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August 18, 2014

Douglas J. Scheidt
Associate Director and Chief Counsel
United States Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Re: No-Action Request under Section 205(a)(1) of the Investment Advisers Act of 1940

Dear Mr. Scheidt:

On behalf of Amerivest Investment Management, LLC (“Amerivest”), an investment adviser registered as an investment adviser with the Securities and Exchange Commission (the “Commission” or “SEC”) under the Investment Advisers Act of 1940, as amended (the “Advisers Act”) and an affiliate of TD Ameritrade, Inc. (“TD Ameritrade”), we request the assurance of the staff of the SEC’s Division of Investment Management (the “Staff”) that the Staff will not recommend enforcement action to the Commission under Section 205(a)(1) under the Advisers Act against Amerivest if Amerivest offers to certain clients an advisory fee rebate in accordance with the terms of this letter. As further described below, Amerivest proposes to rebate investment advisory fees for eligible clients invested in accordance with a model portfolio that experiences two consecutive discrete calendar quarters of negative performance during a twelve month period, as measured by the composite performance of the model portfolio corresponding to the client’s account (the “Proposed Fee Arrangement”). Amerivest believes that the Proposed Fee Arrangement is a balanced approach that is consistent with its fiduciary duty to its clients and its desire to serve the needs of its clients, while at the same time addressing the policy considerations arising under Advisers Act Section 205(a)(1).

I. Background

Amerivest currently offers a discretionary advisory service known as Amerivest Portfolios (the “Service”), which is made available to retail brokerage clients of TD Ameritrade. Under the Service, Amerivest serves as the investment adviser to the clients and is responsible for implementing the asset allocation models and corresponding mutual fund and exchange-traded

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fund investment recommendations provided by Morningstar Associates, LLC (“Morningstar Associates”). Morningstar Associates serves as an investment adviser and independent consultant to Amerivest with respect to the Service, but does not enter into an investment advisory agreement with Amerivest’s clients. Amerivest vets and implements Morningstar Associate’s investment recommendations in their entirety, subject to non-investment related factors such as tax considerations and any reasonable restrictions a client may impose.¹ Morningstar Associates is compensated by Amerivest based on a fee schedule that includes an asset-based fee component and a licensing fee component. Accordingly, Morningstar Associates does not receive performance-based compensation.

Under the Proposed Fee Arrangement, Amerivest would continue to charge a quarterly asset-based advisory fee in advance. However, Amerivest would rebate investment advisory fees for eligible clients who are invested in a model portfolio that experiences two consecutive discrete calendar quarters of negative performance (before advisory fees) during a twelve month period (a “Term”). The amount of the rebate would be equal to 100% of the advisory fees paid by each eligible client for the two calendar quarters in which the performance composite for the model portfolio corresponding to the client’s account experienced negative performance. In other words, the performance would be calculated based on a composite reflecting the actual performance of Amerivest clients invested in a particular model portfolio. To determine whether performance was negative, each calendar quarter would be measured independently; the performance for multiple quarters would not be aggregated. Amerivest will fully and clearly disclose the rules governing eligibility for the Proposed Fee Arrangement and the methodology for calculating the composite performance (together, the “Rebate Terms”) to all clients participating in the Service. Amerivest will follow the Rebate Terms and apply them fairly and consistently. In the event that Amerivest decides to change the Rebate Terms in a manner that may disadvantage participating clients, Amerivest will notify participating clients in advance of such change, and no such change will become effective prior to the commencement of the next subsequent Term.

The Proposed Fee Arrangement will not contain any “catch up” or other provision that would allow Amerivest to recapture foregone fees through future appreciation. Amerivest will not deviate from or otherwise seek to influence Morningstar’s investment recommendations for the

¹ Amerivest’s vetting process is designed to consider whether the asset allocations and securities recommendations provided by Morningstar Associates are reasonable in relation to the investment mandate and risk/return characteristics of each model portfolio, and the overall operation of the Service. In addition, Amerivest may choose not to implement a recommendation provided by Morningstar Associates based on non-investment related considerations that might adversely impact client accounts (e.g., the tax ramifications of substituting one ETF for another). The mere fact that Amerivest has deviated from or declined to implement a recommendation of Morningstar Associates will not in and of itself cause a client to be ineligible for the rebate (discussed below).

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purpose of avoiding payment of any fee rebate under the Proposed Fee Arrangement. Amerivest may deviate from Morningstar's recommendations solely: (i) for non-investment and non-performance related reasons such as tax considerations or reasonable client restrictions; or (ii) to the extent so required to fulfill its fiduciary duty to clients. Amerivest will make and keep true, accurate and current records detailing any such deviation and explaining why such deviation was necessary. There will be no contract, arrangement, or other understanding, explicit or tacit, by and between Amerivest and Morningstar or any principals thereof, such that Morningstar's compensation or continued engagement would be affected by the payment or non-payment by Amerivest of any fee rebate pursuant to the Proposed Fee Arrangement.

The Proposed Fee Arrangement would be implemented for (i) all new discretionary client accounts; and (ii) all existing discretionary client accounts with a new deposit of \$25,000 or higher, provided that the new deposit represents net new assets to Amerivest. Clients would not have to elect to participate in the Proposed Fee Arrangement or request a fee rebate. The fee rebate would automatically apply in the event of two consecutive calendar quarters of negative performance. To be eligible for the Proposed Fee Arrangement, an account must participate in the Service for a minimum of two consecutive calendar quarters during the Term and during such participation the client must not withdraw more than the required deposit of \$25,000 to remain eligible for subsequent quarters. Amerivest would reserve the right to extend the Term for additional twelve month periods or to discontinue the Proposed Fee Arrangement upon ninety days advance written notice to clients.

Subject to enforcing the requirements set forth in the preceding paragraph, Amerivest will not take any action for the purpose of negating or compromising a client's eligibility for the rebate including, without limitation, any action that would result in a client no longer participating in the Service.

II. Legal Analysis

Section 205(a)(1) of the Advisers Act provides that no registered investment adviser shall enter into or renew any investment advisory contract that "provides for compensation to the investment adviser on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds or the client." Section 205(a)(1) is designed to eliminate "profit sharing contracts [that] are nothing more than 'heads I win, tails you lose' arrangements"² that "encourage advisers to take undue risks with the funds of clients,"³ to speculate or to

² S. Rep. No. 1775, 76th Cong., 3d Sess. 22 (1940).

³ H.R. Rep. No. 2639, 76th Cong., 3d Sess. 29 (1940). The section was designed to eliminate the possibility of an investment adviser entering into a contract in which he or she "does not participate in the losses, but participates only in the profits." *Investment Trusts and Investment Companies; Hearings on S.*

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overtrade.⁴ We do not believe that the Proposed Fee Arrangement is prohibited by Section 205(a)(1). Moreover, for the reasons set forth below, we believe that Amerivest's Proposed Fee Arrangement is structured in a manner that would greatly reduce any incentive on the part of Amerivest to take undue risks, speculate or overtrade. To the contrary, the Proposed Fee Arrangement is designed to further align Amerivest's interests with those of its clients because – to put it simply – if the client does not make money, Amerivest does not make money. The result is that the Proposed Fee Arrangement protects the interests of clients both when performance is positive and when it is negative. Unlike traditional performance-based fee arrangements, Amerivest's fee will not increase based on positive performance. Accordingly, Amerivest does not share in the upside potential and its clients receive the full benefit of positive performance. Similarly, the Proposed Fee Arrangement benefits clients during periods of negative performance by rebating advisory fees back to clients and eliminating a situation under which Amerivest continues to receive compensation during sustained periods of negative performance.

Section 205(a)(1) does not, on its face, extend to fee waivers or rebates that are contingent on negative performance. However, in Advisers Act Release No. 721, the Staff articulated its view on contingent fees, interpreting Section 205(a)(1) to prohibit advisory contracts that provide that advisory fees “will be waived or refunded, in whole or in part, if a client's account does not meet a specified level of performance or which otherwise makes receipt of advisory fees contingent on the investment performance of the funds of advisory clients.”⁵ Although the Proposed Fee Arrangement is not contingent on achieving a specified level of capital appreciation or avoiding a specified level of capital depreciation, it is contingent on performance. Notwithstanding positions set forth in Release No. 721, however, the Staff has more recently granted no-action assurance permitting contingent fee arrangements where the underlying policy considerations of Section 205(a)(1) were honored.⁶

In *Trainer*, the SEC Staff allowed the investment adviser to offer a satisfaction guarantee that would permit clients to request a refund if the client was dissatisfied for any reason, including unsatisfactory performance. The analysis in *Trainer* was based, in part, on the fact that the satisfaction guarantee was structured “in a manner that would greatly reduce any incentive on the part of the [investment adviser] to take undue risks, speculate or overtrade.” In Amerivest's

3580 *Before a Subcomm. of the Senate Comm. on Banking and Currency*, 76th Cong., 3d Sess. 320 (1940) (statement of David Schenker, Chief Counsel of the Commission's Investment Trust Study).

⁴ See Securities and Exchange Commission, *Investment Counsel, Investment Management, Investment Supervisor and Investment Advisory Services*, H.R. Doc. 477, 76th Cong., 2nd Sess. at 30 (1939).

⁵ See *Contingent Advisory Compensation Arrangements*, Investment Advisers Act Release No. 721 (May 16, 1980).

⁶ *Trainer*, *Wortham & Co.* (pub. avail. Dec. 6, 2004) (“*Trainer*”).

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case, we believe that the fact that Morningstar Associates, which is an independent investment adviser, is responsible for security selection and asset allocation recommendations similarly provides additional protection against the risk of speculative investing and other policy concerns that Section 205(a)(1) was designed to address. Because Morningstar Associates would be responsible for security selection and asset allocation recommendations, Amerivest will not be in a position to directly affect the value of a client's account. Accordingly, the proposed fee rebate is not contingent on Amerivest's performance. In addition, any incentive that Amerivest might have to override Morningstar Associates' asset allocation recommendations in order to invest in more speculative investments is mitigated by the inability to recapture waived or rebated fees.

We note that while the Proposed Fee Arrangement is contingent on performance, Amerivest's fee would not increase based on positive performance. In this regard, the Proposed Fee Arrangement is more favorable to clients than fulcrum fees, which are available under Section 205(b)(2) to registered investment companies and certain high net worth individuals. Fulcrum fee arrangements require that any increase in advisory fees for positive performance against a benchmark be accompanied by a corresponding decrease in fees in the event of negative performance. In contrast, the advisory fee charged to participants would not increase with positive performance, enabling participants to obtain the upside of a fee rebate when performance is negative without the downside of paying higher fees when performance is positive. In addition, the Proposed Fee Arrangement does not contain any "catch up" or other provision that would allow Amerivest to recover foregone fees through future appreciation. The Proposed Fee Arrangement is the opposite of the "heads I win, tails you lose" approach that Section 205(a)(1) was designed to prevent.

The Proposed Fee Arrangement would also give retail investors access to the benefits of flexible advisory fee arrangements that have traditionally been reserved only for sophisticated investors, without the added complexity and risk associated with those fee arrangements. Although it is not the case here, Amerivest would be permitted to enter into a fee arrangement with Morningstar Associates pursuant to which it receives the advantage of compensating Morningstar Associates based on the performance of the underlying models.⁷ Under current guidance, however, Amerivest would not be permitted to pass that benefit on to its clients. The Proposed Fee Arrangement gives Amerivest the ability to offer the advantages of a performance-based fee arrangement to its retail clients, without creating any incentive on the part of Amerivest or Morningstar Associates to take undue risks, speculate or overtrade. Under the Proposed Fee Arrangement, Amerivest clients would benefit when performance is negative, but they would not be obligated to pay a higher fee when performance is positive.

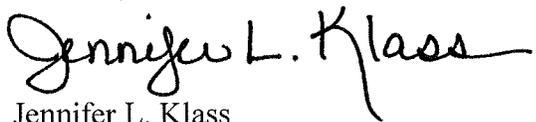
⁷ See, e.g., *Lazard Freres Asset Management* (pub. avail. Feb. 12, 1996); *Copeland Financial Services, Inc.* (pub. avail. Sept. 21, 1992).

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III. Conclusion

For the reasons stated above, we believe that Amerivest's Proposed Fee Arrangement is consistent with the policies underlying Section 205(a)(1) of the Advisers Act. Consequently, we respectfully request the Staff's assurance that it will not recommend enforcement action to the Commission under Section 205(a)(1) of the Advisers Act if Amerivest offers the Proposed Fee Arrangement.

Sincerely,

A handwritten signature in black ink that reads "Jennifer L. Klass". The signature is written in a cursive style with a large, sweeping "J" and "K".

Jennifer L. Klass

c: Gilbert Ott, Amerivest Investment Management, LLC