

MEMO# 16843

December 5, 2003

SEC AND STATE ENFORCEMENT ACTIONS AGAINST FUND ADVISER AND ITS CEO RELATING TO MARKET TIMING

[16843] December 5, 2003 TO: COMPLIANCE ADVISORY COMMITTEE No. 105-03 SEC RULES MEMBERS No. 174-03 SMALL FUNDS MEMBERS No. 76-03 RE: SEC AND STATE ENFORCEMENT ACTIONS AGAINST FUND ADVISER AND ITS CEO RELATING TO MARKET TIMING The Securities and Exchange Commission and the Attorneys General of New York and Colorado announced the filing of federal and state civil enforcement actions against a registered investment adviser and, in the SEC and New York actions, against the executive officer serving as the adviser's President and CEO ("executive officer").¹ The enforcement actions are generally predicated on the same alleged misconduct – namely, that the adviser fraudulently permitted select investors to engage in market timing activity in mutual funds managed by the adviser. In particular, the complaints allege that, over a period of more than two years, the adviser entered into secret arrangements permitting certain large investors to engage in frequent trading of shares of certain mutual funds managed by the adviser. The complaints allege that these arrangements were contrary to disclosures in the funds' prospectuses that investors would be limited to four exchanges per year and that this policy would be modified only if it was in the best interests of the funds. The complaints filed by the SEC and the Attorney General of New York further allege that the adviser and the executive officer: (1) knew or had reason to know that these market timing arrangements were not in the best interests of other investors in the funds' shares; and (2) breached their fiduciary duty by failing to disclose 1 See SEC v. Invesco Funds Group, Inc. and Raymond R. Cunningham, Civil Action No. 03-N-2421 (D. Co. Dec. 2, 2003), State of NY v. Invesco Funds Group, Inc. and Raymond Cunningham, Index No. ____ (N.Y. Sup. Ct. Dec. 2, 2003), and State of Colorado v. Invesco Funds Group, Inc., Case No. 03-CV-9199 (Colo. D. Ct. Dec. 2, 2003). A copy of the SEC's complaint is available on the SEC's website at <http://www.sec.gov/litigation/complaints/comp18482.htm>. A copy of the complaint filed by the Attorney General of New York is available on the Attorney General's website at http://www.oag.state.ny.us/press/2003/dec/invesco_complaint.pdf. A copy of the complaint filed by the Attorney General of Colorado is available on the Attorney General's website at <http://www.ago.state.co.us/PRESREL/presr12003/Invesco%20Funds%20Pleading.pdf> 2 the existence of the arrangements to fund investors and to the independent directors or trustees of the funds. The SEC's complaint charges the adviser and the executive officer with violations of: (1) the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934, and (2) Section 34(b) of the Investment Company Act of 1940, which prohibits material misstatements or omissions in any registration statement filed with the SEC. The complaint also: (1) charges the adviser with violating, and the

executive officer with aiding and abetting violations of, the antifraud provisions of the Investment Advisers Act of 1940; and (2) alleges that the defendants engaged in acts or practices constituting a breach of fiduciary duty involving personal misconduct. The SEC is seeking: (1) injunctive relief, including an injunction pursuant to Section 36(a) of the Investment Company Act that would prohibit the defendants from serving or acting with respect to any fund as an officer, director, member of any advisory board, investment adviser, depositor, or principal underwriter; (2) an accounting of all market timing trading and the management fees received by the adviser from the funds that the adviser allowed to be used by market timers; (3) disgorgement, including of all management fees related to the violations and of all benefits derived by the executive officer from his employment with the adviser; (4) penalties; and (5) such other relief as the court may determine to be just, appropriate, or equitable. The complaint by the Attorney General of New York charges the adviser and the executive officer with violations of New York's Martin Act, General Business Law, and Executive Law. The Attorney General is seeking: (1) injunctive relief, including an injunction prohibiting the executive officer from directly or indirectly engaging in activities relating to the purchase, sale or distribution of any mutual funds; (2) disgorgement of all profits, including fees collected; (3) restitution; (4) penalties; and (5) such other relief as the court deems just and proper in the circumstances. The complaint filed by the Attorney General of Colorado charges the adviser with violations of Colorado's Consumer Protection Act. The Attorney General is seeking: (1) injunctive relief against the adviser, its agents, servants, employees, and successors, any person who, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with the adviser, and all those in active concert or participation with the adviser; (2) restitution, disgorgement, and other equitable relief; (3) mandatory and maximum civil penalties; and (4) such other legal and equitable relief as the court deems appropriate. Rachel H. Graham Assistant Counsel

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