

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

51026

FILE: B-183949

DATE: SEP 22 1975

MATTER OF: Refund by Securities and Exchange Commission of
investment adviser fees.

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DIGEST: Annual charge assessed pursuant to User Charge Statute, 31 U.S.C. § 483a (1970), by Securities and Exchange Commission upon investment advisers and deposited in Treasury as miscellaneous receipts, which charge is now considered erroneous by SEC because of recent Supreme Court decisions, may be refunded by SEC out of permanent indefinite appropriation established by 31 U.S.C. § 725q-1 (1970) to pay moneys "erroneously received and covered." This refund is authorized to all who paid such invalid fee regardless of whether payment was made under protest.

This decision is in response to a request from the Chairman of the Securities and Exchange Commission (SEC). On March 29, 1974, the SEC repealed its \$100 annual assessment imposed upon investment advisers registered with the Commission. This fee was charged, pursuant to the User Charge Statute, 31 U.S.C. § 483a (1970) to all investment advisers registered with Commission, whether or not any services were performed on behalf of the registrant. The fee was imposed only for the years 1971, 1972 and 1973.

The charge was repealed in response to two recent Supreme Court decisions construing the User Charge Statute. While the decisions did not deal specifically with these investment adviser fees, the SEC feels that its annual investment adviser fee did not meet the criteria set forth in those decisions. See National Cable Television Association, Inc. v. United States, et al., 415 U.S. 336 (1974) and Federal Power Commission v. New England Power Company, et al., 415 U.S. 345 (1974). Cf. id., fn. 4, p. 350, where these fees are mentioned.

The Commission is now in receipt of numerous requests for refunds of the \$100 fee from persons registered as investment advisers during the 3 years in question. The Commission desires to return the fees but it questions the right of a person to a refund of fees erroneously collected in the absence of a protest at the time the fee was paid: In this regard we are advised that it would probably be impossible for the Commission to ascertain whether any given registrant paid under protest. Hence the Chairman of SEC seeks our decision on the SEC's authority to refund the subject fees.

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If the SEC, in accordance with the aforementioned Supreme Court decisions, determines that it has erroneously assessed the annual investment advisers fees, and if it has deposited those funds as miscellaneous receipts in the Treasury, it may initiate action to refund those moneys out of the permanent indefinite appropriation established by 31 U.S.C. § 725q-1 (1970). That section appropriates to the Treasury Department, out of any moneys not otherwise appropriated, such sum--to be known as a permanent indefinite appropriation--as may be necessary for the purpose of refunding moneys erroneously received and covered into the Treasury. There is nothing in that section which differentiates between funds received under protest and those received without protest. Moreover, as an equitable matter, when the Government has erroneously charged a fee, we see no reason to in effect penalize those who do not raise objections to payment of the fees to the charging agency. Hence, if the SEC desires, it may, in our view, refund the erroneously received and covered funds to all those who paid it.

The Chairman suggests that if a refund is authorized, the fees should be reclassified from the original receipt account to the SEC's deposit fund suspense account 50X6875. However, since in the instant situation the investment adviser fee was void ab initio the procedure set forth in paragraph (2) of our circular letter of March 24, 1960, B-142380 (a copy of which is being sent to the Chairman of the SEC), to the heads of departments, independent establishments and others concerned, must be employed in the refund of the subject fees. See also Treasury Fiscal Requirements Manual, section 3070.10 (1973).

Paul G. Dembling

For the Comptroller General
of the United States