

McELDOWNEY FINANCIAL SERVICES

Oct 17, 1986

**TOTAL NUMBER OF LETTERS: 2
SEC-REPLY-1:
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549**

Sep 17, 1986

**RESPONSE OF THE OFFICE OF CHIEF COUNSEL
DIVISION OF INVESTMENT MANAGEMENT
Our File No. 86-414-CC**

**McEldowney Financial Services
File No. 801-19832**

Your letter of August 21, 1986, requests our opinion concerning the arbitration clause McEldowney Financial Services proposes to include in its investment advisory contract. In essence, the clause would require the parties to settle any dispute arising out of the investment advisory contract by arbitration, rather than by adjudication in any federal or state court of competent jurisdiction (the "Clause").

As you know, the federal securities laws impose certain liabilities on individuals, e.g., issuers, underwriters, brokers, dealers and investment advisers, that cannot be waived. * Under the Clause as presently written, prospective advisory clients may not be aware that they may have a non-waivable right of action under the Investment Advisers Act of 1940 ("Act"). Because the Clause may mislead clients to believe that they are barred from exercising their rights under the Act, the Clause, in our view, may violate the antifraud provisions in Section 206 of the Act. We believe that McEldowney Financial Services' investment advisory contract should disclose that the Clause does not constitute a waiver of any right provided by the Act, including the right to choose the forum, whether arbitration or adjudication, in which to seek resolution of disputes.

** See, e.g., Wilko v. Swan, 346 U.S. 427 (1953). See also Section 215(a) of the Investment Advisers Act of 1940.*

A. Thomas Smith III
Attorney

INQUIRY-1:
McEldowney Financial Services
Suite 204
20200 Governors Drive
Olympia Fields, Illinois 60461
(312) 481-2600
August 21, 1986

Mr. Thomas P. Lemke
Chief Counsel, SEC
Division of Investment Management
450 5th Street N.W.
Washington, D.C. 20549
Re: Registered Investment Adviser Contract

Dear Mr. Lemke:

I am a Registered Investment Adviser and am intending to put into my Advisory Agreement the following arbitration clause:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. I would appreciate your advising me as to whether the Commission would have any objection to our using the above clause in our Registered Investment Adviser Contract, which is signed by our clients. Thank you for your attention to this matter.

Sincerely,

William James McEldowney, CLU, ChFC
Registered Investment Adviser