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Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Securities and Exchange Commission Authority
to Refund Amounts Erroneously Collected

File: B-239769.2

Date: July 24, 1992

DIGEST

Pursuant to section 6(c) of the Investment Company Act, the Securities and Exchange Commission (Commission) has broad authority to exempt a private investment company from a filing deadline. If, pursuant to this statutory authority, the Commission exempts the investment company from its filing deadline and consequently determines that the filing fees were erroneously collected and covered into the Treasury, the Treasury may charge the refund to the permanent, indefinite appropriation established under 31 U.S.C. § 1322(b)(2).

DECISION

The Director, Division of Investment Management, Securities and Exchange Commission (Commission) asked whether the Commission, having determined to grant an exemption from a filing deadline, is authorized to refund to Flex-funds, an open-end investment company, the previously submitted filing fee. We conclude that the Commission is authorized to refund all amounts determined as a result of the exercise of the Commission's exemption authority to have been erroneously paid by Flex-funds. Such amounts may be charged to the permanent, indefinite appropriation established under 31 U.S.C. § 1322(b)(2).

BACKGROUND

The Investment Company Act of 1940 (Act) permits open-end investment companies such as Flex-funds to register an indefinite number of securities under the Securities Act of 1933, so long as they subsequently file a notice with the Commission of, and pay a fee for, the securities sold each fiscal year. 15 U.S.C. § 80a-24(f). Under the Commission's Rule 24f-2, companies must file the notice within 6 months of the close of the company's fiscal year. 17 C.F.R. § 270.24f-2(b)(1). If the company files its notice within 2 months of the close of its fiscal year, its payment is based

on net sales (referred to as the "net fee"); otherwise, the payment is based on gross sales (the "gross fee"), and is much greater in amount. 17 C.F.R. § 270.24f-2(c).

Flex-funds' notice for fiscal year 1987 missed the 2-month window of opportunity by 11 days; Flex-funds filed its notice on March 11, 1988, according to the date stamped on the notice by the Commission's mail room staff.¹ Accompanying that notice, however, was a check for \$363.09, a "net fee" payment. Consequently, the Commission charged Flex-funds, and the company paid, an additional \$94,248.79, representing a "gross fee" payment.² Flex-funds has requested a refund of this amount.

Flex-funds asserts that its counsel mailed the notice and payment on February 10, 1988, in sufficient time for its receipt by the Commission before the 2-month window of opportunity closed. Flex-funds maintains that the Postal Service was experiencing problems in delivering mail in the Washington area during this time, and that the Postal Service, not Flex-funds, caused the filing to miss the 2-month deadline.

By letter dated September 29, 1989, the Commission's General Counsel denied Flex-funds' request for a refund. He concluded that the company was unable "to rebut the presumption that the date which is stamped on the face of the filing is the date on which it was received by the Commission." At the General Counsel's suggestion, Flex-funds filed with the Commission an application for an order to exempt the company from the 2-month filing deadline for fiscal year 1987 and refund the \$94,248.79 to the company. In response to the application, the Director of the Commission's Division of Investment Management states that since the late filing was not the fault of Flex-funds, the Commission believes that it is within its authority under section 6(c) of the Act, 15 U.S.C. § 80a-6(c), to grant Flex-funds' request for a refund.

¹Flex-funds' fiscal year coincides with the calendar year, closing December 31.

²According to the Commission, it deposited both payments into the general fund of the Treasury.

DISCUSSION

The Commission is responsible for the enforcement of the Investment Company Act. Section 6(c) of the Act provides that the Commission may

"exempt any person . . . from any provision or provisions of [the Act] or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of [the Act]."

15 U.S.C. § 80a-6(c).

Pursuant to its determination that Flex-funds was not at fault for the late filing, the Commission proposes to exercise its discretion under section 6(c) of the Act to exempt the company from the filing deadline of February 29, 1988. The intended effect of the exemption is to alter the substantive right of the Commission to require Flex-funds to pay a "gross fee" for the sale of its securities during fiscal year 1987. As a result, the difference between the "gross fee" payment that Flex-funds made and the "net fee" payment, i.e., \$94,248.79, may be viewed as erroneously received and covered into the Treasury, and Flex-funds would thus be entitled to a refund in the amount of the overpayment.

In determining the proper source of funds for the refund of the overpayment, the initial point of inquiry is how the amounts collected were credited when received. Generally, agency operating funds should not bear the burden of refunding collections that were deposited into the general fund of the Treasury. B-217595, Apr. 2, 1986. As a rule, moneys that are erroneously deposited into the Treasury as miscellaneous receipts are refunded from the permanent, indefinite appropriation created by 31 U.S.C. § 1322(b)(2), unless there is a specific appropriation available for such refunds. 61 Comp. Gen. 224, 226 (1982); B-205877, Mar. 16, 1982.

Here, the Commission states that all payments received from Flex-funds were deposited in the general fund of the Treasury as miscellaneous receipts as required by 31 U.S.C. § 3302(b). The Commission received no benefit from the payments and it has no appropriation specifically available for the refund of excess filing fees. Therefore, if the Commission exempts Flex-funds from the filing deadline and determines that the exemption from the filing deadline renders the "gross fee" payment erroneously received, then

the permanent, indefinite appropriation contained in 31 U.S.C. § 1322(b)(2) may be used to refund the amounts owed Flex-funds.³

for Milton J. Fowler
Comptroller General
of the United States

³This case is distinguishable from our prior cases in which we held that agencies may not use the waiver provision of the Government Employees Training Act, 5 U.S.C. § 4108(c), to make refunds to employees of payments that have already been covered into the Treasury as miscellaneous receipts. See 51 Comp. Gen. 419, 422 (1972); B-208064, Nov. 15, 1983; B-146111, July 6, 1961. In those cases, we stated that the narrow authority under the Training Act only allowed agencies to waive their "right of recovery," and that after the employee extinguished the debt, the waiver was of no effect since no right of recovery remained. Here, the Commission's exemption authority is sufficiently broad to allow it to refund the amounts overpaid.