AUCHINCLOSS & LAWRENCE INC.

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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549
January 8, 1974

RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT

Mr. Edward. H. Auchincloss
Auchincloss & Lawrence, Inc.
610 Fifth Avenue
New York, N.Y. 10020

Dear Mr. Auchincloss:

In our opinion, continued use of your investment advisory contract, even with the addition of the phrase "or violation of law" in the second paragraph, violates Section 206 of the Investment Advisors Act of 1940. The relationship between an investment advisor and his client being fiduciary in nature, it is governed not only by statutory law but also by common law principles applicable to fiduciary relationships. The Commission, in Investment Advisors Act Release No. 58 (1951), published the opinion of its General Counsel that the use of any legend, hedge clause or other provision which is likely to lead an investor to believe that he has in any way waived any right of action he may have either at common law or under the federal securities laws violates the anti-fraud provisions of the various securities laws.

For example, the use of the adjectives "gross" and "willful" in the second paragraph of your contract to define the degree of negligence or malfeasance required to give rise to a client's right of action appears to violate Section 206 of the Act, since there may be situations where applicable law requires a greater degree of care by a fiduciary. For similar reasons, the express denial of liability in that second paragraph for specified conduct may mislead a client into believing he has waived certain rights of action, and therefore violates Section 206. In this connection, we would have no objection if you were to modify the second paragraph as follows:

> *"Your authority hereunder shall not be impaired because of the fact that you may effect transactions with respect to securities for your own account or for the accounts of others which you manage which are identical or similar to securities as to which you may effect transactions for the Account at the same or different times. Except for negligence or malfeasance, or violation of applicable law, neither you nor any of your officers, directors or employees shall be liable hereunder for any action performed or omitted to be performed or for any errors of judgment in managing the Account. The federal securities laws impose liabilities under certain circumstances on persons who act in good faith, and therefore nothing herein shall in any way constitute a waiver or limitation of any rights which the undersigned may have under any federal securities laws."*

We would recommend that the Commission take appropriate action under the Act if you continue to use investment advisory contracts which violate Section 206. However, we will not recommend any action with respect to existing signed contracts provided you agree with the staff of our New York Regional Office on steps to effect the replacement of all such contracts with appropriately modified new contracts over a period of time not extending beyond June 30, 1974. In this regard, your attention is directed to Section 215(b) of the Act concerning the validity of contracts which violate any provision of the Act.

Alan Rosenblat, Chief Counsel
Division of Investment Management Regulation

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November 12, 1973

Alan Rosenblat, Esq. , Chief Counsel
Division of Investment Company Regulation
Securities and Exchange Commission
500 North Capitol Street
Washington, D.C. 20549

Auchincloss & Lawrence Incorporated
Registered Investment Adviser

Dear Mr. Rosenblat:

I have written to you in order to ask your advice with respect to a form of investment advisory contract used until recently by our client, Auchincloss & Lawrence Incorporated ("A&L"), a registered investment adviser. A copy of the form of such contract is attached as the first exhibit to this letter.

Mr. Frank M. Morrison, Chief, Inspections and Investigations, in the New York Regional Office of the Commission has determined that the enclosed form of contract is defective, inasmuch as the exculpatory language in the second sentence of the second paragraph does not contain an exception for violations of applicable law. A&L has, of course, agreed to Mr. Morrison's request that the form of contract be changed in that respect for all clients of A&L who may enter into contracts with A&L from now on. A copy of the form of revised contract is attached as the second exhibit to this letter with the additional language bracketed in red. Mr. Morrison has, however, taken the position that the prior form of contract must be replaced as to all A&L's present clients with the new form of contract, since he feels the prior form, with the omission of the suggested language, constitutes a violation of the Investment Advisers Act. I believe Mr. Morrison infers that result from the opinion of the General Counsel of the Commission dated April 18, 1951, which appears in Release No. 58 under the Investment Advisers Act.

I am unable to conclude that the omission of the language under discussion constitutes a "legend, hedge clause or other provision which is likely to lead an investor to believe that he has in any way waived any right of action he may have, ..." On the contrary, I do not believe that the omission of the language in question would create any impression in the mind of the A&L client. Moreover, neither A&L or we have at any time, by implication or otherwise, made any claim that the A&L client would not have a right of action against A&L for any breach of law by A&L.

The reason for our request for your consideration is that it would be a very sizable inconvenience to A&L and to its clients to require A&L to have new forms of contracts signed by its present clients. Many of the present A&L clients have been so for some years and it would be very difficult to explain to them that an alleged violation of law is present in the contracts they have previously signed, particularly when, in our opinion, no violation of law exists in the language of such contracts.

I would appreciate your consideration of this matter, and I would be happy to answer any questions you may have and to provide any further information you may require.

Very truly yours,
Donald Larkin