precludes him from returning advisory fees.

Section 205(a)(1) of the Advisers Act prohibits a registered investment adviser from entering into an investment advisory contract that provides for compensation on the basis of a share of the capital gains or capital appreciation in a client's account. The staff of the Commission has interpreted this section to prohibit investment advisers from entering into contingent advisory fee arrangements, such as agreements under which fees are waived or refunded if a client's account does not meet a specified level of performance. <sup>1/</sup>

We believe, however, that the Advisers Act does not prohibit a voluntary, non-contractual refund of advisory fees by an investment adviser. You state that your contract with the adviser does not in any manner base advisory fees on the adviser's performance. Assuming you had no other understanding with the adviser regarding a fee refund or waiver related to investment performance, the return of your advisory fees would not be prohibited.

Of course, an adviser is not obligated under the Advisers Act to refund fees for advisory services actually rendered. An adviser, however, is generally required to return advisory fees that were prepaid for periods after the termination of the contract.

I hope the information discussed above is useful. If you have additional questions, you may contact us at (202) 942-0660.

Sincerely,

*Barbara Chretien-Dar*  
Barbara Chretien-Dar  
Senior Counsel

<sup>1/</sup> See Investment Advisers Act Release No. 721 (May 16, 1980) (encl. 1)

ACT IAA/205(a)(1)  
 SECTION 205(c)(1)  
 RULE \_\_\_\_\_  
 PUBLIC \_\_\_\_\_  
 AVAILABILITY 7-18-95

GEORGE COLMAN  
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June 27, 1995

INVESTMENT ADVISORS, INTERPRETIVE MATTERS  
 U.S. Securities & Exchange Commission  
 450 5th Street, NW  
 Washington, DC 20549 FAX # 202-942-9659

ATTENTION: Chief Counsel

Dear Sir:

I signed an investment advisory contract in August of 1993 that provided for discretionary management of my account, along with quarterly advisory fee withdrawals. The contract did not in any way connect advisory fees to the advisor's performance.

I terminated the contract on May 3 because of poor performance by the advisor and, on May 31, I asked for a fee refund, which he refuses to give me. His reason is that he "must adhere to the Investment Advisors Act of 1940, which clearly states that we cannot waive fees based on performance related matters."

In my opinion, a more complete and appropriate extract from the Act would be, "Section 205(1) generally prohibits an investment advisor from being a party to any advisory contract which makes advisory fees contingent on investment performance." Further, Sec. 205(1) expressly applies only to compensation arrangements based upon a share of capital gains or appreciation of the funds of an advisory client. As I stated above, the contract I signed made no connection between advisor performance and advisory fees and a fee refund subsequent to the terminated contract could not create a "conflict of interest," which is what Sec. 205(1) seeks to avoid.

Although the contract I signed clearly permits him to keep the fees, I believe the Investment Advisors Act of 1940 does not in any way preclude him from returning the fees if he believes it is morally correct to do so. May I tell him that the SEC would not see a problem if he chooses to return my fees?

I welcome your early reply since I am right now discussing this issue with the advisor.

Sincerely,  
*George Colman*  
 George Colman