ENFORCEMENT MANUAL

SECURITIES AND EXCHANGE COMMISSION

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INTRODUCTORY

This Manual is confidential, and loaned to employees of the Commission engaged in work pertinent to its provisions during their employment. They are responsible for its production at any time. It is to be surrendered on the order of the Commission or the immediate superior of an employee.

The Manual was adopted after a conference in Washington on December 7 - 9, 1937, attended by all Regional Administrators. Changes in the original form of the Manual will be made from time to time as experience dictates and additions are contemplated having to do with various statutory provisions, rules and regulations pertaining to the work of the Commission.

All employees are solicited to submit at any time their recommendations or suggestions for changes, additions and deletions. Such recommendations or suggestions should be submitted through the Regional Administrator, or in the case of employees at Washington, through the head of the employee's division.

It must be appreciated that the rules and instructions laid down in this Manual are for the guidance of the Commission's employees only. No exposition herein of any statutory provision shall be taken as an interpretation by the Commission of such statutory provision.

The provisions of this Manual supersede previous instructions which are inconsistent with them.

William O. Douglas, Chairman
George C. Mathews
Robert E. Healy
Jerome F. Frank
John W. Hanes

April 15, 1938

ADMINISTRATIVE PROVISIONS

1. *INITIATION OF INVESTIGATION.* No investigation shall be initiated unless authorized by the Commission, the General Counsel, the Director of the Trading and Exchange Division, the Chief of the Oil and Gas Unit, or a Regional Administrator. When an investigation is initiated by a Regional Administrator it shall be reported immediately to the General Counsel, the Director of the Trading and Exchange Division, or the Chief of the Oil and Gas Unit, as the case may be, so that a case number may be assigned, records set up, and a search made of the Commission files.

The report of the initiation of an investigation by a Regional Administrator shall contain, in addition to the names and addresses of the persons to be investigated and the statutory provisions believed to be violated, such factual information as may be available at that time. From time to time, as additional persons are connected with the alleged violation, their names, addresses and other pertinent data concerning them will be transmitted to the Commission by the Regional Administrator.

2. *TERRITORIAL JURISDICTION.* Regional Administrators have immediate jurisdiction over employees and investigations in their regions. This, of course, is not exclusive of the jurisdiction of the Commission itself or, in the case of investigations, of the Division of the Commission having general jurisdiction over the matter under investigation. In certain specific cases, investigations or other proceedings may be supervised directly from Washington. In such cases the Regional Administrator for the region in which the work is being done will be so advised in order that he may cooperate in the investigation. When it is necessary for an employee to enter a region other than that to which he is assigned, his Regional Administrator shall so notify the Administrator of the region to be visited, and such employee shall report his presence in such region and temporary address to the Regional Administrator.

Employees on special assignment shall report their presence in a region and their temporary address to the Regional Administrator.

Official communications concerning investigations or employees in a region shall be addressed to the Regional Administrator.

Communications emanating from a region shall be signed in the name of the Regional Administrator by the Administrator or by an employee to whom such duty has been delegated.

Except where special investigations are directed from Washington, Administrators shall be responsible for the proper investigation of cases in their regions and their approval of investigative reports shall be indicated by their signature thereon.

In any case, Regional Administrators will be expected to obtain information for any Division of the Commission in such manner as the particular Division may request.

3. *PROCURING INFORMATION FROM OTHER REGIONS.* When leads in an investigation require investigative activity outside the region in which the investigation originates a request shall be made to the Administrator of the region wherein such activity is required to make an auxiliary investigation.

Full and complete information necessary for this purpose shall be furnished him by either sending copies of reports previously made, or by letter, telegraph or telephone. All written requests shall be in duplicate.

At times information desired from another region may be in the files in Washington. A copy of a written request for such auxiliary investigations should be sent to the General Counsel, or the Director of the Trading and Exchange Division, or the Chief of the Oil and Gas Unit, as the nature of the case suggests, in order that the information, if available in Washington, may be furnished to the requesting office and unnecessary work in the auxiliary office avoided.

Upon completion of the auxiliary investigation at least two copies of the auxiliary report shall be forwarded to the office of origin and a copy of such report shall be forwarded to Washington.

In emergencies or when the exigencies of a case so require or when economy or common sense so dictate an employee of one region may enter another region for the purpose of investigative activity. A copy of the report of such investigation should be sent to the Administrator of the region entered.

If the exigencies of a case so require correspondence, mail, telegraphic or telephonic, may be addressed to persons in another region, provided copies of written correspondence and summaries of telephonic correspondence are forwarded to the Administrator of such region. Copies of letters concerning routine inquiries need not be furnished.

When information is desired from a public agency the local regional office should be requested to procure such information from the public agency.

4. *COMPLAINTS TO EMPLOYEES.* Complaints or violations of the law coming to the attention of a regional employee shall be referred immediately by such employee to his Regional Administrator or to the person designated in such region to supervise investigations.

5. *WRITTEN REPORTS.* Under no circumstances shall an investigation be made by an employee without a written report thereon being made by the investigator to his Regional Administrator or to the person designated in such region to supervise investigations.

6. *FOLLOWING UP INVESTIGATIONS.* After an investigation is initiated it shall be pursued as vigorously as circumstances permit. At least every thirty days a progress report in triplicate shall be submitted to the General Counsel, the Director of the Trading and Exchange Division, or the Chief of the Oil and Gas Unit as the nature of the case suggests, outlining the work accomplished, that which is proposed to be performed, and a statement as to the theory applicable to the violation. An indication should be made as to when it is expected the investigation will be completed.

The first progress report should be made thirty days after work has been begun on the investigation, and subsequent reports should be forwarded at the end of each succeeding thirty day period.

Each progress report should be filed under the name of the case. Such reports will constitute the running record of the investigation.

It should be noted that these reports are not necessarily to be made as of the first day of each calendar month, but after the lapse of not more than thirty days from the time work was initiated or the last report rendered.

Progress reports should be used as the basis for recommendations for closing (where it is recommended that no action of any character be taken), and for the issuance of formal orders for investigation. The provisions of Paragraph 35 should be consulted in connection with the preparation of a final report recommending court or similar adversary proceedings.

7. *DEVELOPMENTS IN CASES.* The General Counsel, the Director of the Trading and Exchange Division, or the Chief of the Oil and Gas Unit, as the nature of the matter suggests, should be kept advised of important developments in investigations and of all developments in other proceedings.

When important developments occur the proper official should be advised by telegraph or telephone as the exigencies of the case require.

Field offices and employees in time zones different from Washington should bear in mind the difference in time between their city and Washington in forwarding such information, and in all instances possible advice as to important developments should reach Washington by three o'clock in the afternoon, Washington time.

8. *ASSIGNMENT CARDS.* When an investigation is received in a regional office an assignment card should be prepared on the prescribed form. This card should show the title of the case, the character of the case as described below, the file number, the date the case was received in the office, the date of any Commission order, the persons named therein, the name of the person to whom the case is assigned for attention with the date of such assignment and an estimate of the number of "man days" which it is thought will be required to complete the investigation. This estimate should be on the basis of one person performing all the work which is anticipated will be necessary to complete the case, and may be described as less than ten days, more than ten but less than thirty days, or more than thirty days. Estimated time is to be indicated only as to those cases in which the investigation work has been started.

The character of the case should be indicated as one of the following classifications: Informal investigation where no formal order for investigation has been issued by the Commission; Formal investigation, where a formal order for investigation has been issued by the Commission; Civil case where the Commission is the plaintiff; Civil case where the Commission is the defendant; Criminal Reference, where the case has been referred to the Department of Justice for criminal prosecution; Other reference, where the case has been referred to some other agency, such as the Post Office Department; Informal trading Investigation, where no formal order has been issued by the Commission; Formal trading investigation, where an order for investigation has been issued by the Commission; Margin Inspections; Prospectus Inspection and Adversary Proceeding, where action is taken by the Commission, such as stop order proceedings, hearings on revocations, etc.

9. *MANNER OF USING ASSIGNMENT CARDS.* A file of the assignment cards should be maintained subdivided into a section marked "unassigned", sections marked with the names of each investigative employee, and a section marked "closed". If a case cannot receive immediate investigative attention the assignment card should be placed in the "unassigned" section of the file.

When the case is assigned to an employee for investigation the card should be placed in the section bearing the name of the employee to whom it is assigned.

When the case is closed the card should be transferred to the "closed" section until the monthly report is prepared. It should then be placed in a permanent file for the cards on closed cases which should be subdivided with the names of the employees.

While the case is active when any action is completed thereon the file clerk should make an entry on the reverse side of the card such as "Report submitted-9-30-37", "Investigation completed-Report being prepared-9-30-37", "Memorandum report for formal order-9-30-37", "Injunction granted-9-30-37". This information should be entered on the card from the papers, forms, correspondence, etc., that come to the clerk for filing.

Notation of statistical data, of the type suggested by the form, developing in the case should also be entered on the card in the space provided.

The assignment cards can then be used as the basis for the preparation of the monthly report.

The cards can also be used as a tickler system for following up the investigations.

10. *ASSIGNMENT OF FIELD WORK.* A duplicate copy of the assignment card may be used to aid in the assignment of field work by showing the location and pendency of investigations outside the city in which the regional office is located.

A file may be maintained with sections marked with the names of several of the key cities in the region. The duplicate card should be marked with the name of the place where the investigation is required and placed in the section bearing the name of the city nearest the place of such investigation.

When an employee is sent to a given locality all the pending work in that area may be assigned to him.

11. *MONTHLY ADMINISTRATIVE REPORT.* Each Regional office shall submit to Washington a monthly administrative report on the prescribed form, covering the investigations in the region.

This report in triplicate, shall be mailed so as to reach Washington not later than the 5th day of the month and shall cover the work of the regional office for the preceding month.

The data for the report should be obtained from the assignment cards described above.

The report should be prepared as follows:

COLUMN (1) In this column should be set forth the character of the cases, to wit: (a) Informal Investigations which are investigations in which there has been no formal order for investigation issued by the Commission; (b) Formal Investigations, in which a formal order for investigation has been issued by the Commission; (c) Civil cases where the Commission is the plaintiff; (d) Civil cases where the Commission is the defendant; (e) Criminal References, where cases have been referred to the Department of Justice for Criminal prosecution; (f) Other references, where cases are referred to some other agency, such as the Post Office Department; (g) Informal Trading investigations, where no formal order for investigation has been issued by the Commission; (h) Formal Trading investigations, where a formal order for investigation has been issued by the Commission; (i) Margin Inspections; (j) Utility Act investigations; (k) Adversary Proceedings, where action is taken through Commission order, such as stop order proceedings, hearings on revocations, etc.

COLUMN (2) In this column, opposite the character of the case, should be entered the total number of such cases pending at the beginning of the period covered by the report.

COLUMN (3) In this column should be entered, opposite the figure in column 2, the total number of such cases received during the period.

COLUMN (4) In this column should be entered the sum of the entries in columns 2 and 3.

COLUMN (5) In this column should be entered the number of such cases closed during the period.

COLUMN (6) In this column should be entered the total number of cases *assigned* for investigation, hearing or trial.

COLUMN (7) In this column should be entered the total number of days work estimated to be necessary to complete the total investigations that are *assigned*, based on the estimate described in the section on Assignment Cards.

COLUMN (8) In this column should be entered the total number of cases that are *unassigned*.

COLUMN (9) In this column should be entered the total number of days work estimated to be necessary to complete the total investigations that are *unassigned*, based on the estimate described in the section on Assignment Cards.

COLUMN (10) In this column should be entered the sum of columns 6 and 8. The figure in this column should correspond with the entry in column 2 of the report for the next period.

COLUMN (11) In this column should be entered the titles of all cases handled in the reporting office during the period of the report, including auxiliary investigations for other offices, grouped as to the character of such cases.

COLUMN (12) In this column should be entered the file number of each case.

COLUMN (13) In this column should be entered the appropriate symbol for the character of the particular case, such as:

IF- Informal Investigation
FI- Formal Investigation
CP- Case where Commission is Plaintiff
CD- Case where Commission is Defendant
CR- Criminal Reference
OR- Other Reference
IFT- Informal Trading Investigation
FTI- Formal Trading Investigation
MI- Margin Inspection
PI- Prospectus Inspection
UA- Utility Act Investigation
AP- Adversary Proceeding

COLUMN (14) In this column should be entered the date on which the case originally was received by the reporting office.

COLUMN (15) In this column should be entered the date on which the formal order of the Commission was issued, in the event such an order is in effect.

COLUMN (16) In this column should be shown the name of the employee to whom the case is assigned for attention together with the date of such assignment. If the case has not been assigned the word "UNASSIGNED" in capital letters should be entered.

COLUMN (17) In this column should be entered an estimate (as described in the section on Assignment Cards) of the total days work required to complete the investigation and to prepare a report. This estimate should be on the basis of one person performing all the work which it is anticipated will be necessary to complete the investigation.

COLUMN (18) In this column should be entered a very brief statement as to the last action taken in the case together with the date of such action, such as, "Bill of Complaint filed-9-30-37"; Investigation Completed-preparation of report begun-9-30-37", "Memorandum for formal order forwarded-9-30-37";

"Pending auxiliary investigation-Chicago-9-30-37", "Closed-9-30-37". The totals of the entries in columns 2 to 10 should be shown at the bottom of such columns. In the event any court action or commission action of the kind shown on the lower part of page one of the report and on the assignment card transpires during the period appropriate entries shall be made in the space provided.

12. *DISCLOSURE OF SOURCE OF COMPLAINT.* Investigators shall not disclose the source of complaints or the identity of complainants, unless circumstances clearly indicate the necessity or desirability of such disclosure.

Neither shall any employee furnish directly or indirectly to any person outside the Commission any information whatsoever obtained or learned by him as a result of his employment with the Commission, without having received prior authorization therefor from his superior.

Nor shall any employee use such information for his personal benefit.

This rule shall not be interpreted so as to preclude proper cooperation with agencies assisting in or interested in investigations; or so as to limit in any way the examination of persons furnishing information to investigators.

13. *CO-OPERATION WITH OTHER AGENCIES.* Regional Administrators are authorized in their discretion to consult with local Postal and State authorities concerning particular cases arising in their respective regions, but should obtain prior approval of the Commission before a formal reference of the entire record of a particular case is made.

Regional Administrators are authorized in their discretion to refer to Exchanges within their respective regions cases or complaints involving alleged violations of the rules of such exchanges, the Regional Administrator, however, to report immediately to the Trading and Exchange Division the reference of any such case or complaint to an exchange and to obtain authorization from the Commission before referring cases involving a violation of law or involving a complaint of other than minor importance.

14. *EXPRESSIONS OF OPINIONS AND ADVICE.* Employees shall not express legal, financial or other opinions, or give advice to any one concerning the business of the Commission or any matter in which the Commission is or may be interested, without having received prior authority so to do from their superior, or having been assigned to duties in the Commission which require proper discussion with, and advice to, persons having business before the Commission.

Nor shall any employee accept or perform any outside or private work without having received prior authorization to perform such work from the official under whose supervision such employee is engaged, that is, the Regional Administrator or the head of the employee's division.

15. *NON-DISCLOSURE OF CERTAIN INFORMATION.* Information or documents obtained by officers or employees of the Commission in the course of any examination, study or investigation pursuant to Section 8(e) or 20(a) of the Securities Act of 1933; Section 17(a) or 21(a) of the Securities Exchange Act of 1934; or Section 13(g) or 15(f) or paragraph (a) or (b) of Section 18 of the Holding Company Act of 1935 shall, unless made a matter of public record, be deemed confidential. Officers and employees are prohibited from making such confidential information or documents available to any one other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the document called for, basing his refusal upon the applicable Commission rule. The Commission rules on this subject are Rule 122, under the Securities Act of 1933; Rule A4, under the Securities Exchange Act of 1934; and Rule 5, under the Holding Company Act of 1935. Any officer or employee who is served with such a subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making available such information or document.

This regulation applies not only to instances where a subpoena is served upon an employee but precludes him from disclosing such information or documents under any other circumstances without authorization of the Commission.

In this connection attention is called to the provisions of Section 24(c) of the Securities Exchange Act of 1934 and of Section 22(c) of the Public Utility Act of 1935 which make it unlawful for Commission employees to use or disclose information under the circumstances set forth therein.

16. *STATEMENTS OF WITNESSES.* A written record must be made immediately following all interviews and telephone conversations conducted during an investigation. This may be in the form of a statement signed by the person questioned, an affidavit executed by such person or a memorandum for the file. This record shall contain a complete statement of the information obtained from such person, together with his full name and address, and the date and place of the interview.

It is not essential that this record be typewritten and where the exigencies of an investigation conducted in the field do not reasonably permit such preparation the record should be prepared in longhand and filed in that form.

17. *CIRCULAR LETTERS.* Care shall be exercised in the use of circular letters or questionnaires during an investigation, that no undue harm or damage shall be caused the subject of the investigation by such circular letter or questionnaire. It is suggested that the following form, which may be adapted to fit the circumstances of the particular case, be incorporated in any circular letter or questionnaire used:

"The fact that this questionnaire (letter) is being sent you should not be regarded as reflecting on the character or reliability of the person (concern) mentioned nor as an expression of opinion on the part of the Commission or its Counsel that any violation of law has been committed. This communication should be treated as confidential."

It should of course be realized that, even with such a reservation clause, a questionnaire might give rise to inquiries in the mind of the recipient. Consequently, discretion should be used in employing circular letters or questionnaires and there should be substantial grounds for believing that a violation of law has occurred before a letter or questionnaire is circulated.

Forms of questionnaires which have been approved by the Commission and forwarded to regional offices may be used without further specific approval, but any form of questionnaire substantially differing from such approved forms must be submitted to the Commission for approval before being used.

18. *INTERVIEWS WITH WITNESSES.* Caution shall be exercised in conducting interviews with prospective witnesses, subjects or persons connected in any way with investigations, in order that no basis may be available for the charge that any offer, inducement, promise, threat or duress of any kind was used for the purpose of obtaining information. At the same time care shall be used to avoid any expression of opinion, as to securities purchased by the person being interviewed, their value or any statement indicating a prejudgment on the part of the investigator as to a violation of the law, on the part of the subject of the investigation.

Investigators of the Commission will always demean themselves as gentlemen. They are federal officers and as such are entitled to respect. Any statement or act by one of our investigators which might indicate that he is less than a gentleman will necessarily lessen the respect which he can claim, and militate against the Commission. They should at all times show a proper regard for the legal and constitutional rights of those with whom they deal.

Suggestions relative to interviewing witnesses, which may be of assistance to investigators, are set forth in the investigative section of this Manual.

19. *SEARCHES AND SEIZURES.* Investigating officers have no authority, by virtue of their employment, to make searches of any persons or premises, or to seize papers, records, documents or other property. Whenever the examination of any paper, record or document is deemed necessary, the consent of the person in whose custody such paper, record or document is found shall be obtained.

Discretion shall be exercised in taking possession of any paper, record or document even with the consent of the person having custody of such paper, record or document.

Only in instances where it is advantageous to the investigation shall such possession be taken, and then care shall be exerted to the end that the actual possession and custody of such paper, record or document, in unchanged form, may be established by evidence of the custodian of such paper, record or document from the time possession thereof is taken until the paper, record or document is used as evidence in court or otherwise.

Consideration shall be given to the advisability of procuring copies, photostatic or otherwise, of such material, rather than obtaining the physical possession thereof.

In all instances the names and addresses of witnesses competent to establish the identity and admissibility of paper, records or documents shall be obtained.

Each office shall maintain a record of any property, exhibits, books or documents, the possession of which is taken during an investigation, and appropriate provision shall be made for the safe and orderly keeping thereof until such possession has served its purpose.

Such property shall then be returned to the person from whom secured at the earliest possible time, an appropriate receipt obtained and a proper notation made on the exhibit record.

20. *EXAMINATIONS OF RECORDS.* Notwithstanding the provision for the examination of records under the various acts enforced by the Commission, the full and free consent of any persons whose papers or records it is desired to examine shall be sought in a courteous manner.

In the event that such consent is refused in circumstances covered by the provisions of law relating to such examinations, full details of the refusal shall be communicated immediately to the General Counsel's office.

Such a report shall include the status of the refusing party, information as to the records which the Commission representative sought to examine, the reasons for the examination and the materiality of such examination to any investigation or inquiry.

If examination of papers or records is refused in other circumstances the facts relative thereto shall be incorporated in the request for an order for formal investigation.

When papers and records are made available for examination by Commission representatives, the investigator should be alert to any information indicating the use of the mails or the instrumentalities of interstate commerce reflected in such examination.

Letters and the source from which they emanated, telephone records and bills, charges for telegraph, express, and mail are possible leads to such information.

21. *REQUESTS FOR ORDERS FOR FORMAL INVESTIGATION.* The request for a formal order of investigation shall be forwarded to the General Counsel, the Director of the Trading and Exchange Division, or the Chief of the Oil and Gas Unit, as the facts of the particular case indicate.

It is not desired, however, that in every investigation such an order be sought. In many instances formal orders have been requested and granted without necessity, with the result that long transcripts of testimony have been taken, the examination often involving days and being attended not only by the official reporter and the investigating attorney, but by a trial examiner and attorneys for witnesses, with resultant expenses for the transcripts, witness fees, and other charges.

It is desired therefore that every effort be made to complete an investigation and develop the evidence necessary to sustain whatever disposition the case warrants without recourse to a formal order.

The request for such an order shall be made in connection with the submission of a progress report in the prescribed form.

This report should show a real possibility of completing the development of the violation by a formal investigation and the necessity for doing it that way.

The order should show the grounds upon which the Commission believes the investigation necessary and proper, the facts which it believes constitute the violation, the section of the Acts violated and the names of the officers to be designated for such investigation.

The privilege of subpoena during an investigation under a formal order, is a right which should be used carefully, and no circumstances should be permitted to arise which would support the charge of an abuse of such power.

22. *CONDUCT OF INVESTIGATION.* It is believed that ordinarily there is no necessity for an officer or examiner designated in a formal order to preside in the manner of a Trial Examiner.

It is suggested that normally it will be preferable to take sworn narrative statements from witnesses, the officer designated in the formal order for investigation administering the oath to the witness. In this latter type of procedure the officer should not use reporters but should make use of the stenographic assistance available.

The same procedure may be followed in investigations in which no formal order has been issued, except that no Commission officer having been named, no oaths can be administered by a representative of the Commission, and transcripts of testimony cannot be taken. Unsworn but signed narrative statements can be obtained, and if it is felt that a sworn statement is desirable a notary public can execute the jurat in the form of an affidavit.

Whenever a witness is examined pursuant to subpoena issued under authority of a formal order of investigation, he shall be advised of his privilege to have his counsel present, regardless of whether the examination is embodied in a verbatim transcript. Such attorney may be permitted to advise the witness as to his constitutional rights against self-incrimination, both generally and in respect of particular questions, and if the attorney so requests, he may, at the conclusion of the examination of the witness by the officer or examiner of the Commission, be permitted to ask further questions bearing upon the subject matter of the investigation. Such questions normally should not go beyond the scope of the examination made by the Commission's officer or examiner, although in particular instances it is possible that questioning by such attorney, even though beyond the scope of such examination, will nevertheless come within the scope of the investigation. Such attorney is, of course, entitled to object to any question asked by the Commission's officer or examiner on the ground that it goes beyond the scope of the order of investigation. If such an objection is made, the officer or examiner should consider the merits of such objection and, if he regards it as without merit, he should so advise the attorney and should require the witness to answer the question. If a verbatim transcript is being taken, it is not necessary that such transcript record *in extenso* such arguments as may be made by the attorney. It is sufficient if the record merely indicates his objection and the legal ground of objection. Objections of the attorney, in order to be meritorious, should be based upon a claim of privilege or upon the ground that the question is beyond the scope of the order of investigation.

An attorney shall not be permitted to be present during the examination of a witness unless he represents the witness, and it is appropriate for the officer or examiner of the Commission to question the witness as to whether the attorney has in fact been retained to represent him in the matter.

If a witness who is being examined otherwise than pursuant to a subpoena which has been served upon him, requests that he be permitted to have his own counsel present, this request should be granted.

Investigators are cautioned against relying too heavily on facts developed through the use of leading questions. Recommendations relying on testimony which the witness is likely to explain away in a later adversary proceeding may result in unwarranted action by the Commission, and in unfortunate adverse decisions. Prospective witnesses should not be led away from, nor should the investigator ignore statements as to, possible defences or excuses. It is helpful to know available defences both in determining what steps are to be taken, and in determining what defences will have to be met if proceedings are instituted.

23. *RESULT OF FORMAL INVESTIGATION.* When the Commission has authorized an investigation under Section 19(b) of the Securities Act of 1933, or Section 21(a) of the Securities Exchange Act of 1934, to determine whether specific sections of the said Acts have been or are about to be violated by the respondents in question, and an officer has been designated to administer oaths, subpoena witnesses, etc. there is no necessity for the said officer to make findings of fact, as the only purpose of such investigation is to develop evidence, to be considered by the Commission in conjunction with other evidence already available or to be obtained.

On the other hand, when the attorney has developed all possible evidence at such an investigation, the attorney shall prepare a full and complete report in the manner hereinafter suggested.

The attorney should, however, include with such report his recommendation as to the action which he believes should be taken by the Commission, as a result of such investigation.

24. *CONTUMACY OF WITNESSES AT FORMAL INVESTIGATION.* In any case where it is necessary to apply to a United States court to compel a person to testify or produce documentary evidence, at a formal investigation, such application shall only be made after it has been authorized by the Commission.

Similarly, when it is felt desirable to compel a person to testify or produce documentary evidence, at such an investigation, and he has asserted his privilege against self-incrimination, no such person shall be compelled to testify, and the consequent immunity from prosecution given, without authorization of the Commission.

The authorizations in either case shall be sought through the office of the General Counsel.

No proceedings under Section 21(c) of the Securities Exchange Act of 1934 for the prosecution of a person who fails, or refuses without just cause, to obey a subpoena of the Commission, shall be initiated without the authorization of the Commission.

25. *TESTIMONY OF WITNESSES TO BE UNCONDITIONAL.* Witnesses should not be permitted to attach conditions to their appearance or testimony in a formal investigation.

Should any witness seek to attach a condition to his appearance or testimony the situation shall be regarded as one in which the witness refuses to appear or testify and the facts shall be transmitted to the Commission through the General Counsel's office for instructions or authorization to apply to a United States Court for an order to require such witness to testify.

In this connection see "In the Matter of the Application of the Securities and Exchange Commission for an order to compel Thomas Bracken, et al to appear and testify, C.C.A. 2d Circuit, 84 F. (2d) 316.

The court in this case decided that a witness had no right to decline to testify because of the refusal of the Commission's counsel to agree to furnish witness with a copy of his testimony at a formal investigation.

26. *WITNESSES' REQUESTS TO BE FURNISHED WITH TRANSCRIPTS.* Persons appearing at investigations conducted by officers of the Commission have no legal right to receive a copy of the transcript of their testimony at such investigations. However, authority so to do may be granted by the Commission, but no officer shall furnish a copy of the transcript to such person or permit the reporter to furnish such copy without first obtaining such authorization.

This provision does not preclude the giving to persons interviewed who sign or make affidavit to narrative statements, copies of their statements in proper cases.

see next page

Excerpt from Commission Minutes

February 11, 1941
2:30 P.M.

INSTRUCTIONS RE WITNESSES' REQUESTS FOR TRANSCRIPTS OF THEIR TESTIMONY

The New York Regional Administrator and Assistant General Counsel Kline were present.

The New York Regional Administrator referred to Instruction 26 of the Enforcement Manual, which reads as follows:

"26. WITNESSES' REQUESTS TO BE FURNISHED WITH TRANSCRIPTS. Persons appearing at investigations conducted by officers of the Commission have no legal right to receive a copy of the transcript of their testimony at such investigations. However, authority so to do may be granted by the Commission, but no officer shall furnish a copy of the transcript to such person or permit the reporter to furnish such copy without first obtaining such authorization.

"This provision does not preclude the giving to persons interviewed who sign or make affidavit to narrative statements, copies of their statements in proper cases."

In order to clarify its policy in respect of witnesses' requests for copies of the transcripts of their testimony taken in private investigations conducted by officers of the Commission, the Commission expressed its policy to be as follows:

(1) That requests must be made in writing, signed by the witness, and must set forth the reasons for which the request is made;

(2) That the Commission will consider each request on its merits; and, subject to a showing by Commission counsel that the request in a particular case should not be honored, the Commission will continue to follow its liberal practice with respect thereto;

(3) That there will be a slight presumption that it is unwise to grant such a request before the investigation is closed;

(4) That in all cases the views of the Regional Office in charge of the investigation shall be obtained before presentation of the request to the Commission for consideration.

Orval L. DuBois
Recording Secretary

27. *SUBPOENAS DUCES TECUM.* Where, under an order for formal investigation, or where in an adversary proceeding it becomes necessary to issue a subpoena duces tecum, a challenge thereof in court should be anticipated by a proper preparation and service of such subpoena.

Consideration therefore should be given to obtaining the Commission's authority to issue such subpoena and having the Commission "deem" the desired records "relevant and material to the inquiry". Sufficient information should be furnished with the request for such authority to indicate to the Commission the relevancy or materiality of such record.

The following suggestions for preparing such subpoenas are made, which should be followed as far as practicable:

1. The subpoena should describe as carefully and as specifically as possible each individual book or document called for, and should be limited to books or documents containing entries within a specified period of time, or which refer to transactions occurring within a specified period of time. If it is impossible definitely to describe the books or documents, it would be advisable to either informally inquire of the bookkeeper or some responsible officer as to exactly what books there are, or if this information is not volunteered, to subpoena ad test the said bookkeeper or officer, and compel him to so describe them.

   (a) In the case of financial books, ledgers or records, the name of each particular book ledger or record called for should be given, as well as a statement of the subject matter to which such books, ledgers or records refer. In situations where it is impossible to name the particular book, ledger or record, it should be called for by naming the class or category of financial records into which it falls, such class being stated as definitely as possible.

   (b) In the case of correspondence the subpoena should so far as possible specify the dates of the particular letters called for, and should also indicate the names of the senders or addressees. Where the names of individual addressees are unknown, the class of addressees with whom the correspondence took place should be described (for example, "prospective customers"). In calling for correspondence, the subject matter of the letters which are desired should also be stated.

   (c) In the case of contracts, agreements, confirmation slips, deposit slips, cancelled checks, etc., the names of all parties to such instruments and the date thereof should be stated whenever possible. If the names are unavailable, a description of the class of persons within which the parties fall, should be given, and unless the name of the document called for reveals its subject matter, it should be described.

   (d) The subpoena should call for each item or class of items in separate numbered paragraphs.

2. Only such records and documents should be called for as are reasonably believed to be relevant and material to proving facts and conditions, the ascertainment of which is the object of the investigation. If there is doubt as to the materiality of any particular type of documentary evidence, it is safer not to include it. In the event that further investigation discloses the materiality and necessity of obtaining access to such documents, an additional subpoena may be served, which, in the event of contest, could be sustained in court.

3. Avoid any appearance of conducting a "fishing expedition", with which the courts have no sympathy. A general sweeping description of all the books and records of business would in nearly all cases be held invalid, whereas if materiality as to the inquiry exists, a detailed description of each book required would result in a valid subpoena, even though the net effect of the itemized description is to call for all the books and records in the office.

4. Wherever the books, records, etc. of a corporation are necessary, a separate subpoena duces tecum, addressed to the corporation, should always be served upon an officer thereof, notwithstanding the fact that an individual subpoena addressed to the same officer but in his individual capacity may also have been served upon him. The officer's constitutional right to refuse to incriminate himself does not apply to his production of corporate books or records.

A sample description to be contained in a subpoena duces tecum is attached hereto as a guide. Although the degree of definite description which is possible will vary in each case, it is urged that all subpoenas duces tecum be drawn so far as possible in terms approaching definiteness of the attached sample. ****and that you produce at the time and place aforesaid:***

1. All journals and books of original entry of the corporation, commonly designated as journals, cash books, purchase and sales books, and/or stock trading books, containing entries made from _____1933 to_____1935, in respect to transactions occurring from _____1933 to _____1935, and showing receipts and disbursements of said corporation occurring during such period.

2. All journals and books of original entry showing receipts and disbursements of cash by the said Corporation occurring during the period of time from _____1933 to _____1935.

3. All original expense books and vouchers of the abovenamed corporation and all of its officers and employees reflecting the operating expenses, the allocation of same, to whom the same were paid, and for what purposes during the period of time from _____1933 to_____1935.

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* Many of the books and records listed here will be material only if the financial status of the subject is in question. When representations of worth, the payment of dividends improperly, solvency, etc. are involved, such descriptions may be used.

4. All original cancelled checks, bank statements, bank pass-books and duplicate deposit slips of the above-named corporation in and from the Bank and in and from each and every bank carrying on its books an account of the above-named corporations, which will reflect the size and condition of the accounts carried by the above-named corporation with said banks during the period of time from _____ 1933 to _____ 1935.

5. All statements of account between the above-named corporation and _____ and Company, and each and every other business entity conducting the business of brokerage or dealing in securities, with which the above-named corporation carries an account, which will reflect the amount and size of said accounts during the period from _____ 1933 to _____ 1935.

6. A statement of all collateral, including securities held for customers and securities owned by the above-named corporation, and all customers' envelopes and control books of the above-named corporation in respect of customers to whom and for whose account securities were bought or sold by use of the mails or in interstate commerce covering the period from _____ 1933 to _____ 1935.

7. All customers' ledgers or lists, containing the names of customers to whom securities were sold or for whose account securities were bought or sold by the above-named corporation by use of the mails or in interstate commerce from _____ 1933 to _____ 1935.

8. All lists, ledgers or card indexes containing the names and addresses of prospective customers which have been solicited by the above corporation by use of the mails or in interstate commerce to purchase, sell or trade in securities, from _____ 1933 to _____ 1935.

9. All original correspondence or copies thereof between the above-named corporation or its officers acting therefor and John Doe, Richard Roe ***** and any other customers to whom securities were offered for sale or for whose account securities were bought or sold which relate to or contain offers to sell securities, or to buy or sell securities for the account of customers or prospective customers covering the period of time from _____ 1933 to _____ 1935.

10. Copies of all advertising material, circulars, market reports, investment counsel services or other advertisements relating to securities which have been sent by the above-named corporation to prospective customers or purchasers of securities, through the mails or in interstate commerce from _____ 1933 to _____ 1935.

11. The original books containing the minutes of the meeting of the board of directors of the above-named corporation held during the period of time from _____ 1933 to _____ 1935.

12. The stock certificate book and the stock transfer book of the above-named corporation containing entries or records of transactions made or occurring from _____ 1933 to _____ 1935.

28. *SUBPOENAING TELEGRAMS.* Subpoenas duces tecum requiring Telegraph Companies to produce telegrams, issued in the course of investigations under orders pursuant to Section 19(b) and 20(a) of the Securities Act and Sections 21(a) and 21(b) of the Securities Exchange Act, should read in the following manner:

"To produce any and all telegrams, or copies thereof, in its custody, or control, sent or received by X between the dates of _____ and _____, which mention or refer to the Y security or any transaction or proposed transaction therein or any activity or proposed activities in connection therewith."

In any investigation in which telegrams between X and Z have been obtained pursuant to this form of subpoena, there may then be served, if it is deemed necessary, a second subpoena calling for "all telegrams, or copies thereof, in the custody or control of the telegraph company exchanged between X and Z between the dates of _____ and _____."

It may be possible in certain instances to make the description even more specific, and, if so, it is of course advisable to do so. In no event, however, should the description of the telegrams desired to be produced be more general than indicated above.

29. *SUPPORTING SUBPOENA FOR TELEGRAMS.* The Circuit Court of Appeals for the fifth circuit sustained subpoenas duces tecum in substantially the form of the above suggestion in *Newfield* v. *Ryan, et al.* No. 8558; *Newfield* v. *Ryan, et al.* No. 8459; and *Ballentine* v. *Florida Tex Oil Company, et al.* No. 8460, decided July 22, 1937, 91 Fed. (2) 700.

"We agree with appellants," said the Court, "that the subpoenas in themselves are unexceptional; that they are not unduly indefinite; and that they do not constitute unreasonable searches and seizures."

The Court further said, "The subpoena in the Ballentine case was definitely limited to a period of less than three months; those in the Newfield cases to a period of less than one year. The subpoenas in all cases were limited to the persons and corporations under investigation and to the schemes being investigated. In each of the subpoenas attention was called to the subjects under particular investigation. None of the subpoenas could in any sense be regarded as dragnets for fishing expeditions. All of them are well within the specific limits approved in the cases. *Hale* v. *Henkel*, 201 U.S. 43; *Consolidated Rendering Co.* v. *Vermont*, 207 U.S. 541; *Wilson* v. *United States*, 221 U.S. 361; *Wheelin* v. *United States*, 226 U.S. 478; *Brown* v. *United States*, 276 U.S. 134; *McMann* v. *Engel*, 87 Fed. (2d) 379."

It was also held by the Court that a subpoena duces tecum, under such circumstances, constituted a "demand of other lawful authority", under the Federal Communications Act of 1934, 47 U.S.C.A. Sec. 605, which requires and justifies the disclosure of telegraph messages.

30. *SUBPOENAS FOR TELEPHONE CALL SLIPS.* Arrangements have been made that in seeking long distance telephone calls investigators will first check the long distance telephone call slips that will be made available by the telephone companies in order to ascertain exactly the slip or slips that are desired in the investigation. A subpoena duces tecum can then be issued as to such slip or slips and the telephone company will not be required to produce a large number of immaterial slips in order that the ones desired may be checked or established.

In the event a telephone company refuses to make such slips available for such examination the General Counsel shall be advised immediately and instructions will be issued as to the procedure to be followed.

31. *CHALLENGING SUBPOENA DUCES TECUM.* Of possible interest in connection with challenges of subpoena duces tecum is the case of McMann v. Securities and Exchange Commission (C. C. A. 2d Circuit) 87 F. (2d) 377.

In this case the plaintiff sought an injunction to restrain his broker from producing records of his account before an officer of the Commission, in response to a subpoena duces tecum issued under an order for investigation.

The court held that the plaintiff had no standing to object to the subpoenas.

32. *WITNESS FEES AND EXPENSES.* Witnesses subpoenaed to appear at formal investigations or hearings ordered by the Commission are entitled to mileage and witness fees as prescribed by existing law. If they wish to claim such mileage and fees it is necessary that voucher form SE-A-13, provided by the Commission for such cases, be prepared showing in detail the information called for on such form. If the facts as stated on the voucher meet with the approval of the Examiner or other officer who issued the subpoena, the Examiner or other officer should certify the voucher in the space provided thereon for the signature of "Commissioner or Examiner".

If witnesses are subpoenaed to appear in a United States Court in a matter in which the Commission is an interested party, the provisions of title 28, section 808, U.S.C. apply, "In cases where United States are parties, the Marshal shall on the order of the Court to be entered on its minutes, pay the jurors and witnesses all fees to which they appear by such order to be entitled which sum shall be allowed him in the General Accounting Office in his account."

Marshal's expenses incurred in the service of subpoenas issued by Clerks of the United States Courts at the instance of the Commission should not be advanced by Commission's employees, and the Commission's attorneys subpoenaing witnesses for hearings in the United States Courts should see that those witnesses are paid their fees and mileage by the Marshal before such witnesses depart at the conclusion of the hearing.

In the event any difficulty is experienced with any Marshal, the General Counsel shall be notified immediately so that the issuance of instructions to the Marshal may be requested of the Attorney General's office.

Instructions will also be issued by the General Counsel as to the procedure to be followed by the attorney.

When United States Marshals serve subpoenas issued by the Commission for attendance at hearings before examiners or officers of the Commission, the Marshal's office has nothing to do with the payment of witness fees and mileage and any expenses incurred by the Marshal in the service of such subpoenas should be handled as described below:

It is provided in 29 Stat. 180 that "fees of United States Marshals are not required or authorized to be charged against the United States." Therefore, while it is permissible for the Commission to pay the expenses incurred by the Marshal in the service of Commission subpoenas returnable before Commission officers, it is not required to pay the Marshal a fee for such service.

The expenses of the Marshal in such cases should be paid in accordance with the following quoted paragraph of the Standardized Government Travel Regulations:

"Par. 77. Method of Payment -- Charges for such services should not be paid by the traveler, but the account should be approved by the traveler, certified by the payee, and forwarded to the administrative official for approval and payment to be made direct to the person who rendered the service. The account must show the dates of service, and such other particulars as may

be needed for a clear understanding of the charge. If Government voucher form is not used, care should be taken that each account is submitted in duplicate, the original of which shall bear the approval of the traveler and the following certificate by the payee: 'I certify that the foregoing account is correct and just and that payment therefor has not been received.' (see par. 78)".

"Par. 78. Cash Payment -- Where cash payment is demanded for such services, reimbursement for the charges actually paid may be allowed. Reimbursement expense account must be supported by receipts showing the quantity, unit and unit price and statement that cash payment was demanded."

33. *REPORTING HEARINGS AND INVESTIGATIONS.* The Commission annually makes a contract for stenographic reporting service covering public and private hearings, investigations and examinations in Washington and in the field.

The contract reporter designates representatives throughout the country to handle this service.

The name of the current reporter and the list of his designated representatives are available at regional offices or at the office of the Chief of the Service Section at Washington. All employees having occasion to use this service should obtain a copy of the list of reporters and keep it corrected as changes are made therein.

Such reporters are to be used only for Commission hearings, investigations and examinations. When it is necessary to use a reporter for a case in the federal court arrangements should be made with the United States Attorney to furnish the reporter as the charge for such service is payable by the Department of Justice appropriation. In the event such arrangements fail the matter should be taken up with the office of the Secretary and appropriate instructions will be issued.

For reporting services in Washington arrangements should be made through the Hearing Room Clerk. When a proceeding is to be held in the field at a place where no reporter is listed, the nearest representative of the contract reporter should be contacted to report the proceedings. If the designated reporter for a particular locality cannot take care of the matter Mr. H. P. Avery, Chief, Service Section of the Commission, should be notified in order that instructions regarding the securing of reporting service may be furnished.

If the exigencies of the situation make this procedure impracticable any suitable reporter may be procured. In such case the contract reporter pays such person for the service and the rate agreed upon should not exceed that fixed in the annual contract.

Information relative to such rates is included in the list of designated reporters.

At the beginning of any private hearing or investigation if a reporter is used it should be made clear to the reporter that the hearing is confidential and that all stenographic notes in connection therewith must be turned over to the officer conducting the hearing and that without specific approval of the Commission copies of the transcript may not be sold to anyone other than the Commission, except as hereinafter provided.

It should be borne in mind that except in emergencies, at least three days' notice should be given to the reporter of the time and place of the proposed hearing or investigation, and in emergencies all possible notice should be given.

When the transcript of any proceeding is delivered to any officer of the Commission in the field, it is imperative that a receipt for such transcript be signed by the officer of the Commission receiving the transcript and handed over to the reporter or other person delivering the transcript, in order that it may be returned to the Commission through the contract reporter. In addition to the number of pages and the number of copies of the transcript, the receipt should indicate whether the proceeding was public or private.

The contract reporters should not be employed for ordinary stenographic work as such work is not covered by the contract.

34. *AVAILABILITY OF TRANSCRIPT OF RECORD OF HEARING AND INVESTIGATION.* The Commission has enunciated the following policy with respect to the types of cases in which copies of the transcript of record of hearings and investigations may be sold to the general public.

INVESTIGATIONS: -- In all preliminary investigation cases the stenographic reporters on the payroll of the Commission will be used if available. In the New York regional office and in the Washington Office the reporters on the payroll of the Commission should be able to take the testimony on most of these hearings. If it becomes necessary to use the Commission's contract reporting firm in these or other offices of the Commission, the reporter should be informed at the time that he is notified of the proceeding that no copies of the testimony may be sold, and that all stenographic notes and copies of the testimony must be turned over to the officer designated to conduct the investigation.

BROKER AND DEALER HEARINGS: -- Unless otherwise directed by the Commission, all hearings in connection with the registration of Brokers and Dealers, pursuant to the rules for the regulation of over-the-counter markets, shall be treated as private hearings and no copies of the transcript of hearing shall be available for sale to the general public. Should the party concerned, or the representative of same, request a copy of the transcript, it may be sold to him at the rate of 25 cents per page, provided the hearings are taken by reporters on the payroll of the Commission. If the hearings are taken by the official contract reporters, the rates to be charged by the official reporter for copies to be sold to the parties involved shall not be in excess of the rates fixed by contract between the Commission and the reporter. As in preliminary investigations, if the contract reporting firm is used, the reporter should be informed at the time that he is notified of the proceedings that no copies of the testimony may be sold to the general public and that all stenographic notes and copies of testimony must be turned over to the officer designated to conduct the hearing.

HEARINGS ON APPLICATIONS FOR CONFIDENTIAL TREATMENT OF MATERIAL: -- All hearings conducted in connection with applications for confidential treatment of material filed with the Commission shall be private and confidential. However, transcripts of such hearings reported by a staff reporter may be furnished to the registrant or its representative upon the payment of twenty-five cents per page. Copies of these transcripts prepared by the contract reporting firm or its representatives may be sold to registrant or its representative only upon specific approval of the Commission.

PUBLIC HEARINGS: -- In all public hearings the use of the official contract reporter is preferred. The reporter should be given all possible advance notice of the hearings and informed at that time that it is a public hearing. Transcripts of record of public hearings may be sold to the general public by the contract reporters at rates not in excess of those fixed by contract between the Commission and the reporter. If requests are received for copies of transcripts of public hearings the writer should be referred to the contract reporting firm.

COMMISSION RECORDS INTRODUCED IN EVIDENCE: -- At times in the past the original or duplicate of registration statements, applications for exemption, and other filings with the Commission have been introduced in evidence at Commission hearings. In the event that review of the Commission's action is taken on any such case the entire record has to be certified and it will be necessary to secure a Court order to get the statement back. To obviate such a situation, in all cases stipulations should be made with the respondent to the effect that a certified photostat copy of the statement may be substituted at any time for the statement, application, or document admitted in evidence.

35. *COMPLETION OF INVESTIGATION.* Upon the completion of an investigation a full and complete report in quadruplicate immediately shall be prepared for and filed with the Commission. The report shall be accompanied by a letter of transmittal in which shall be included a recommendation as to the action on the part of the Commission which it is believed the evidence developed warrants, such as adversary proceedings, injunction proceedings, a reference to the Attorney General for the institution of criminal prosecution or a reference to the postal authorities or other enforcement agency.

In determining the action which should be taken on the recommendation and in supporting such course it is necessary to analyze the evidence in great detail and to prepare Bills of Complaint or other charges, or to cooperate with the Department of Justice in preparing an indictment. This requires an organization of evidence in most respects as detailed as that required in anticipation of trial.

The report should therefore present a statement of the case, a detailed analysis of supporting proof and a discussion of jurisdictional requirements, venue and other similar matters.

In order to facilitate the consideration of a case, the form below is suggested for the report.

It is not intended that this outline be rigid and forced to meet the varying requirements of each case but should be a guide with due regard to the facts and circumstances developed by the investigation.

Nor is it intended that every detail suggested in this form be covered, but the investigator *will be expected to discriminate* in the essential facts necessary to establish the elements of the particular violation of the law which he is investigating.

Where time is important, as in injunctive cases, a brief summary of the facts developed by the investigation may be conveyed to the General Counsel by telephone, telegraph or mail, as the exigencies of the matter dictate, and then preparation of the report delayed as the circumstances may require.

It should be noted that the attached outline is based on a hypothetical violation of Section 17(a) of the Securities Act. It is of course appreciated that many cases may be prepared which are not based on any violation of this section.

Item 1 of the suggested outline is a Table of Contents. It is not felt that such a Table is necessary unless the report is voluminous.

36. *SUGGESTED FORM OF REPORT.*

REPORT OF INVESTIGATION

I. TABLE OF CONTENTS

II. HISTORY OF INVESTIGATION

1. Title of Case

2. Security Involved

3. Period Under Review

4. Investigation Conducted By

5. Character of Case - (A short concise statement as to the type of the case, and the sections of the law violated)

III. PERSONS (AND COMPANIES) UNDER INVESTIGATION

1. Name and Aliases

2. Home and Business Addresses

3. Criminal Record (if known)

4. Positions Held or Official Connections

5. Benefits Received

6. Financial Interests

7. General Participation of Individual (or Company)

(If individual, state: whether he approved or signed financial statements, circulars, prospectuses; connection with declaration of dividends; knowledge of condition of company; participation in maintenance of market for securities; participation in sales promotion; whether he acted as treasurer or trustee of individual or company's funds; control of bank accounts; negotiations with underwriters or assistance to promoters or underwriters; or any other facts showing participation of person or company under investigation.)

IV. GENERAL STATEMENT OF FACTS

1. Security Offered

2. Practices Engaged In

3. Manner of Distribution

4. Date and Place of Incorporation of Dealer or Brokerage Companies (if recommended as defendants).

5. Principal Offices

6. Capital Structure of Issuer

7. Policies Dictated by

8. Type of Business Conducted by Issuer

9. General Financial Condition of Issuer at Beginning of Period under Review and at End of Period

10. Type of Business Conducted by Persons or Companies under investigation (if other than issuer).

    (Whether brokerage, underwriters, management service, sales promotion, or investment counsel.)

11. General Income and Expense of Person or Company under Investigation

12. Profit or Income of Persons or Companies for period Under Review (Both money and securities)

13. (In case of a widely used prospectus, any peculiar type of securities, or any important contract or agreement, or other document which stands out as particularly important and upon which emphasis is desired, a copy or photostat should be attached to this general statement.)

V. REPRESENTATIONS AND OMISSIONS TO STATE

1. Representations

(A) Manner in Which Representation was Made.

(a) Oral

(Cross reference to names of purchasers and generally the names of persons making the representation.)

(b) Written

(Whether contained in sales documents, prospectuses, pamphlets and general letters. Cross reference with names of purchasers and persons making the representations.)

(B) Proof of Falsity

(Give a short concise statement of actual facts, and cross reference to the supporting witness, together with documents, which go to establish the falsity of representations made.)

(Where omissions to state are alleged, the statements that are made misleading by the omissions should be specifically set forth in the same manner.)

VI. INVESTOR WITNESSES

1. Name and Address

(At this point give a running story of the account such as: security purchased; date; amount paid; date delivered; from purchased; general business transactions; general representations made; how they were made; and by whom made.)

2. Misrepresentations and Omissions

(Here insert numbers as given under heading "Representations and omissions to state".)

3. Jurisdiction

(A) Letters Mailed or Received

(a) Date

(b) By Whom Signed

(c) Where Postmarked

(d) Brief Summary of Contents.

(Also state whether envelope is available and cross reference to the supporting witness who can identify the letter or document and who can testify to facts relating to the writing, mailing and connection with the defendants.)

(B) Use of Instrument of Interstate Commerce

(Set up same detail as under 3(A) above.)

(After each letter given or instrument of commerce used, cross reference to testimony of supporting witness who can establish either the mailing, writing or signature, or who can establish the use of an instrument of commerce.)

4. Other Documents Identified by the Witness

(a) Prospectus

(b) Sales Letter

(c) Receipt for Money Paid (or other miscellaneous documents)

VII. SUPPORTING WITNESSES

1. Name and Address

(A general statement of the testimony of witness, including the facts relating to the association with persons under investigation, scope of duties of witness, and admissions made to him by defendants.)

2. Documents Which Can Be Identified

(a) Books of Issuer

(b) Books of Respondent

(c) Prospectus

(d) Sales Letter

(e) Financial Statements

(f) Miscellaneous Documents, Letters or Reports

VIII. OTHER VIOLATIONS

(If there are violations in addition to Section 17 of the Securities Act, such as Sections 5 or 24 of the Securities Act of Sections 9 or 15 of the Exchange Act, additional facts may be set forth under this heading.)

IX. VENUE

(A brief statement should be given concerning the proper venue in the case, together with the reasons for recommending the particular venue. Under this section a number of overt acts should be shown, together with the proof of same in order that these facts may be considered in connection with a possible conspiracy allegation or count in any bill or indictments.)

X. DOCUMENTARY MATERIAL

(Under this title describe and set up each exhibit obtained during the course of the investigation. Opposite the exhibit give the number assigned to it during the investigation. Accounting reports, particularly those relating to a trading investigation, should be attached to this report. In case of books, records, documents or letters of individuals or companies under investigation, additional information should be given, i.e. it should be stated from whom these documents were obtained, in what manner they were obtained, in whose custody they are at the time of the writing of the report, together with any other circumstances relating to the acquisition of them.)

(NOTE: AS FAR AS POSSIBLE STATEMENTS CONCERNING PROOF SHOULD BE ESTABLISHED EITHER BY REFERRING TO AN EXHIBIT OR TO THE TESTIMONY OF A WITNESS.)

37. *BILLS FOR INJUNCTION.* A bill shall be filed for an injunction only if such filing is authorized by the Commission and the form of the Bill of Complaint is approved by the General Counsel.

A Bill of Complaint must not be filed until a draft thereof has been submitted to and approved by the General Counsel. In an emergency where for special reasons it is not feasible to submit a draft, the General Counsel may permit a pleading to be filed without his prior approval as to form but no legal proceedings of any kind shall be instituted without prior authorization by the Commission.

Such drafts should also be accompanied by copies of the moving papers for the preliminary injunction including copies of the affidavits in support thereof, and, if practicable, the exhibits.

38. *COMMISSION CASES IN FEDERAL COURTS.* In order that draft bills of complaint submitted to this office for approval may be examined in the light of the available evidence, all such drafts submitted should be accompanied by a statement of the evidence intended to support them, unless a report hereinbefore suggested in Paragraph 35 has been made.

The statement of evidence should include the following items:

(1) The names of all the proposed defendants. The exact name of corporate defendants and the State of incorporation must be included. All the partners in co-partnership defendants must be named. If any of the defendants were doing business under a trade name, this should be stated. Any alias of any of the defendants should be given.

(2) The residences of all the defendants. If the venue is to be laid in a district in which the defendants do not reside, the statement should include such other facts as are necessary to support the venue.

(3) The jurisdictional facts upon which the bill is predicated, stating in detail the circumstances in which the mails or the means and instruments of interstate commerce, or the facilities of a national securities exchange were used or whether the defendant is a member of a national securities exchange.

(4) A summary statement of the acts and practices of the defendants upon which the bill is predicated, disclosing the inter-relationship among the defendants in detail. If violation of Section 5 of the Securities Act is charged, give such particulars about the transaction, as dates, amounts, names and addresses of offerees or purchasers, as to all offers or sales, in order that it may be determined that no exemption from registration is available. If violation of Section 17 of the Securities Act is charged, describe the scheme, artifice or course of business relied upon as fraudulent. Where the bill is based on misrepresentations by the defendant, state the misrepresentations made, the persons to whom they were made and the respect in which they were false to the knowledge of the defendant. If violation of Section 9 of the Securities Exchange Act is charged, furnish such facts as will establish a violation of specific subsections. In every type of case the time when the acts or misrepresentations complained of occurred should be fixed as closely as possible.

(5) The names and addresses of available witnesses, together with a concise statement of the facts as to which each witness is testimonially qualified.

To the end that the General Counsel may be fully and immediately informed as to matters in court it is desired that draft copies of all pleadings with which cases are to be instituted be forwarded to his office at least a week in advance of their filing.

If at all possible, it is also desirable that copies of indictments to be submitted to grand juries be forwarded to this office at the earliest time practicable, and before the return by the grand jury. Every effort should be made to have such copies in Washington at least a week in advance of the time of the return by the grand jury.

The General Counsel should also be advised immediately in the event a grand jury returns a secret indictment. Advice should also be received immediately upon such an indictment becoming public.

If any changes have been made in the draft previously submitted or if there has been any delay, a telegram must be sent to the General Counsel approximately twenty-four hours before the bill or other pleading is to be filed or the indictment to be returned advising the General Counsel of that fact and confirming the correctness of the draft in his possession or setting forth any changes which have been made therein.

When a decision is handed down or a verdict has been reached, a statement as to the result should be communicated to Washington immediately by wire or telephone as the importance of the matter suggests.

Where convicted defendants are sentenced immediately upon the verdict, the sentences should be included in the telegram advising of the verdict. When sentence is deferred, this office should be advised not less than twenty-four hours in advance of the date on which the sentence is to be handed down and, of course, advice as to the sentence should be immediately transmitted.

At the earliest practical moment the General Counsel should be advised of the full names of the attorneys representing the Commission and, if the Department of Justice is involved in the case, the full names of the representatives of that Department who may be in charge. He should also have the full names of the Judge, the situs of his Court and the District in which the proceedings are being held.

In many instances and particularly in the case of indictments the original pleadings are verbose and complicated. Under these circumstances when the original pleading is transmitted to Washington, it should be accompanied by a short outline statement of the crucial facts and circumstances involved. This statement should follow and contain quotations from the transmitted document.

Whenever a bill may be taken pro confesso, such action should be taken without delay, and at the expiration of the required thirty days, application should be made for a final decree.

When a final decree of injunction is obtained, attorneys shall see that a certified copy of such final decree is served upon each defendant in the suit either by the United States Marshal or in the manner prescribed by the practice in the particular court.

In cases when the investigation by the Commission results in a criminal trial followed by a conviction and a penitentiary sentence of more than a year, the prisoner may be entitled to seek parole after having served a portion of his sentence. The parole board in these cases asks the Commission

for an expression before acting on such applications. Due to changes in the Commission personnel, the voluminous files in such cases and because such applications often occur several years after the termination of the case, it is not expedient to prepare a report for the parole board de novo at the time its request is made. Accordingly, in all cases when a sentence of more than a year is handed down, the attorney in charge of the case in the regional office will thereupon prepare a "parole report" to be submitted in triplicate. This report will be kept in the Washington office for submission to the Parole Board when a request therefor is received. Such a report should contain the type of information which is not admissible in evidence at the trial, but which will give the Board the background of the prisoner and the crime. Its purpose is to aid the parole board to determine whether the crime and its circumstances were of such nature as to warrant the extension of parole to the prisoner. It sometimes happens that our regional offices prepare reports for the probation officer after conviction and before sentence. The parole board desires the same kind of report, and where a report has been made to the probation officer, three copies of that report may be submitted in compliance with this provision.

39. *TRIAL DOCKET REPORT.* In order to maintain current trial dockets in court proceedings, the attorney in charge of the case shall file in the office of the General Counsel, in duplicate, a memorandum on the appropriate form, "yellow" or "salmon", setting forth any action taken in such proceedings. The memorandum should be filed immediately following the pleading, order, hearing, or other matter and should include all dates, names, and other items of information necessary to make the appropriate entry on the trial docket. Dates when future pleadings must be filed, hearings held, appeals taken, briefs filed, et cetera, should also be indicated.

In most instances, the information called for in the memorandum slip can be furnished merely by writing in opposite the action referred to the date on which such action was taken. When it becomes necessary to add to the form of memorandum provided for civil and criminal cases in order to report action for which no provision has been made in the memorandum, it is important that every appropriate item called for on the form be shown in full. This includes date of filing, indictment numbers, et cetera.

It is also required that two copies of all pleadings filed in court be forwarded to the Trial Docket. These copies should show signatures and court docket numbers. They should be attached to the memoranda reporting their filing.

Occasion is taken to stress certain points with respect to these forms.

1. Each step should be reported as soon as it occurs. It is not necessary to repeat previous action on any subsequent memoranda.

2. The Trial Docket is charged with the duty of following all court proceedings to prevent any failure to make proper action within the required time limits. It is also required to maintain a calendar of all court actions scheduled for every case in which the Commission appears as a party or as intervener. It is therefore essential that this office be informed as soon as any date is set for a hearing, for briefs or pleadings to be filed, by any party to the proceedings, et cetera.

3. Since Trial Docket is frequently called upon for statistical information regarding the number of active cases, their status, et cetera, it is essential that the information received from the regional offices be current and accurate.

4. Since different jurisdictions have different provisions regarding the dismissal of cases for want of prosecution, copies of the rules of the various courts within the territory covered by each regional office should be sent to Trial Docket and a periodic check made of all cases on which action has not been taken during the allotted time.

5. The transmittal of any case to the Attorney General or to any United States Attorney should be reported. In reporting criminal cases it is essential to include indictment numbers. If more than one indictment is brought in the same case, it is important to report the ultimate disposition of each indictment.

6. Emphasis should be placed on the importance of submitting two conformed copies of all pleadings, orders, et cetera, filed or entered in court proceedings. This applies to all papers filed by all parties to the case in both civil and criminal cases and not merely to papers filed by the Commission. This instruction, of course, is applicable only to papers which are actually entered in proceedings, and is not applicable to tentative drafts, et cetera.

7. Copies of forms sent to Washington are to be kept in the field office file. An appropriate notation of the contents of such form should be made on the assignment card.

40. *TRAVEL EXPENSES.* Official travel performed by officers and employees of this Commission will be in accordance with the Standardized Government Travel Regulations, as amended, issued for the guidance of civilian officials and employees of the several executive departments and independent establishments. Persons having occasion to travel should obtain a copy of these regulations and study them carefully.

41. *LOST CHECKS.* Government checks lost by Commission employees should be reported promptly in writing to the Budget and Accounting Section where the necessary steps will be taken to have payment stopped. Information should be furnished stating whether the check was not received or was lost or destroyed after receipt. If lost after receipt, the circumstances surrounding the loss should be given stating whether the check had been lost by the payee. Where stoppage of payment is necessary, this will be arranged by the Budget and Accounting Section. The Treasurer of the United States will send an owner bond to be executed for the issuance of a duplicate check after the expiration of thirty days from the date of original check as prescribed by law. If lost check is found before receipt of duplicate, the owner should notify the Budget and Accounting Section at once by wire or mail, and after the stop payment order has been lifted the original check may be cashed.

42. *ANNUAL AND SICK LEAVE.* Annual and sick leave regulations of the Commission are covered in Office Memorandum No. 49. Questions regarding the interpretations of these regulations should be referred to the Secretary for decision.

43. *FIELD PURCHASES.* All materials, supplies and equipment shall be requisitioned from the Washington Office except (1) where prior approval to purchase has been given by the Secretary of the Commission, (2) in the case of inexpensive expendable articles where the need is urgent and time will not permit delivery from Washington, and (3) in cases where the items are inexpensive and heavy and it is clearly evident that the shipping cost would make it more expensive to send from Washington, D. C.

Where it is necessary to make field purchases of material, supplies, equipment, and services, the following instructions should be observed:

(1) Three or more competitive bids shall be obtained if the proposed purchase will exceed $50. Except in emergency cases, all bids received must be submitted to the Secretary of the Commission with recommendations for acceptance. In emergencies, where delay would be detrimental to the work of the Commission, the lowest bid may be accepted immediately and the purchase made. In these instances, all bids received should be transmitted to the Secretary with the voucher covering the payment.

(2) While the law does not require competitive bids for purchases not exceeding $50, the Regional Administrator nevertheless has the responsibility of making a reasonable price inquiry among possible competitors to secure the lowest price practicable.

44. *SHIPMENTS. Freight* and *express* shipments should be made on Government bill of lading when the employee has this form available. A supply of the forms properly numbered may be obtained from the Washington Office. In cases where the bill of lading form is not available, the employee should have the shipment sent collect if he is sending it to one of the Commission's regional offices or to the Washington Office. In other cases, he may pay the charges and enter a claim properly supported by a receipt in his reimbursement voucher. Express service should be used only when the postal service cannot be more economically employed and the freight service will not answer the requirements. The value of any materials shipped by express should not be placed at more than $50.

Parcel post should be used in all cases for supplies and materials where a package does not weigh more than four pounds, in which case it may be shipped free under the Government penalty privilege. Also, when plainly indicated on the wrapper, packages containing official Government printed or written matter may be shipped without charge under the penalty privilege by first-class mail not to exceed seventy pounds in weight. If necessary, postage stamps for use on packages weighing more than four pounds, may be purchased locally and the cost thereof included in the expense account of the officer making the purchase. The charge must be supported by a receipt indicating the number and denomination of the stamps purchased and the total amount paid.

45. *PHOTOCOPIES.* The Washington Office has complete equipment economically to make photocopies and field employees should submit material to that office to be photocopied when practicable to do so. In emergencies, however, photocopies may be ordered in the field. In these cases, the firm doing the work should submit a certified bill containing an itemization of the charges, i.e., the number of copies furnished, the unit price and the total cost on Standard Form 1034, containing the same itemization, to the Budget and Accounting Section for payment. The bill or voucher should bear an endorsement by the officer ordering the work to the effect that the material was received in good condition, if such is the case. If the firm demands payment at the time the work is done, the traveller may pay for same and make claim for reimbursement in his expense account, which should be supported by a receipt itemized as indicated above.

46. *DUPLICATING WORK.* The requirements of the field personnel for mimeographing, multigraphing, and other duplicating work should be submitted to the Secretary of the Commission for attention. The Washington Office is completely equipped to handle this type of work expeditiously and special attention will be given to urgent requests from the Commission's employees in the field.

47. *PRINTING AND BINDING.* There is appropriated annually a limited amount of funds which may be used for printing and binding work of the Commission. The law requires that "all printing, binding, * * * for every independent office and establishment of the Government shall be done at the Government Printing Office, except such classes of work as shall be deemed by the Joint Committee on Printing to be urgent or necessary to be done elsewhere than in the District of Columbia for the exclusive use of any field service outside of the said District." (March 1, 1919, c. 86, Sec. 11, 40 Stat. 1270). If the time element precludes the transmission of briefs, transcripts of record, stipulations, etc., to Washington, D.C. for printing at the Government Printing Office, the printing thereof is then considered as emergency work, and, upon approval of the Secretary as to the availability of funds, may be done in the field. The cost of the printing should be billed to the Commission in a manner similar to that contained in par. 45, Photocopies. The bill must be supported by a statement from the responsible officer in the field under whose authority such printing is purchased that in his opinion such work was urgent or necessary to have done elsewhere than in the District of Columbia for the exclusive use of the field service.

In addition to the number of copies required by the Regional Administrator or other official for his own use and the use of the court, 150 copies should be sent to the office of the General Counsel in Washington.

48. *RENTAL OF TEMPORARY OFFICE.* When an officer of the Commission is traveling in the field and an urgent need for an office or hearing room for a few days develops, the Postmaster, the local Federal Business Association, or the custodian of any Federal building in the city or town should be contacted to ascertain whether free space is available in any Federally-owned or rented building. If no room is available from any Government organization and the space will be required for only a few days, it will be permissible for the employee to make reasonable price inquiries and rent the cheapest suitable space available, having the owner submit a Standard Form 1034 voucher claiming payment therefor. In these cases, it is frequently possible to secure a meeting room without extra charge from the hotel at which the employee is registered.

In all cases where office space will be required for a longer period than that stated above, the facts should be forwarded to the Secretary of the Commission and detailed procedure will be furnished concerning the proper steps to take to enter into an informal agreement or a formal lease as may be necessary.

INVESTIGATIVE PROVISIONS

INVESTIGATIVE PROVISIONS

INVESTIGATIONS UNDER THE SECURITIES ACT OF 1933

Section 5

The provisions of Section 5 of the Securities Act of 1933 are as follows:

"Section 5(a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly--

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

(b) It shall be unlawful for any person, directly or indirectly--

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to any security registered under this title, unless such prospectus meets the requirements of Section 10; or

(2) to carry or to cause to be carried through the mails or in interstate commerce any such security for the purpose of sale or for delivery after sale, unless accompanied by or preceded by a prospectus that meets the requirements of Section 10."

There are four different offenses covered by this section. In any investigation of these offenses it is necessary to obtain evidence which positively supports each element of the crime.

The elements of these offenses are:

Section 5(a)(1)

ONE: That no registration statement was in effect as to a security.

TWO: That some means or instrument of transportation or communication in interstate commerce or the mails were used to sell or to offer to buy such security through the use of a prospectus or in any other manner.

An investigation of this offense must establish that a search of the records of the Securities and Exchange Commission was made and revealed that no registration statement was in effect at the time the effort to sell the security was made.

The employee of the Commission who has searched the records of the Commission for this purpose should be named in the report.

Evidence should then establish that some means of interstate transportation or communication or the mails were used to sell the security.

The use of the telephone, telegraph, radio, railroad freight or express, automobile freight or express, private automobile transportation, air line freight or express, private airplane transportation, the use of boat lines, or private messenger or carrying service from one state to another state should be shown.

Or any use of the mails, whether interstate or intrastate, will satisfy the second element of this violation.

In the investigation the various agencies suggested above may be checked to determine whether they were used.

It is also suggested that the examination of the books and records of a subject, by an accountant or other investigator may furnish some lead as to evidence supporting this element of the offense.

Telegraph or telephone messages may be shown to have been efforts to sell as may be radio broadcasts. Other instrumentalities checked may reveal that their use involved an effort to sell.

Evidence should be developed by interviews with persons approached or solicited by the subject as to the effort to sell such security.

Full information should also be obtained as to the prospectus or other method used in the solicitation.

Section 5(a)(2)

ONE: That no registration was in effect as to a security.

TWO: That the security was carried through the mails or in interstate commerce.

THREE: That the security was so carried for the purpose of sale or for delivery after sale.

An investigation hereunder should also establish in the manner outlined above that no registration statement was in effect at the time the security was carried through the mails or in interstate commerce.

The various instrumentalities of interstate commerce should also be checked to sustain this element of the offense or proof of the use of the mails in the carriage of such security should be obtained.

Statements from persons to whom such securities were sold or delivered should include the means by which such sales or deliveries were accomplished in order that further inquiry can be made to establish independently of such witnesses the use of the mails or instrumentalities of interstate commerce.

Where interstate commerce is involved the agency which was used should be contacted to develop evidence in its possession relative to the carriage of such securities.

Proof should be obtained showing that such carriage was for the purpose of sale or delivery after sale.

Section 5(b)(1)

ONE: That some means or instrument of transportation or communication in interstate commerce or the mails were used.

TWO: That a prospectus was carried or transmitted by such means.

THREE: That such prospectus related to a security registered under title 1 of the Securities Act of 1933.

FOUR: That such prospectus did not meet the requirements of Section 10 of such Act.

This section applies to a security registered under the Act and this fact should be shown specifically by the investigation.

Detailed evidence should be obtained showing the manner in which the prospectus fails to meet the requirements of Section 10.

Evidence as to the use of the mails or interstate commerce should be obtained as suggested under Section 5(a)(1).

Section 5(b)(2)

ONE: That a security was carried through the mails or in interstate commerce.

TWO: That such security was so carried for the purpose of sale, or delivery after sale.

THREE: That such security was not accompanied or preceded by a prospectus meeting the requirements of Section 10.

This section applies to a registered security and registration should be established by the investigation.

The failure to forward with a prospectus the security or before the transmission of the security, should be definitely established.

If a prospectus was used, the investigation should show in what manner it failed to meet the requirements of Section 10.

EXEMPTIONS

Careful consideration should be given to the provisions of Sections 3 and 4 and the regulations issued thereunder to determine, before investigation if possible, whether the particular security or transaction could be exempt from registration.

If there is any doubt as to the status of the security the initial investigative action should be to determine definitely whether the security or transaction is exempted under the provisions of Sections 3 or 4 or the Commission's regulations.

The facts should then be presented to the Regional Administrator for determination as to whether an exemption applies.

Section 17

The provisions of Section 17 of the Securities Act are as follows:

"Sec. 17(a) It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any ommission to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

(c) The exemption provided in Section 3 shall not apply to the provisions of this section."

There are four different offenses covered by this section.

The elements which must be established by positive evidence to support a violation of any of the provisions of this section, and which should be covered in an investigation follow:

Section 17(a)(1)

ONE: That there was a sale of a security.

TWO: That some means or instrument of transportation or communication in interstate commerce, or the mails were used in the sale.

THREE: That some device, scheme or artifice to defraud was employed in such sale.

It should be noted that the exemptions provided in Sections 3 and 4 of the Act, which apply to Section 5 cases, do not apply to matters falling under Section 17.

The term "sale" used in this section should be interpreted in the light of Section 2(3) of the Act which defines the term "sale", "sell", "offer to sell", or "offer for sale" to include every contract of sale or disposition of, attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value.

It does not however, under the terms of Section 2(e) include preliminary negotiations or agreements between an issuer and an underwriter.

Therefore the element of sale is supported by evidence of attempts to sell, and completed sales, while desirable to be shown, are not necessary to sustain the offense.

Suggestions shown above as to proof of the use of the mails or the instrumentalities of interstate commerce apply to Section 17 as well.

As to the third element the character of the device, scheme or artifice to defraud may be as varied as the imaginations may conjure. This phraseology is so similar to that of Section 215 of the criminal code relative to the use of the mails to defraud that an outline of this offense is provided below in the thought that court decisions interpreting that offense may be applicable to Section 17, in the absence of wide interpretation of Section 17, by the courts.

Section 17(a)(2)

ONE: That there was a sale of a security.

TWO: That some means or instrument of transportation or communication of interstate commerce or the mails were used in the sale.

THREE: That in such sale money or property was obtained by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in the light of circumstances under which they were made not misleading.

Section 17(a)(3)

ONE: That there was a sale of a security.

TWO: That some means or instrument of transportation or communication of interstate commerce or the mails were used in the sale.

THREE: That the subject engaged in a transaction, practice or course of business which operates as a fraud or deceit upon the purchaser.

Section 17(b)

ONE: That some means or instrument of transportation or communication in interstate commerce, or the mails were used.

TWO: That there was thereby published or circulated, a notice, circular, advertisement, newspaper, article, letter, investment service, or a communication describing a security but not purporting to offer such security for sale.

THREE: That the person so publishing or circulating such material received or will receive a consideration for such publication or circulation, from an issuer, underwriter or dealer.

FOUR: That such person failed to fully disclose such consideration and the amount thereof.

COURT DECISIONS

(These Decisions are Suggested as Bearing on Sec. 5 and Sec. 17.)

In *Securities and Exchange Commission* v. *Boise Petroleum Corporation, et al.*, Equity No. 1974, the U. S. District for Idaho held that the use of the mails intrastate constituted a violation of this section saying, "Congress has power to regulate the use of the mails both intrastate and interstate."

With respect to the admissibility of telephone calls the Circuit Court of Appeals for the First Circuit, in *Jarvis* v. *U. S.*, 90 F.(2d) 243, said, "The law is now well settled with respect to telephone calls, that if the person testifying does not recognize the voice, the surrounding circumstances may show sufficient probability that the person talking at the other end was one whose statements would be admissible to warrant admitting the conversation. *Andrews* v. *U. S.*, 78 F.(2d) 274; *American British Corp.* v. *New Idria Co.*, 293 Fed. 509; *General Hospital* v. *New Haven Rendering Company*, 65 Atl. 1065; *Van Riper* v. *U. S.* 13 F.(2d) 961. The circumstances surrounding the incident made it altogether probable that the person talking to the witness over the telephone was connected with Gibbs & Company as he said he was, and justified the admission of the testimony."

In *U. S.* v. *Kopald, Quinn and Company*, criminal No. 14725, the U. S. District Court for the Northern District of Georgia said, "The confirmation of a sale is a part of the transaction, the final step in the sale, so that the use of the mails for bringing about this final step in the sales alleged in counts one to five, inclusive, of the indictment and evidenced by the respective documents set out in said counts, constitute a violation of Sec. 17(a) of the Act."

In *Coplin* v. *U. S.* 88 F.(2d) 652, the Circuit Court of Appeals for the ninth circuit held that proof that one party used the telephone between states was sufficient to convict others who were indicted as co-defendants who "did * * * make use of a means of communication in interstate commerce * * *, etc.", the court observing that 18 U.S.C.A. Sec. 550 provides that aiders, abettors and counsellors of a crime are principals therein. The court quoted from its decision in *Cossack* v. *U. S.* 82 F.(2d) 214, "When it is established that persons are associated together to accomplish a crime or series of crimes, then the admissions and declarations of one of such confederates concerning the common enterprise while the same is in progress are binding on the others. It is not the name by which such a combination is known that matters but whether such persons are working together to accomplish a common result. The legal principle governing in cases where several are connected in an unlawful enterprise is that every act or declaration of one of those concerned in the furtherance of the original enterprise and with reference to the common object is, in contemplation of law, the act or declaration of all." (Other cases cited.)

INVESTIGATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

Section 9

The provisions of Section 9 of the Securities Exchange Act of 1934 are as follows:

"PROHIBITION AGAINST MANIPULATION OF SECURITY PRICES

Sec. 9. (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange--

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the prices of such security.

(4) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to make, regarding any security registered on a national securities exchange, for the purpose of inducing the purchase or sale of such security, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security, to induce the purchase or sale of any security registered on a national securities exchange by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of the market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) It shall be unlawful for any person to effect, by use of any facility of a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors--

(1) any transaction in connection with any security whereby any party to such transaction acquires any put, call, straddle, or other option or privilege of buying the security from or selling the security to another without being bound to do so; or

(2) any transaction in connection with any security with relation to which he has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege; or

(3) any transaction in any security for the account of any person who he has reason to believe has, and who actually has, directly or indirectly, any interest in any such put, call, straddle, option, or privilege with relation to such security.

(c) It shall be unlawful for any member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(d) The terms "put", "call", "straddle", "option", or "privilege" as used in this section shall not include any registered warrant, right, or convertible security.

(e) Any person who willfully participates in any act or transaction in violation of subsection (a), (b), or (c) of this section, shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue in law or in equity in any court of competent jurisdiction to recover the damages sustained as a result of any such act or transaction. In any such suit the

court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant. Every person who becomes liable to make any payment under this subsection may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment. No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation.

(f) The provisions of this section shall not apply to an exempted security."

Under the present rules of the Commission there are five offenses covered by this section of the above Act. In any investigation of these offenses it is necessary to obtain evidence which positively supports each element of the crime.

The elements of these various offenses are set out below:

Section 9(a)(1)(A)

ONE: That directly or indirectly a transaction was effected in a security which involved no change in the beneficial ownership of such security.

TWO: That such security was registered on a national securities exchange.

THREE: That the purpose of such transaction was to create a false or misleading appearance of active trading in such security or to create a false or misleading appearance with respect to the market for such security.

FOUR: That in effecting such transaction some use was made of the mails, or some means or instrumentality of interstate commerce, or of some facility of a national securities exchange, or that the person who effected such order was a member of a national securities exchange.

Section 9(a)(1)(B)

ONE: That directly or indirectly an order was entered for the purchase of a security.

TWO: That such security was registered on a national securities exchange.

THREE: That the person entering such order did so with the knowledge that an order of substantially the same size and at substantially the same time and at substantially the same price had been or would be entered, for the sale of such security, by the same or different parties.

FOUR: That the purpose of entering such order was to create a false or misleading appearance of active trading in such security or to create a false or misleading appearance with respect to the market for such security.

FIVE: That in entering such order some use was made of the mails or some means or instrumentality of interstate commerce or of some facility of a national securities exchange or that the person who entered such order was a member of a national securities exchange.

Section 9(a)(1)(C)

ONE: That directly or indirectly an order was entered for the sale of a security.

TWO: That such security was registered on a national securities exchange.

THREE: That the person entering such order did so with the knowledge that an order of substantially the same size, and at substantially the same time, and at substantially the same price had been or would be entered, for the purchase of such security, by the same or different parties.

FOUR: That the purpose of entering such order was to create a false or misleading appearance of active trading in such security or to create a false or misleading appearance with respect to the market for such security.

FIVE: That in entering such order some use was made of the mails or some means or instrumentality of interstate commerce or of some facility of a national securities exchange, or that the person who entered such order was a member of a national securities exchange.

Section 9(a)(2)

ONE: That a series of transactions in a security was effected by one or more persons.

TWO: That such security was registered on a national securities exchange.

THREE: That such transactions created actual or apparent active trading in such security or raised or depressed the price of such security.

FOUR: That the purpose of such transactions was to induce the purchase or sale of such security by other persons.

FIVE: That in effecting such series of transactions some use was made of the mails or some means or instrumentality of interstate commerce or of some facility of a national securities exchange or that the person who effected such transactions was a member of a national securities exchange.

Section 9(a)(3)

ONE: That a person circulated or disseminated information to the effect that the price of a security would or was likely to rise or fall because of market operations of any one or more persons conducted for that purpose.

TWO: That the person who circulated or disseminated such information was a dealer or broker, or a person selling or offering for sale or purchasing or offering to purchase such security.

THREE: That the person circulated or disseminated the information in the ordinary course of his business.

FOUR: That such security was registered on a national securities exchange.

FIVE: That such information was circulated or disseminated for the purpose of inducing the purchase or sale of such security.

SIX: That the purchase or sale was induced by the use of the mails, or some means or instrumentality of interstate commerce, or of some facility of a national securities exchange, or that the person who circulated or disseminated such information was a member of a national securities exchange.

Section 9(a)(4)

ONE: That a statement was made, regarding a security, which at the time made and in the light of the circumstances under which it was made, was false or misleading with respect to a material fact.

TWO: That the person making such statement, at that time, knew or had reasonable grounds to believe it was so false or misleading.

THREE: That the person making such statement was a dealer or broker, or a person selling or offering for sale or purchasing or offering to purchase such security.

FOUR: That such security was registered on a national securities exchange.

FIVE: That the statement was made for the purpose of inducing the purchase or sale of such security.

SIX: That in making such statement some use was made of the mails, or of some means or instrumentality of interstate commerce, or of some facility of a national securities exchange, or that the person making such statement was a member of a national securities exchange.

Section 9(a)(5)

ONE: That a person circulated or disseminated information to the effect that the price of a security would or was likely to rise or fall because of market operations conducted by any one or more persons for that purpose.

TWO: That such person, directly or indirectly, received some consideration from a dealer or a broker, or from some other person selling or offering for sale or purchasing or offering to purchase such security, for inducing the purchase or sale of such security.

THREE: That the information was circulated or disseminated for the purpose of inducing the purchase or sale of such security.

FOUR: That such security was registered on a national securities exchange.

FIVE: That in inducing such purchase or sale of such security some use was made of the mails, or of some facility of a national securities exchange, or that the person who circulated or disseminated such information was a member of a national securities exchange.

INVESTIGATION OF VIOLATIONS INVOLVING MANIPULATIVE, DECEPTIVE AND FRAUDULENT DEVICES AND CONTRIVANCES UNDER SECTIONS 10(b) AND 15(c) OF THE SECURITIES EXCHANGE ACT OF 1934

The Commission under sections 10(b) and 15(c) respectively of the Securities Exchange Act through the adoption of the GB and MC rules has defined certain acts to be manipulative, deceptive or fraudulent devices and contrivances.

The provisions of Rules GB2 and GB3 and the MC rules are as follows:

"Rule GB2. *Solicitation of Purchases on an Exchange to Facilitate a Distribution of Securities.* (a) No person, participating or otherwise financially interested in the primary or secondary distribution of any security of any issuer, shall, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange

(1) pay or offer or agree to pay, directly or indirectly, to any person any compensation for soliciting another to purchase any security of the same issuer on a national securities exchange, or for purchasing any security of the same issuer on any such exchange for any account other than the account of the person who pays or is to pay such compensation; or

(2) sell, offer to sell or induce an offer to buy such security, or deliver such security after sale, if, in connection with such distribution, such person has paid, or has offered or agreed to pay, directly or indirectly, to any person, any compensation for soliciting another to purchase any security of the same issuer on any national securities exchange, or for purchasing any security of the same issuer on any such exchange for any account other than the account of the person who has paid or is to pay such compensation.

(b) No person, participating or otherwise financially interested in the primary or secondary distribution of any security of any issuer, shall cause a purchase or sale of any security of the same issuer on a national securities exchange by paying or offering or agreeing to pay, directly or indirectly, to any person any compensation for soliciting another to purchase such security on any such exchange, or for purchasing such security on any such exchange for any account other than the account of the person who pays or is to pay such compensation.

(c) The provisions of this rule shall not apply in respect to any salary paid by a broker or dealer to any person regularly employed by him whose ordinary duties include the solicitation or execution of brokerage orders on a national securities exchange, if such salary represents only ordinary compensation for the discharge by such person of such duties in the regular course of his employment, and is not paid, in whole or in part, directly or indirectly, for the inducement by such person of the purchase or sale on a national securities exchange of any security of the issuer of the security in the primary or secondary distribution of which such broker or dealer is participating or otherwise financially interested.

Rule GB3. *Employment of Manipulative and Deceptive Devices.* It shall be unlawful for any broker or dealer, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange, to use or employ, in connection with the purchase or sale of any security otherwise than on a national securities exchange, any act, practice, or course of business defined by the Commission to be included within the term "manipulative, deceptive, or other fraudulent device or contrivance", as such term is used in Section 15(c) of the Act.

Rule MC1. *Definitions.* As used in any rule adopted pursuant to Section 15(c) of the Act:

(a) The term "customer" shall not include a broker or dealer.

(b) The term "the completion of the transaction" means:

(1) In the case of a customer who purchases a security through or from a broker or dealer, except as provided in paragraph (2), the time when such customer pays the broker or dealer any part of the purchase price, or, if payment is effected by a bookkeeping entry, the time when such bookkeeping entry is made by the broker or dealer for any part of the purchase price;

(2) In the case of a customer who purchases a security through or from a broker or dealer who makes payment therefor prior to the time when payment is requested or notification is given that payment is due, the time when such broker or dealer delivers the security to or into the account of such customer;

(3) In the case of a customer who sells a security through or to a broker or dealer, except as provided in paragraph (4), if the security is not in the custody of the broker or dealer at the time of sale, the time when the security is delivered to the broker or dealer, and if the security is in the custody of the broker or dealer at the time of sale, the time when the broker or dealer transfers the security from the account of such customer;

(4) In the case of a customer who sells a security through or to a broker or dealer and who delivers such security to such broker or dealer prior to the time when delivery is requested or notification is given that delivery is due, the time when such broker or dealer makes payment to or into the account of such customer.

Rule MC2. *Fraud and Misrepresentation.* (a) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any untrue statement of a material fact and any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, which statement or omission is made with knowledge or reasonable grounds to believe that it is untrue or misleading.

(c) The scope of this rule shall not be limited by any specific definitions of the term "manipulative, deceptive, or other fraudulent device or contrivance" contained in other rules adopted pursuant to Section 15(c) of the Act.

Rule MC3. *Misrepresentation by Brokers and Dealers as to Registration.* The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any representation by a broker or dealer that the registration of a broker or dealer, pursuant to Section 15(b), or the failure of the Commission to deny or revoke such registration, indicates in any way that the Commission has passed upon or approved the financial standing, business, or conduct of such registered broker or dealer or the merits of any security or any transaction or transactions therein.

Rule MC4. *Confirmation of Transactions.* The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any act of any broker or dealer designed to effect with or for the account of a customer any transaction in, or to induce the purchase or sale by such customer of, any security unless such broker or dealer, at or before the completion of each such transaction, gives or sends to such customer written notification disclosing (1) whether he is acting as a broker for such customer, as a dealer for his own account, as a broker for some other person, or as a broker for both such customer and some other person; and (2) in any case in which he is acting as a broker for such customer or for both such customer and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the fact that such information will be furnished upon the request of such customer, and the source and amount of any commission or other remuneration received or to be received by him in connection with the transaction.

Rule MC5. *Disclosure of Control.* The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any act of any broker or dealer controlled by, controlling, or under common control with, the issuer of any security, designed to effect with or for the account of a customer any transaction in, or to induce the purchase or sale by such customer of, such security unless such broker or dealer, before entering into any contract with or for such customer for the purchase or sale of such security, discloses to such customer the existence of such control, and unless such disclosure, if not made in writing, is supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

Rule MC6. *Disclosure of Interest in Distributions.* The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any act of any broker who is acting for a customer or for both such customer and some other person, or of any dealer who receives or has promise of receiving a fee from a customer for advising such customer with respect to securities, designed to effect with or for the account of such customer any transaction in, or to induce the purchase or sale by such customer of, any security in the primary or secondary distribution of which such broker or dealer is participating or is otherwise financially interested unless such broker or dealer, at or before the completion of each such transaction gives or sends to such customer written notification of the existence of such participation or interest.

Rule MC7. *Discretionary Accounts.* (a) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any act of any broker or dealer designed to effect with or for any customer's account in respect to which such broker or dealer or his agent or employee is vested with any discretionary power any transactions of purchase or sale which are excessive in size or frequency in view of the financial resources and character of such account.

(b) The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any act of any broker or dealer designed to effect with or for any customer's account in respect to which such broker or dealer or his agent or employee is vested with any discretionary power any transaction of purchase or sale unless immediately after effecting such transaction such broker or dealer makes a record of such transaction which record includes the name of such customer, the name, amount and price of the security, and the date and time when such transaction took place.

Rule MC8. *Sales at the Market.* The term "manipulative, deceptive, or other fraudulent device or contrivance", as used in Section 15(c) of the Act, is hereby defined to include any representation made to a customer by a broker or dealer who is participating or otherwise financially interested in the primary or secondary distribution of any security which is not admitted to trading on a national securities exchange that such security is being offered to such customer "at the market" or at a price related to the market price unless such broker or dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created, or controlled by him, or by any person for whom he is acting or with whom he is associated in such distribution, or by any person controlled by, controlling or under common control with him.

The elements necessary under these rules to be established by evidence to prove a violation of the law follow:

Rule BG2(a)(1)

ONE: That the subject participated in or was financially interested in the primary or secondary distribution of a security of some issuer.

TWO: That the subject directly or indirectly paid, offered or agreed to pay compensation to some person for soliciting the purchase, or for purchasing for the account of another, some security of the same issuer, on a national securities exchange.

THREE: That such compensation was not a salary, paid by a broker or dealer to a person regularly employed by him whose ordinary duties included the solicitation or execution of brokerage orders on a national securities exchange, representing only ordinary compensation for the discharge of such duties in the regular course of his employment, and such salary was not paid, in whole or in part, directly or indirectly, for the inducement of the purchase or sale on a national securities exchange of any security of the issuer of the security in the primary or secondary distribution of which such broker or dealer was participating or otherwise financially was interested.

FOUR: That some use was made of a means or instrumentality of interstate commerce, or of the mails, or of a facility of a national securities exchange.

Rule GB2(a)(2)

ONE: That the subject participated in or otherwise financially was interested in the primary or secondary distribution of a security of some issuer.

TWO: That the subject has paid, offered or agreed to pay, directly or indirectly, some compensation to some person for soliciting the purchase, or for purchasing for the account of another, some security of the same issuer, on a national securities exchange.

THREE: That the subject sold, offered to sell or induced an offer to buy or delivered after sale the security, in the primary or secondary distribution of which he was participating or otherwise financially was interested.

FOUR: That such compensation was not a salary, paid by a broker or dealer to a person regularly employed by him whose ordinary duties included the solicitation or execution of brokerage orders on a national securities exchange, representing only ordinary compensation for the discharge of such duties in the regular course of his employment, and such salary was not paid, in whole or in part, directly or indirectly, for the inducement of the purchase or sale on a national securities exchange of any security of the issuer of the security in the primary or secondary distribution of which such broker or dealer was participating or otherwise financially was interested.

FIVE: That in such sale, offer to sell or inducing of an offer to buy or in such delivering after sale some use was made of a means or instrumentality of interstate commerce, or of the mails or of a facility of a national securities exchange.

Rule GB2(b)

ONE: That the subject participated in or otherwise financially was interested in the primary or secondary distribution of a security of some issuer.

TWO: That the subject caused a purchase or sale of some security of the same issuer, on a national securities exchange, by paying or offering or agreeing to pay, directly or indirectly, to some person compensation for soliciting the purchase by another, or for purchasing for the account of another, on a national securities exchange, such security.

THREE: That such compensation was not a salary, paid by a broker or dealer to a person regularly employed by him whose ordinary duties included the solicitation or execution of brokerage orders on a national securities exchange, representing only ordinary compensation for the discharge of such duties in the regular course of him employment, and such salary was not paid, in whole or in part, directly or indirectly, for the

inducement of the purchase or sale on a national securities exchange of any security of the issuer of the security in the primary or secondary distribution of which such broker or dealer was participating or otherwise financially was interested.

FOUR: That in causing such purchase or sale some use was made of a means or instrumentality of interstate commerce, or of the mails, or of a facility of a national securities exchange.

Violations in Over-the-Counter Transactions

Commission Rule GB3, adopted under the provisions of Section 10(b) of the Securities Exchange Act, which makes it unlawful, "for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of a national securities exchange **** to use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors", brings within the purview of this section certain acts which the Commission, by virtue of section 15(c) of the Securities Exchange Act, has defined to constitute "manipulative, deceptive or other fraudulent devices or contrivances".

These acts are set forth in the MC rules and the performance of such acts is made through rule GB3, a violation of section 10 of the Securities Exchange Act.

The elements necessary under these rules to be established by evidence to prove a violation of the law follow:

Rule MC2(a)

ONE: That there was a purchase or sale of a security, otherwise than on a national securities exchange, by a broker or a dealer.

TWO: That in connection with such purchase or sale there was used or employed by such broker or dealer an act, practice or course of business which operated or would have operated as a fraud or deceit upon some person.

THREE: That in connection with such purchase or sale of such security such broker or dealer made some use of a means or instrumentality of interstate commerce, or of the mails or of some facility of a national securities exchange.

Rule MC2(b)

ONE: That there was a purchase or sale of a security, otherwise than on a national securities exchange, by a broker or dealer.

TWO: That in connection with such purchase or sale of such security such broker or dealer made an untrue statement of a material fact or omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, which statement or omission was made with knowledge or reasonable grounds to believe that it was untrue or misleading.

THREE: That in connection with such purchase or sale of such security such broker or dealer made some use of a means or instrumentality of interstate commerce or of the mails, or of some facility of a national securities exchange.

Rule MC3

ONE: That there was a purchase or sale of a security, otherwise than on a national securities exchange, by a broker or dealer.

TWO: That in connection with such purchase or sale of such security such broker or dealer made a representation that the registration of a broker or dealer pursuant to section 15(b), or the failure of the Commission to deny or revoke such registration, indicated that the Commission had passed upon or approved the financial standing, business or conduct of such registered broker or dealer or the merits of any security or any transaction therein.

THREE: That in connection with such purchase or sale of such security such broker or dealer made some use of a means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

Rule MC4

ONE: That an act was performed by a broker or dealer designed to effect with or for the account of a customer a transaction in, or to induce the purchase or sale by such customer of, a security otherwise than on a national securities exchange.

TWO: That such broker or dealer did not at or before the completion of such transaction, purchase or sale, give or send to such customer written notification disclosing:-

(1) Whether he was acting as a broker for such customer, as a dealer for his own account, as a broker for both such customer and some other person; and

(2) In any case in which he was acting as a broker for such customer or for both such customer and some other person, either the name of the person from whom the security was purchased or to whom it was sold for such customer and the date and time when such transaction took place or the fact that such information would be furnished upon the request of such customer, and the source and amount of any commission or other remuneration received or to be received by him in connection with the transaction.

THREE: That in connection with such act such broker or dealer made some use of a means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

Rule MC5

ONE: That a broker or dealer performed an act designed to effect with or for the account of a customer a transaction in, or to induce the purchase or sale by such customer of a security, otherwise than on a national securities exchange.

TWO: That such broker was controlled by, was controlling, or was under common control with, the issuer of such security.

THREE: That such broker or dealer, before entering into a contract with or for such customer for the purchase or sale of such security, failed to disclose to such customer the existence of such control.

FOUR: That such broker or dealer, before the completion of the transaction failed to give or to send such customer written disclosure of the existence of such control.

FIVE: That in connection with such act some use was made, by such broker or dealer, of some means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

Rule MC6

ONE: That an act was performed, designed to effect with or for the account of a customer a transaction in, or to induce the purchase or sale by such customer of, a security, otherwise than on a national securities exchange.

TWO: That such act was performed by a broker who was acting for such customer or for such customer and another person; or that such act was performed by a dealer who received or had promise of receiving a fee from such customer for advising such customer with respect to securities.

THREE: That such broker or dealer was participating or otherwise financially was interested in the primary or secondary distribution of such security.

FOUR: That at or before the completion of such transaction, purchase or sale, such broker or dealer failed to give or send to such customer written notification of the existence of such participation or interest.

FIVE: That in connection with such act some use was made by such broker or dealer of some means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

Rule MC7(a)

ONE: That a broker or dealer performed an act designed to effect with or for a customer's account a transaction or transactions of purchase or sale of a security, otherwise than on a national securities exchange.

TWO: That such broker or dealer or his agent or employee was vested with discretionary power in respect to such account.

THREE: That such transaction or transactions were excessive in size or frequency in view of the financial resources and character of such account.

FOUR: That in connection with such act, such broker or dealer made some use of a means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

Rule MC7(b)

ONE: That a broker or dealer performed an act designed to effect with or for a customer's account a transaction of purchase or sale of a security, otherwise than on a national securities exchange.

TWO: That such broker or dealer or his agent or employee was vested with discretionary power in respect to such account.

THREE: That such broker or dealer immediately after effecting such transaction failed to make a record of such transaction which included the name of such customer, the name, amount and price of the security and the date and time when such transaction took place.

FOUR: That in connection with such act such broker or dealer made some use of a means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

Rule MC8

ONE: That a broker or dealer, in connection with the sale of a security, otherwise than on a national securities exchange, made a representation to a customer that such security was being offered to such customer "at the market" or at a price related to the market.

TWO: That such security was not admitted to trading on a national securities exchange.

THREE: That such broker or dealer was participating or otherwise financially was interested in the primary or secondary distribution of such security.

FOUR: That such broker or dealer did not know or have reasonable grounds to believe that a market for such security existed, other than that made, created or controlled by such broker or dealer, or by a person for whom such broker or dealer was acting or with whom he was associated in such distribution, or by a person controlled by, controlling, or under common control with such broker or dealer.

FIVE: That in connection with such representation or sale some use was made by such broker or dealer of a means or instrumentality of interstate commerce, or of the mails, or of some facility of a national securities exchange.

PROOF THAT SECURITY IS REGISTERED ON A NATIONAL SECURITIES EXCHANGE

Many of the offenses under the Securities Exchange Act of 1934 involve securities registered on a national securities exchange.

In such cases it is necessary affirmatively to establish that such security was so registered at the time the violation of the law took place.

This fact may be established by a certificate of the Secretary of the Commission that the records of the Commission reveal that the security was registered on a particularly named national securities exchange at the date of the violation which is the subject matter of the proceeding.

USE OF THE MAILS

Where the use of the mails is depended upon as the jurisdictional element in the violation there must be positive proof of the use of the mails in the manner which is prohibited by the applicable provision of the law.

SECURITIES ACT OF 1933

Section 5(a)(1)

Under the Securities Act of 1933 in Section 5(a)(1) an offer to sell, or a sale of a security must be shown to have been made through a use of the mails.

The mailings in this instance must be a part of the transaction, such as an offer, a solicitation, a purchase or negotiations for the purchase or sale, and mailings after the purchase or sale will not support a violation of this paragraph. Dividend checks sent through the mails may not suffice nor is it believed that confirmations alone will be enough in all instances, although if there is evidence of mailings in connection with prior negotiations these items may be corroborative evidence.

Section 5(a)(2)

Section 5(a)(2) prohibits the use of the mails for the purpose of sale or delivery after sale. The mailing in this instance must show that it contained the security. It is doubtful if any other use of the mails will satisfy this provision.

Section 5(b)(1)

To sustain a violation of section 5(b)(1) it is necessary in a similar way to show that the mails were used to carry or transmit a prospectus and no other use of the mails will support a case under this paragraph.

Section 5(b)(2)

Likewise under Section 5(b)(2) it is necessary to establish that the mailing carried a security for sale or delivery and no other mailing will support this element.

Section 17(a)

There is perhaps more latitude in establishing the use of the mails under Section 17(a) of this act although there is no doubt that the mailing must be a part of the offer or sale and undoubtedly must occur not later than the consummation of the sale.

It is possible that in some circumstances a confirmation through the mails may be sufficient, although this may not be true in all cases.

If a sale must be confirmed before it is complete under the circumstances of a particular case, such use of the mails will probably support a violation.

If the sale is complete before the mails are used, it is doubtful that any mailings thereafter will sustain the case.

Dividend checks and literature sent then may not be enough, although in some cases it is possible to show this use and to connect it with later sales in such a way as to show a violation. Instances where purchasers are "loaded" and "reloaded", with the use of the mails occurring between the first and subsequent purchases, undoubtedly would constitute a violation.

Section 17(b)

Under this paragraph it is necessary to show that the prohibited items were sent through the mails. Other mailings will not be sufficient under this provision.

SECURITIES EXCHANGE ACT OF 1934

Section 9(a)(1)(A)

Under the Securities Exchange Act of 1934, section 9(a)(1)(A) it must be shown that the transaction was effected through the use of the mails.

The mailing certainly must precede the transaction and must be such as to be virtually a part of it, and should be in the nature of an order or show arrangements being undertaken or negotiated for such a transaction. Confirmations, statements and similar mailings after the transaction will not be enough.

Section 9(a)(1)(B)

To sustain a violation under paragraph (a)(1)(B) of this section the mailing must be shown to carry an order or directions therefor and no other mailing will fill this requirement.

Section 9(a)(1)(C)

The requirement relative to the use of the mails under paragraph (a)(1)(C) is the same as under (a)(1)(B).

Section 9(a)(2)

Under paragraph (a)(2) the use of the mails must be connected with the effecting of a series of transactions. In this case it would seem probable that the mails would be used on a wider scale than in the above instances and any mailings which relate to the transactions and that are sent prior to or during the transactions may be admissible.

Such mailings as contain orders to buy or sell or mailings between parties to the transactions and which are relative thereto may be sufficient to sustain a violation of this paragraph.

Section 9(a)(3)

It must be shown that the mails were used to induce the purchase or sale, under paragraph (a)(3). The best evidence here would be to show that the

information mentioned was sent through the mails and the purchase or sale so induced, although it is believed that any mailing that can be connected with the purchase or sale will support a proceeding.

Section 9(a)(4)

To establish a violation of paragraph (a)(4) it must be shown that the mails were used in making the false or misleading statement. It is doubtful that any other mailing will suffice to support this violation.

Section 9(a)(5)

The mailing under paragraph (a)(5) should also contain the information mentioned in this paragraph or be intimately connected with the sale or purchase. No other mailings will sustain a proceeding under this paragraph.

Suggestions for Establishing Use of the Mails

In all instances the evidence of the use of the mails should be positive, complete and directly connected with the subjects of the investigation.

It must be shown that the subject or subjects used the mails and it is not sufficient merely to show that someone received something through the mails.

Proof must connect the subjects with the deposit of the letter or package in the mails.

While it is not necessary to show that the subject actually by his own hand deposited the mailed material in the mails, it is essential to show that such mailing was with his knowledge, under his direction, control, was contemplated by him, or was a reasonable consequence of his action.

It is highly desirable to obtain the envelope, wrapper or cover of the mailed material with the cancelled stamp although the case may be sustained in the absence of such evidence provided other evidence is at hand.

An effort should always be made to obtain evidence from clerks, employees or others closely connected with the subjects that the material was deposited in the mails.

Evidence of the custom of the particular office with reference to mailing material from the establishment may be useful in building up the element of the use of the mails.

If it can be shown that in the usual course of business certain material is deposited in the mails this may suffice where it would be impossible to have a witness identify and positively say that a certain letter was mailed.

Every effort should be made to obtain all the information possible as to the manner in which material for mailing purposes is handled by the particular establishment.

In some instances addressing and mimeographing or printing establishments deposit material in the mails for their clients and the investigator should be alert to the possibility of the use of the mails in this manner.

When such a situation is discovered statements should be obtained from the addressing, mimeographing or printing company as to the arrangements with their client, where they get their directions, mailing lists and similar information in order to show that the mails were so used by the direction or with the knowledge of the subject.

In some instances it may be found that subjects have a mailing permit which enables them to mail material without placing stamps on individual pieces. The local Postmaster can often furnish information as to such mailings and as to their volume.

Investigators who have been allowed access to the books, records or files of an establishment should always be on the alert for evidence which may be available indicating a use of the mails.

When interviewing persons who received material through the mails all possible information relative thereto should be obtained. If they have mail material and are willing to turn this over to the investigator, he should have them initial or otherwise mark it so that they can later identify such material so that it can be introduced in evidence.

They should be questioned as to when they received it, whether other or similar material had been received, as to whether they are familiar with any signatures appearing thereon, whether they have seen the persons whose signatures purport to be on such material sign their names so that they can qualify to identify the subject's signature preparatory to the mailing being introduced in evidence.

Whether they personally took the material from the mails or whether someone took it for them and generally all details which may trace the chain of the mailing back to the subject.

It should be borne in mind that a subject's connection with the letter or other material should be shown by proof irrespective and independent of any statement he may have made.

If the connection is to be established by the subject's signature proof must be available that it is his signature.

An effort should always be made to obtain statements from persons closely connected with subject's business as to their knowledge of his signature in order that mailings may be connected with him by such proof of his signature.

The evidence should not only show the receipt of the mailing but its deposit by or for the subject.

Proof of the use of the mails by one subject may support a proceeding against all subjects with whom he was associated in the enterprise, when it is shown that such mailing was part of the scheme or plan of activity in which the subjects were engaged.

USE OF MEANS AND INSTRUMENTALITIES OF INTERSTATE COMMERCE

The Securities Act of 1933 defines "interstate commerce" to mean "trade or commerce in securities or any transportation or communication relating thereto among the several states or between the District of Columbia or any Territory of the United States and any State or other Territory or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia," while the Securities Exchange Act of 1934 defines it as "trade, commerce, transportation, or communication among the several states, or between any foreign country and any State, or between any State and any place or ship outside thereof."

Criminal provisions of the 1933 act prohibit certain acts by "the use of any means or instruments of transportation or communications in interstate commerce", while the 1934 act prohibits certain acts by "any means or instrumentality of interstate commerce".

These provisions while phrased differently, to all practical purposes, mean the same thing. They will be so treated herein.

When interstate commerce is depended upon as the jurisdictional element of the violation then positive evidence establishing the facts relative thereto must be at hand.

Evidence must show not only that some means or instrument of interstate commerce was used by the subject or subjects but that such means or instrument was used in the particular manner described in the section and paragraph of the act, the violation of which is charged.

SECURITIES ACT OF 1933

Section 5(a)(1)

Under the Securities Act of 1933, Section 5(a)(1), it must be shown that a means or instrument of interstate commerce was used to sell or offer to sell, or offer to buy the security.

The use of the instrument of interstate commerce must be shown to be part of the transaction such as a solicitation, a sale, an offer to purchase, or negotiations to sell or purchase.

Ordinarily the form of instrument used will probably be the long distance telephone or the telegraph. Frequently sales campaigns are conducted through the long distance telephone where high pressure salesmanship can operate in its most effective manner.

Section 5(a)(2)

To sustain a violation of paragraph (a)(2) of this section it is necessary to prove that the security was carried by the instrument of interstate commerce.

This may be established by records of railway, automobile or airplane express companies or steamship lines. It is of course possible that a shipment may be sent by freight.

In the investigations of these situations it will be necessary to interview various employees of the express or freight agency, to determine first whether they have any personal knowledge of the shipment and are able to identify the shipper.

The waybill covering the shipment should also be obtained in order to show the course of the shipment. From this it will be possible to learn the various employees of the carrier who have had some connection with the shipment or transshipment of the security.

Statements should be obtained from the clerk who received the material for shipment and if a shipping order is available that should be obtained. This will aid in connecting the subject with the shipment.

In railway express shipments frequently material is handled over several railroads and the material transferred from car to car. Ordinarily, the waybill will show this fact, the routing and persons having something to do with the shipment who should be interviewed.

Clerks and employees of the subject should not be overlooked in the search for evidence as to the shipment of the security, and they should be fully questioned as to any knowledge they have of the manner of operations.

It is possible that the security was carried in interstate commerce either by a messenger on a train, airplane, boat or by private automobile. If this is ascertained all possible information should be procured as to the route followed and the investigator should be alert to any lead which will corroborate the interstate nature of the travel, such as places at which the messenger may have stopped en route, garages visited, etc.

And of course it must be emphasized that the evidence must show that the security was so carried.

Sections 5(b)(1) and (b)(2)

Under paragraphs (b)(1) and (b)(2) it is likewise necessary to show that the instrument of interstate commerce was used to carry the prospectus or security and no other use of such an agency will support a violation of these provisions.

Section 17(a)

More latitude is permissible under Section 17 of this act, particularly paragraphs (a)(1), (a)(2) and (a)(3). The use of interstate commerce hereunder should occur not later than the consummation of the sale.

Here again it is probable that the long distance telephone will be found to be the means most often used. This will be in high pressure methods of salesmanship and in efforts to "load" and "reload" and to "switch" persons from other securities.

Section 17(b)

Under paragraph 17(b) the telephone or telegraph may be used in publicizing the information in the prohibited manner.

However, neither of the above violations is limited in its operations to these means of interstate commerce and the investigator should bear in mind that any other use of such commerce will support a proceeding under these provisions.

SECURITIES EXCHANGE ACT OF 1934

Section 9(a)(1)(A)

In violations of the Securities Exchange Act of 1934, Section 9, paragraph (a)(1)(A) it must be shown that the instrument of interstate commerce was used to effect the transaction and it is therefore important that the evidence show that the use of the instrument of interstate commerce preceded the consummation of the transaction and was virtually a part of the transaction.

Sections 9(a)(1)(B) and 9(a)(1)(C)

It must be shown that the instrument of interstate commerce was used to carry or to enter the order to establish a violation of paragraph (a)(1)(B) of this section and the same type of proof must be developed under paragraph (a)(1)(C).

Section 9(a)(2)

The proof of the use of interstate commerce under paragraph (a)(2) of this section must be connected with the effecting of the series of transactions. The entry of the orders or correspondence by telephone or telegraph between states may be available to establish this point. Also messages or communications between parties to the transactions and which are relative thereto may be sufficient to establish a violation of this provision.

Section 9(a)(3)

In proving a violation of paragraph (a)(3) it should be shown that the instrument of interstate commerce was used to induce a purchase or sale and it is believed that ordinarily the means used will be the telephone or telegraph.

This form of the use of such instruments also lends itself to high pressure sales methods which may include the circularization of the prohibited material.

It should be shown that outlawed information was disseminated through such instruments.

Section 9(a)(4)

It is necessary under paragraph (a)(4) to show that the instruments of interstate commerce were used to carry the false or misleading statement and it is doubtful if any other form of the use of such instruments will suffice.

Section 9(a)(5)

Similarly it is necessary under paragraph (a)(5) to show that the information outlawed was carried or transmitted by such instrumentality or that the purchase was intimately connected with such use.

Suggestions for Establishing the Use of Interstate Commerce

When opportunity is afforded to examine the books and records of a subject the investigator should bear in mind the possibility of obtaining leads as to the use of these instrumentalities from the accounts relative to telegraph and telephone bills, freight and express charges and accounts relative to travel expenses.

In all instances it is necessary to show that the subject is connected with the use of the instrumentality either personally or by showing its use with his knowledge or under circumstances which would indicate that such use was contemplated.

Telegraph companies ordinarily keep copies of wires for only one year and this fact should be borne in mind so that such inquiries as to the use of telegraph service should be initiated without delay.

In checking on the use of the telegraph an effort should be made to obtain from the company any available information as to wires sent or received before causing a subpoena to be issued. If it is possible to learn of the existence of a wire the subpoena may then be directed to the specific telegram.

All possible information should be obtained from employees of telegraph companies as to their knowledge of the subject of his employees so that identification of the sender or receiver of the wire may be established.

Inquiry should be made as to the ordinary course of the subjects dealing with such company with the same purpose in mind. That is whether the messages for transmittal are sent by subject to the telegraph office, whether a messenger calls for them, whether they are sent over the telephone to the telegraph office and billed by the telephone company or whether some other means are used.

The receiver of the message should not be overlooked. All possible information should be obtained from him which will connect subject with the sending of the message. Information relative to subsequent dealings with the subject may be such as to tie him in with the message. Confirmations of it through the mails and later communications may serve the purpose of developing such evidence.

In connection with the use of the long distance telephone an examination should be made of the toll call slips which may be made available by the company.

The telephone companies ordinarily will make these available so that later the specific call slip may be made the subject of a subpoena.

These slips will furnish information as to the person or number called and the telephone from which the call was made.

Clerical employees of subject should frequently be the source of information as to the use of the telephone by subject and may furnish the necessary evidence identifying him with the use of such instrument.

The telephone account should also indicate the probability of the use of the telephone as worthy of developing for the jurisdictional proof.

In such investigations the person called should be a fruitful source of information, not only as to the call and its purpose, but also in identifying the person who called.

Knowledge of the voice or circumstances surrounding the call and subsequent dealings between the person called and the one who made the call are all possible leads to the establishing of the identity of the subject as making or causing the use of this instrumentality.

The use of the telephone, as in the use of the mails or instrumentalities of interstate commerce, by one subject during the course of the operation will be sufficient to be admissible against other persons in the joint scheme.

Declaration made by one subject during the course of a mutual enterprise will likewise be useful to connect the others with such scheme.

USE OF THE FACILITIES OF A NATIONAL SECURITIES EXCHANGE

If this element is depended upon as a jurisdictional fact it will be necessary first to establish that at the time of violation the exchange was registered as a national securities exchange.

A certificate from the Secretary of the Commission should be obtained showing that an examination of the records of the Commission revealed that at the particular time such exchange was registered as a national securities exchange.

It will then be essential to show that a facility of such exchange was used in a prohibited manner by the subject or with the subject's knowledge or under circumstances which reasonably indicate that such use was a normal consequence of subject's action.

The term "facility", according to the Act, includes "its premises, tangible or intangible property or any service thereof for the purpose of effecting or reporting a transaction on an exchange (including, among other things, any system of communication to or from the exchange, by ticker or otherwise, maintained by or with the consent of the exchange) , and any right of the exchange to the use of any property or service."

Any transaction effected on the exchange, the transmission of an order from a member's office to the telephone clerk near the floor, the use of any of the tubes for the transmission of orders or reports on the exchange, the use of the quotation service, the use of the ticker service, a report on a transaction from the telephone clerk, and the use of the clearing house are perhaps the most frequent facilities used.

Evidence must show however that the "facility" depended upon as a jurisdictional fact is a "facility" of the particular exchange. Therefore, it will be necessary to prove either that the facility is the premises of the exchange, a property thereof, a use of the premises or property or a service for the purpose of effecting or reporting transactions, or a system of communication to or from the exchange maintained by it or with its consent, or the right of the exchange to the use of any property or service.

Under Section 9, paragraph (a)(1)(A) the facility of the exchange must be used to effect the transaction, and similarly under (a)(1)(B) the facility of the exchange must be used in the entering of the order or orders.

The same requirement prevails as to 9(a)(1)(C) in that the facility must be used in entering the order or orders.

The facility must be shown to have been used in effecting the series of transactions under paragraph 9(a)(2).

To sustain a violation of paragraph 9(a)(3) it is essential to establish that the facility was used to induce the purchase or sale.

Under paragraph 9(a)(4) a violation will have to be supported by evidence that the facility of the exchange was used to make the misleading or false statement.

Paragraph 9(a)(5) requires that the use of the facility of the exchange was to induce the purchase or sale.

MEMBER OF A NATIONAL SECURITIES EXCHANGE

In some instances under the Securities Exchange Act of 1934 jurisdiction may be established by showing that the offense was committed by a member of a national securities exchange.

If this is depended upon to sustain the proceeding evidence should be at hand to prove that the subject is a member of such an exchange within the definition of membership in a national securities exchange as set forth in the act.

Section 3(a)(3) of the act provides "The term 'member' when used with respect to an exchange means any person who is permitted either to effect transactions on the exchange without the services of another person acting as broker, or to make use of the facilities of an exchange for transactions thereon without payment of a commission or fee, or with the payment of a commission or fee which is less than that charged the general public, and includes any firm transacting a business as broker or dealer of which a member is a partner, and any partner of any such firm."

FORM OF SUBJECT'S ACTIVITY

It is of primary importance in every investigation to ascertain at the outset the form through which or by which the subject engaged in the activity under inquiry.

He may engage in business in his own name or under some trade name, by a partnership arrangement with another or others; he may operate under a corporate organization or under a form of trust agreement, or possibly in some other manner.

Therefore it is necessary to learn immediately the manner in which the subject's activity takes form.

This fact will have an essential bearing on the manner in which the investigation is conducted such as the examination of the subjects, and the examination of books and records, and in formal cases the desirability of subpoena subjects.

Full and complete information as to the foregoing should always be obtained at the beginning of the investigation, and such details should be fully set out in reports on the investigation.

OPERATING AS AN INDIVIDUAL

It should be comparatively simple to show that the subject is operating in his own name as an individual.

Ordinarily the business will be conducted in the subject's name and information from landlords, public utility companies as to light and telephone, credit agencies, banks, and the people with whom the subject does business, as well as stationery and literature circulated by him, may show this fact.

In some instances the subject may do business on his own account but under some trade name rather than in his own name.

Local laws in some jurisdictions, notably in New York, require that trade names be registered in the county record office showing the identity of the person using such trade name.

PARTNERSHIPS

If the partnership form of organization is used, all details should be ascertained as to the members of the partnership, their interests therein, the amount of capital contributed and the services rendered to the business.

It may be possible that a silent partner may be interested in the business and all information relative to the contribution of capital by persons not actively identified with the business should be learned.

A person aiding in financing the enterprise may be as much a subject to a violation as one carrying out the undertaking.

This form of organization also may operate under a trade name or through an instrument of trust in the same manner as an individual could and this possibility should not be overlooked.

The suggestions applicable to the investigation of an individual are equally applicable to the partnership form of enterprise.

Such sources of information should not be overlooked. State and County offices wherein public records are filed may reveal also the entry of other documents that may have a bearing not only on the form of subject's business but which are important to the investigation in other ways.

TRUST AGREEMENTS

Some subjects may be found to be doing business under a form of trust agreement, this being particularly true of cases involving oil, gas or mineral royalties and the sale of participating interests therein.

Others, such as certain types of investment trusts, may use the same type of organization.

Such form of organization may be ascertained from the examination of the records of public registry offices as ordinarily the local law may require a public record of the documents establishing such a trust.

This is true particularly where the trust is operating in the jurisdiction where it was organized although it may or may not be true if the trust was organized in a foreign jurisdiction.

Some states may require that such trusts organized in a foreign jurisdiction also record such documents in the place where the business is operating.

Full information should therefore be obtained as to the organization, the date and the place thereof, the persons involved, and the desirability of obtaining copies of documents establishing the trust should be borne in mind.

CORPORATIONS

Where the corporate form of organization is used, this fact should not be difficult to establish.

Such fact may frequently be suggested by the very name used and the requirement in some places that the name of the business show that it is incorporated.

Some states require that the articles of incorporation or copies thereof be recorded in the county wherein the principal place of the corporation's business is located.

In the case of domestic corporations it is possible to ascertain from the appropriate state office or department the details of the incorporation, although this may not be true if the business is conducted by a foreign corporation.

The investigator should always learn at the outset of an investigation the name of the state or sovereignty under whose laws the corporation was incorporated.

If the local law does not require this fact to be made of public record in some public office, it may be ascertained from any legal documents executed on behalf of such company, or from public utility contracts, leases, banks, credit agencies, better business bureaus and similar agencies, from employees of the corporation, or from persons with whom the corporation has done business.

Having ascertained the place of incorporation, full information should be obtained as to the details of incorporation.

The date and place of incorporation, the names and addresses of the incorporators, the names and addresses of the directors or similar officers, the names and addresses of all officers of the company, the amount of the shares of stock subscribed to by such persons and the amount of money or the kind and value of property traded for such stock; the amount of stock authorized to be issued with full details as to the various kinds thereof and the rights and privileges embodied in each type as well as the manner in which it is to be authorized and issued, should be obtained.

The importance of the examination of corporate records should not be overlooked by the investigator.

Such records as the books of account, the stockholders register, the minutes of the directors or similar officers, the by-laws as well as the articles of incorporation, contracts and agreements of the company, may be productive of important evidence.

The desirability of obtaining copies of articles of incorporation and similar documents should be kept in mind.

Information which is on file with the Commission concerning registration, supporting documents thereto, and reports will be available to investigators, and this source of information should not be overlooked.

INTERVIEWS

A written record should be made of all interviews conducted during the course of an investigation whether information is given that can be used as evidence of the violation or whether it is of a nature that explains or tends to disprove the violation.

Ordinarily the rule should be followed of interviewing witnesses separately. Occasionally it may be necessary for such person to consult someone else or some record to refresh his memory but the investigator should always question the person with the thought in mind that such person may be used as a witness in court and his testimony on the interview, his manner of giving it, whether he referred to others or to records, the reliance that may be placed on his memory are all matters that should bear weight in the determination of the use to be made of the information furnished by him.

Frequently the person may be of little value from the standpoint of evidence to which he could testify in court from his own knowledge, but he may be extremely helpful from the standpoint of the investigation in furnishing leads and information that may be checked in other ways and developed into admissible and competent evidence that may be useful in court.

The full name and address of the person interviewed should always be obtained and recorded, together with information as to his occupation or status and often times information as to his intelligence and business acumen or lack of business experience should be made of record.

Detailed information should be obtained as to his dealings with the subject from the beginning of the acquaintance or the transaction of business between them.

If exhibits or documents are taken from the person he should be questioned as to his ability later to identify them, and should be requested to place his initials and the date thereon in order that the particular paper may positively be identified by him. The interview should include the details of the manner in which such documents or exhibits came into his possession.

He should be questioned as to his knowledge of the subject and his ability to identify the subject. Sometimes it may be useful to have him furnish a description of the subject. It may be that on occasions it will be found that a subject has been using different names to different people and it may be important in connecting the subject with the various transactions to have such a description and the ability of the person to describe the subject may have some bearing on his ability later to identify the subject as the person with whom some transaction was made.

The person should as far as he can remember furnish to the investigator the exact words used by the subject in making statements that will be material in a trial and the investigator should seek to obtain direct quotations from the person interviewed on all possible statements made by the subject.

In some instances it may be important to know whether the person has ever seen the subject sign his name in order that such person may qualify in court to identify the subject's signature.

In cases where the person has received mailings, telegrams or telephone calls from the subject full information should be obtained as to the communication.

If a mailing was received he should furnish information as to when and where it was received, whether he took it from the mails or the carrier or whether someone did this for him.

He should be questioned as to any mailings or communications initiated by such person addressed to subject and to the course of any business or communications between them which may in any way be connected with the mailings which may be evidence of the jurisdictional element required.

Similar information should be obtained if a telegram is involved in the case.

In the event the telephone was used he should be questioned as to his knowledge of the subject's voice and the details of the call including if possible direct quotes on the statement made by the subject.

Information as to prior or subsequent calls and as to whether any transactions resulted from such calls is of importance as it may suggest the existence of other evidence which will be revealed by a check of the leads furnished by such person.

If the person cannot identify the subject's voice it should be borne in mind that the subject can be connected with the call in other ways such as the subsequent transaction of business in line with the call or by subsequent communications between the parties or by some testimony from another source that the person was called on the telephone by subject.

In some instances, particularly where the person interviewed may later become a subject consideration should be given to warning the person that he does not have to testify against himself and that any statement made is voluntarily given and can be used in any manner desired.

Under no circumstances should the investigator obtain a statement by force, or by promises, and all the circumstances of the interview should be such as to show that any statement obtained was voluntarily given by the person.

Extreme care should be used in interviews to avoid doing unnecessary damage to a subject by the manner in which a person is questioned.

In some instances where it may develop that no violation has occurred real damage may be done by a thoughtless attitude of prejudgment on the part of the investigator and he should respect the right of the subject to a fair and impartial inquiry which does not improperly undermine the confidence of of persons to which the subject may be justly entitled.

Every reasonable effort should be made by the investigator to obtain a written statement from the person interviewed which such person should be requested to read and sign.

If any corrections are to be made in such a statement the person interviewed should be requested to make the corrections in his own handwriting and to place his initials opposite thereto.

Where the testimony given by the person is such that it may be useful in an application for an injunction the investigator should prepare the statement in affidavit form and request the execution of it by the person.

The date and the place of all statements should be made of record together with the name of the investigator to whom the statement was made.

ACCOUNTING INVESTIGATIONS

In connection with the examination of books and records particular attention should be directed to the profit and loss accounts, and to such accounts as salaries of officers, bonuses paid, commissions and gratuities paid, and accounts showing charges to officers in order to discover any evidence of abnormal or unreasonable withdrawals by officers or employees.

The profit and loss accounts and the surplus account should be carefully examined to determine whether there has been any appreciation of assets by undue or unwarranted inflation.

Surplus accounts that contain many adjustments made to surplus directly should be analyzed for the purpose of adjusting the profit and loss accounts of prior years especially where profitable operations are set forth in a prospectus.

Where dividends have been declared and paid it should be ascertained whether such dividends were paid from earnings or out of capital.

The capital stock account should also be examined to determine the nature of the contributions received by the company in connection with the issuance of its capital stock.

A similar examination should be made where there has been an issue of bonds, debentures or notes.

Where representations have been made that the funds derived from the sale of stocks, bonds, debentures or notes were to be used for specific purposes, it should be determined whether the funds were so applied.

In this regard it might be well to set up a statement of "application of funds" for the period under review.

If the examination discloses that there has been a diversion of funds the details thereof should be obtained and described.

A general survey of the accounting system should be made to determine the possibilities of misappropriations remaining undetected. Also any accounts showing large balances under general titles such as "Miscellaneous Expenses" should be examined in sufficient detail to determine their use.

Every effort should be made to develop evidence of additional fraudulent transactions which may be reflected by the books and records.

Transfer records should be examined to determine whether shares represented to be original issue are sold from shares owned by officers or promoters.

The record of the minutes of directors meetings should be examined and copies taken of those minutes recording authorization of questionable transactions. The authorization of officers salaries should be copied and a notation made of the directors present. Notation should be made of approval of minutes at subsequent meetings or of the lack of such approval. It is also pertinent to show whether approval by the board was obtained before or after the transaction was completed.

Listed below are some suggestions as to items which it might be desirable in various cases to consider;

PERSONS INVOLVED AS SUBJECTS IN INVESTIGATION

1. History

(a) Name and aliases.

(b) Home and business address.

(c) Marital status, condition of home life and family.

(d) Reputation, social affiliations and associates.

(e) Criminal record (if known).

2. Connection With Investigation:

(a) Positions held or official connections.

(b) Salary and other benefits received.

(c) Financial interest.

(d) Other business connections.

(e) Official acts. Such as:

(1) Approved and signed financial statements.

(2) Approved and signed or attested offering circulars, prospectuses, etc.

(3) Approved declarations of dividends, with knowledge that there was no earned surplus to pay same.

(4) Approved the maintenance of a market in the company's securities.

(5) Approved or prepared the advertising used to promote sales of the company's securities.

(6) Approved transfers of cash and securities to associated interests and others without regard for the company's interest or while the company was in financial difficulties.

(7) Signed checks transferring the company's funds in payment for services in excess of value received or in violation of covenants.

(8) Managed the joint account used in maintenance of market in the company's securities.

(9) Negotiated the agreement with the underwriters.

(10) Supervised the salesmen and handled complaints from prospective customers or persons who had purchased securities or inquiries.

3. History of Subject Corporation Offering for Sale and/or Manipulating the Security in Question.

Registration of Security with Commission (Date) _____

or Security not registered with Commission.

Incorporation

(a) Corporate name
(b) State of incorporation
(c) Date of incorporation
(d) Change in corporate name (if any)
(e) Principal office
(f) Branch offices

Corporate powers and objects

(a) Chartered to engage in business of _____
(b) Can borrow money, underwrite and deal in securities, etc.
(c) Limitations, if any.

Capital structure

(a) Original capitalization
(b) Changes in capitalization

Organizers, Directors and Officers

(a) Names, positions held with company and tenure of office. (Prepare a schedule of all such officers and directors).
(b) Services performed.

Corporate connections and affiliations

(a) Associated companies
(b) Companies controlled or influenced
(c) Memberships in stock exchanges
(d) Subscribers to financial and statistical services
(e) Investments in and/or advances to Affiliates, Associates or others.

Management and Control

(a) Composition of executive committees
(b) Policies dictated by
(c) Departments and branch offices under direction of
(d) Stock control held by

Business

(a) Brokerage
(b) Underwriters
(c) Management Services
(d) Sales promotion
(e) Investment counsel

Practices in connection with distribution and trading.

(a) Distribution:

1. Participation in underwriting syndicates.
2. Secondary distribution.
3. Securities sales to affiliates or associates interests.
4. Securities purchases from affiliates or associated interests.
5. Sales of securities of companies with which officers or directors are connected with or have financial interest.

(b) Trading:

1. Trading in securities of companies, or securities being handled by syndicates or groups with which the company or the officers or directors are identified or have an interest.
2. Participations in trading accounts of any securities.

Principal Employees

This information will be secured with a view towards illustrating the mechanics of operating the business so that employees may be called upon to identify records and transactions and other practices.

(If the company or person is registered with the Commission, certain of the information necessary as to the corporate structure may be secured from Commission files.)

Financial Condition at beginning and end of Period under review.

Principal investments in securities at beginning and end of period.

Income and Expense (detail) for period under review.

Activities in connection with security offered for sale and/or manipulated.

(a) Relationship, past or present, to the issuer.
(b) Investment in securities of the issuer just prior to the period under review, or options secured on such securities.
(c) Loans or advances receivable from the issuer, or other pending financial transactions had prior to the period under review.
(d) Initial negotiations relative to purchase and/or distribution of the security in question. (Secure copies of correspondence.)
(e) Underwriting agreements (copies to be secured).
(f) Syndicate agreements (copies to be secured and correspondence)
(g) Secondary distribution (copies to be secured and correspondence)
(h) Agreements to maintain a market (copies and correspondence)
(i) Repurchase agreements (copies and correspondence)
(j) Literature describing the issue (copies and correspondence)
(k) Instructions to salesmen and arrangements made. (Copies, if any)
(l) Joint trading account or other agreements to stabilize the security in question or other securities of the same company.

(m) Facts developed from the examination of the accounts:

(1) Profit from sale and/or manipulation of the security in question, and other benefits.
(2) Commissions, bonuses, and other direct expense related to sale and/or manipulation of security in question.
(3) Expense related to jurisdictional proof:

(a) Stamps and mailing privileges.
(b) Telephone and telegraph (detail separately).
(c) Express and other transportation expense.
(d) Travel expense.
(e) Printing, mimeographing, addressing and other similar services.
(f) Advertising.
(g) Financial Sheets and Investment counsel.

(4) Bonuses or rights or other indirect benefit in connection with the sale of the security in question.
(5) Prior accumulation of security in question or other securities of the issuer. Disposal of same.
(6) Securities taken down under the underwriting agreement and disposal.
(7) Securities taken down under option and disposal of same.
(8) Securities repurchased under agreement and/or cancellation of subscriptions.
(9) Detail of Syndicate Participations.
(10) Detail of Trading Accounts.
(11) Comparisons of firm and joint trading to volume on market.
(12) Detail of washed, matched and other trades used to create an artificial market and establish prices.

4. History of Subject Corporation Whose Security is Being Offered for Sale and/or Manipulated.

(a) Incorporation (same information as in 3)

(b) Corporate powers and objects (same information as in 3)

(c) Capital Structure (same information as in 3 and set out relative rights of securities outstanding.)

(d) Organizers, directors and officers. (same as in 3.)

(e) Corporate connections and affiliations. (same as in 3.)

(f) Management and control. (same as in 3.)

(g) Business. (same as in 3.)

(h) Prior practice used in sale of own securities.

(i) Trading in own securities.

(j) Facts related to offer for sale and/or manipulation of security;

(1) Relationship, past or present, to distributor, distributors or persons engaged in manipulating security in question.

(2) Capital stock outstanding, funded debt and other financial obligations of the issuer at the start of the period under review.

(3) Authorization for issuance of the security in question or participation in market activity of the security in question. (Board meeting minutes, persons present, etc.)

(4) For what purpose was the new money to be raised. Reason for engaging in market activity.

(5) Initial negotiations had with others relative to the offer for sale of the security or the activity.

(6) Agreements made relative to distribution with underwriter. Bonuses paid or rights given.

(7) Agreements had relative to maintenance of a market in own securities or security in question.

(8) Agreements had relative to repurchase of own securities or securities in question.

(9) Registration of security with the Commission.

(10) Listing of security with a national securities exchange.

(11) Description of the security offered as contained in the prospectus.

(12) Other direct or indirect assistance given relative to the program for sale of its own security or securities or the manipulation of such, in the way of reports to stockholders, advice to stockholders upon inquiry or publicity that might influence prospective buyers.

(13) Facts developed from examination of the books of account:

(a) Statements of Financial Condition on dates necessary to refute representations made.

(b) If investment company, prepare portfolio lists at stated periods at market.

(c) Detail of disposition made of proceeds from sale of security.

(d) Detail of loans payable or other financial obligations (not funded debt) at beginning of period.

(e) Detail of trading in own securities.

(f) Detail of payments made account of maintenance of market.

(g) Comparison of firm trading in own securities to market.

(h) Detail of washed, matched or other trades used to establish prices or create artificial market.

5. False Financial Statements.

Where a representation is made in a financial statement, prospectus, or report which was used in connection with the offer for sale of a security or to promote activity, which appears to be false, the following information should be set up:

(a) Date for which statement or report was rendered.

(b) Date report was sworn to, person preparing same, (giving his name and official connection) person who authorized the issuance of same and the names of other persons, officers or directors attesting same.

A copy of the statement found to be false should be set up in the report together with adjustments necessary to show the true financial condition. Where possible a three column statement is suggested. The first column to contain the values found to be incorrect and as published; the second to contain adjustments which should be keyed to comments; and the third to contain the values found to be true from the accountant's examination and as adjusted by the accountant. A further comparison should be shown of the value per share as shown in the false financial statement and the value per share as shown in the adjusted statement where the subject security is a common capital share.

Books and Records Required in Evidence

A. Books and records examined by Commission employees.

List separately as to company, where located, person having custody or in authority so that subpoena may be served if necessary or in case of reference.

B. Other records, documents and correspondence.

If not already secured state their location and in whose possession they are. In identifying such other records, etc. submitted as evidence, an exhibit number will facilitate handling and reference, however, care shall be taken to make such marking lightly and in pencil. It is preferable if slips of paper bearing such identification marks are clipped on so that they can be removed when necessary to offer for identification or as evidence in any action.

A list is suggested as follows:

Exhibit No.

1. Minutes of Board X. Securities Corp._____ authorizing issue.

2. Certification of Secretary of Commission of registration of Allotment Ctfs.

3. Certification of Secretary of Commission of registration of Common Stock.

Exhibit No.

4. Certification of Secretary of Commission of registration of X Stock Exchange.

5. Certification of listing of Allotment Ctfs. on X Stock Exchange.

6. Certification of listing of Allotment Ctfs. on Stock Exchange.

7. Prospectus dated _____ used in offer of sale of Allotment Ctfs.

8. Market lists of prices of Allotment Ctfs. ____ to ____.

9. Articles of Incorporation of X Securities Corp.

10. Underwriting agreement dated _____.

11. Agreement for secondary distribution dated _____.

12. Agreement to maintain market on common and protect market on ctfs. _____.

13. Agreement joint trading account common stock dated _____.

14. Agreement joint trading account common stock extension dated _____

15. Certification from Secretary of Commission of registration of Blank Inv. Inc.

15a. Certification from Secretary of Commission of registration A. Company.

15b. Certification from Secretary of Commission of registration B. Company.

16. Memorandum Blank Inv. Inc. reference to Specialist dated _____.

17. Certification from Secretary of Commission showing stock ownership of Blank Investment Inc. in X Securities Corp. on _____.

18. Minutes of Board of X Securities Corp. dated _____ showing approval of reimbursement of Blank Inv. Inc. for loss in maintainance of market.

18a. Toll call slips long distance calls 7-1-37 Chicago, Ill. A Company. #3

18b. Toll call slips long distance calls 8-15-37 Mason City, Iowa, A. Company. #88

19. Letter 7-10-37 Salesman to _____. Offense #4

20. Letter 7-15-37 Salesman to _____. " #5

21. Statement of condition as of _____. " #6

Exhibit No.

22. Letter 9-1-37 Vice Pres. X. Sec. Corp. to _____. Offense #10

23. Telegram 9-1-37 Salesman to _____. " #9

23a. Expense voucher August Salesman-Telegram Charge 8-1-37. " #9

24. Letter 9-25-37 Vice Pres. X Sec. Corp. to _____. " #11

C. Schedules prepared by Commission Investigators:

Exhibit No.

25. Trading by X Securities Corp. in own Allotment Certificates, Compared to Market.

26. Trading by X Securities Corp. in own Allotment Certificates Matched Trades.

27. Asset Values per share of Common Stock at stated periods.

28. Analysis of Earnings at 6-30-27 - comparison to Published Report.

29. Capital Stock Account Analysis as at 5-1-37.

30. Comparison Asset Values to Market Values Common Stock.

31. Purchases by Blank Inv. Inc. of Common Stock prior to 6-1-37 and Disposals during Periods covered by Agreements to Maintain Market.

32. Joint Account Trading in Common Stock - Comparison to Market.

33. " " " " " " - Matched Trades.

34. Trading by Specialist " " " - for own Account.

35. Blank Investment Inc. Expenses related to Sales of Allotment Ctfs. and promotion of Common Stock Purchases.

36. Blank Investment Inc. detail of Expenses for Period _____ to _____.

37. A. Company Expense Accounts relative to sales and promotion of Securities Corp. Securities.

38. B. Company Expense Accounts relative to sales and promotion of Securities.

Testimony Required from Witnesses

In setting forth the list of witnesses be sure to give full name and home and business addresses so that they may be located without delay. Telephone numbers may also be of assistance.

OFFENSE NO.

1. _____ Home Address _____ Business Address _____ a prospective customer will testify that on or about June 10, 1937, _____ a salesman representing himself to be employed by A. Company called on her at her home relative to the purchase of Allotment Certificates of X. Securities Corp. and stated: (set out as quoted in offense already set up).

4. _____ Home Address _____ Business Address _____ a stockholder will testify that on or about July 12, 1937, he was handed a sealed envelope by the mail carrier at his home _____, Denver, Colorado, that on opening the envelope it contained a letter signed _____, that the letter was on the letterhead of A. Company, and that enclosed with the letter was a prospectus describing the Allotment Certificates of X. Securities Corp. dated _____. He will identify the letter, prospectus and envelope referred to.

5. _____ Home Address _____ Business Address _____ a stenographer employed by A. Company during the the period under review, will testify that the letter above referred to, dated July 10, 1937, was dictated to her on said date, by _____ _____ salesman and was typed by her as reflected by her initials on the lower left hand corner and that the signature is the signature of _____ _____ salesman and was signed by him in the usual routine followed in the office and returned to her and then encolsed in the envelope which was attached and which was also prepared by her, and sealed and stamped by her as was her custom, and then deposited by her in a mail chute on the floor of the building in which the office of A. Company is situated, on her departure from the office at the end of the day as was also her usual custom.

6. _____ Home Address _____ Business Address _____ a senior accountant in the employ of _____ and _____ Public Accountants during the period under review, will testify that on July 7, 1937, he was engaged in the preparation of the Financial Statement of X Securities Corp. as at June 30, 1937, at the offices of said company, that he had had a conversation with _____, Vice President of said company and had been requested by the said officer to prepare the balance sheet as at June 30, 1937, so as to "consolidate surplus accounts under one total under the heading Surplus", this he refused to do and a partner of _____ and _____ Public Accountants was called in to settle the argument and agreed with the Vice President.

7. _____ Home Address _____ Business Address _____ Head Bookkeeper for Blank Investment Inc. will testify that he has been in the employ of said company for _____ number of years and during the period under review was charged with supervising the books of account, he will identify the books and records and will testify that the entries made therein are in his handwriting or of others under his supervision. That such entries as appear on the books and records were made under the authority given him by the officers and directors of said company, and that the entries were made at or about the time the transaction took place, and are books of original entry regularly kept in the course of business.

MAIL FRAUD INVESTIGATIONS

There is a similarity between a mail fraud case and one involving section 17(a) of the Securities Act of 1933 which suggests the desirability of outlining some of the court decisions under Section 215, in the hope that these decisions may be helpful in the investigation of either type of case.

If the mailing under section 17(a) of the Securities Act of 1933 cannot be connected with the sale of a security, but relates to a scheme or artifice to defraud the investigation may develop a violation of the mail fraud statute.

Title 18, Section 338, United States Code, provides:--

"Using mails to promote frauds; counterfeit money, -- Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, Municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit-money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'green goods,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside of the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both." (R.S. 5490; Mar. 2, 1889, c. 393, sec. 1, 25 Stat. 873; Mar. 4, 1909, c. 321, sec. 215, 35 Stat. 1130.)

The elements of the offense are:

One: A scheme devised or intended to be devised to defraud, or for obtaining money or property by means of false pretenses;

Two: For the purpose of executing such scheme or attempting so to do, the placing of any letter in any post office of the United States, to be sent or delivered by the post-office establishment. (U. S. v. Young, 232 U. S. 155.)

"The mailing of a letter in the execution or attempted execution of a fraudulent scheme is the gist of the offense denounced by the statute. It is that act, and it alone, which confers jurisdiction upon the courts of the United States to punish devisers of fraudulent schemes." (*Lemon* v. *U.S.*, 164 Fed. 953.)

PURPOSE OF THE STATUTE

The purpose of the statute was to protect the public against all intentional efforts to despoil, and to prevent the post office from being used to carry these efforts into effect. (*Durland* v. *U.S.*, 161 U.S. 306.)

"A prime purpose of section 215 is to prevent the prostitution of the mail service. The incidental protection of the public from frauds supplements a service usually performed by the State. * * * The offense involves the use of the mails in the consummation of, or in the effort to carry out, the fraudulent design. The gist of the offense is the improper use of the mails. * * * The consummation of the crime is not dependent upon the success of the scheme. The crime is complete before the letter designed to mislead or otherwise used in carrying out the scheme is received by the intended victim. The person addressed may have the shrewdness to detect the fraud; or, being misled, he may be in such financial condition as to be proof against fraud. Neither fact will affect the crime." (*Whitehead* v. *U.S.*, 245 Fed. 385.)

THE SCHEME

"The terms 'artifice' and 'scheme' are those descriptive of the thing to be planned or devised. 'Artifice' means 'subtle or deceptive art in contriving; trickery; cunning; strategy; finesse; as to lure by artifice.' According to the same authority, as well as the common understanding of the term, a 'scheme' may be of broader meaning, and not necessarily involve trickery or cunning. A scheme may include a plan or device for the legitimate accomplishment of an object. But to come within the terms of the statute under consideration the artifice or scheme must be designed to defraud." (*Horman* v. *U.S.*, 116 Fed. 350.)

"The scheme devised by appellant was made possible by the fact that it took about four days to clear a check from one bank to another. Taking advantage of that fact the corporation drew checks upon another bank where it had no funds or insufficient funds, in favor of one of its other banks, and, before the check reached the drawee bank for payment, a check was drawn upon another bank in favor of the payee in the first check." * * * "Appellant's plan, whereby he intended to get, and did get, money from one bank upon the representation of the check, which was a representation that there was money in the bank on which the check was drawn, when as a matter of fact there were no funds in the drawee bank, without any power in the drawer of the check to provide funds to pay such check, except by drawing a like check under like circumstances, constituted a scheme to defraud. This does not mean that every drawer of a check against an account where he has no funds is guilty of a scheme to defraud, but, when the undertaking is such that the checks must be drawn and passed in rapid succession from one bank to another in an endless chain, as here, a scheme to defraud is shown." (*Federman* v. *U.S.*, 38 F. (2d) 441.)

A scheme need not be unlawful in itself, or constitute a fraud, either at common law or by statute, to be a "scheme or artifice to defraud," within the statute. It is enough if its purpose is to defraud other persons of their money. (U. S. v. Loring, 91 Fed. 881.)

The statutory "scheme to defraud" may be found in any plan to get the money or property of others by deceiving them as to the substantial identity of the thing which they are to receive in exchange, and this deception may, of course, be by implication as well as by express words. On the other hand, the "scheme" can not be found in any mere expression of honest opinion as to quality or as to future performance. There must be the underlying intent to defraud. (Harrison v. U. S., 200 Fed. 662.)

INTENT

Although formerly, under Revised Statutes 5430, scheme to defraud must have embraced intent to use mails as part of scheme to render accused liable, under this section, such intent is not necessary, but it is sufficient if fraudulent scheme has been devised and mails are used in carrying it into effect. (Morris v. U. S., 7 Fed. (2d) 785.)

On a trial for using the mails in aid of a scheme to defraud, involving the sending to parties from whom defendant desired credit of false statements of his financial condition, the controlling consideration was the truth or falsity of such statements and if they were knowingly false, the sending thereof could not be reconciled with honesty. (Kaplan v. U. S., 229 Fed. 339.)

In a prosecution for using the mails to defraud by selling stock in and getting deposits for a bank by false representations about its capital and assets, where it appeared that one of the defendants furnished a mercantile agency with a statement which was vitally untrue, but he claimed that he merely gave out what he had been told by others connected with the bank and believed it to be true, the issue of his good faith or fraudulent intent was for the jury. (McDonald v. U. S., 241 Fed. 793.)

The offense charged with the mailing of the written statement for the purpose of executing the scheme to defraud, and not obtaining property by false pretenses, with which the Government is not concerned. What goods defendant may have obtained and what he did with them are not the material matters. Manifestly, a written statement showing the firm to be abundantly solvent would tend to induce the extension of credit to it. Manifestly, the sending of such a statement to a commercial agency, or to a person from whom defendant's firm was seeking to buy goods, itself proved the purpose of its sending. If the statement were proved to be false, and it were also proved that defendant knew it to be false when he mailed it, there was sufficient evidence to warrant the finding that the statement was sent for the purpose of executing the scheme. (Scheinberg v. U. S., 213 Fed. 757.)

Under section 215 it is sufficient to show an intent on the part of the deviser or devisers of the scheme to defraud someone; it is no longer necessary to show an intent to use the mails to effect the scheme, as it was under

section 5480, U. S. Revised Statutes. The deviser of the scheme may, at the time he planned it, have intended to avoid all use of the mails in carrying it out; nevertheless, if, in carrying it out, he does use the mails, the offense is committed. There are two elements of the crime, a scheme intended to defraud and an actual use of the mails; both, of course, must be proved to warrant conviction. (Farmer v. U. S. 223 Fed. 903, 907.)

In both civil and criminal cases the intent with which an act is done is inferred from the result of the act itself, and the law presumes that every man intends the legitimate consequences of his own acts. (Agnew v. U. S., 165 U. S. 36.)

CHARACTER OF MAILINGS

The letters mailed need not be of a nature calculated to be effective in carrying out the fraudulent scheme. "It is enough if, having devised a scheme to defraud, the defendant, with a view of executing it, deposits in the post office letters which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefor." (Durland v. U. S., 161 U. S. 306.)

This section applies to the act of one engaged in a legitimate business, who, to obtain money or credit, sends through the mail a false statement as to his financial condition. ***Where loans were obtained by virtue of a false financial statement sent through the mails, there was an artifice to defraud within this section, though the borrower was then solvent. (Bettmen v. U. S., 224 Fed. 819.) This section is not limited to schemes of the nature of those specified in the section, but includes the use of the mails for the transmission of a false financial statement by which defendant intended to obtain, and did obtain goods on credit to which he was not entitled. (Scheinberg v. U. S., 213 Fed. 757.)

USE OF MAILS

The letters need not be to or from intended victims. (Stewart v. U. S., 300 Fed. 769.)

Where the mails are used by persons who have devised a scheme to defraud, and as a part of the means for carrying out such scheme, an offense is committed and it is immaterial to whom the letter was addressed or by whom mailed. (U. S. v. Ryan, 123 Fed. 634.)

Where the execution of a scheme to defraud would have been utterly impossible without the use of the mails, all who participated in the scheme would be guilty, although they did not actually deposit or take from the mails any of the letters. All who participated in this scheme contemplated the use of the mails in their common design; and when to this end two of the principal defendants made use of the mails it was not only on their own behalf, but as well on behalf of their coparticipants; and their acts in this regard become the acts of each of them. This is not less true where the prosecution is under section 215 than under the charge of conspiracy. (Fitzpatrick v. U. S., 178 U. S. 304.)

Evidence that defendant induced the alleged victim of his fraudulent scheme to deposit his check on a bank located in another city in a local bank, and that this bank used the mails in cashing the check; Held sufficient to show a use of the mails on defendant's initiative. (Headley v. U. S., 294 Fed. 838.)

The letters that were contained in these envelopes were proven to be in the handwriting of defendants, or to have emanated from them, and if these letters were written by the defendants and found their way into the mail the jury would be authorized to infer that they were deposited in the mail by the defendants. (Stockes v. U. S., 157 U. S. 187.)

Though defendant did not participate in fraud whereby others obtained checks and drafts, he was guilty of a violation of this section, where he attempted to collect checks and for that purpose deposited them with a bank which transmitted them through mails. (Spear v. U. S., 243 Fed. 250.)

Nor is it essential to the commission of the offense that the objectionable matter be deposited in the mail by the offender himself, or by another acting under his express direction, because he is equally responsible if it is deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect. *** In the line of causation his act is a proximate cause of the objectionable matter being put in the mail. (Demolli v. U. S., 144 Fed. 363.)

The United States Circuit Court of Appeals for the Second Circuit has held that the use of the mails for the transmission of a false financial statement to commercial agencies, with the intent that it should be used as a basis for the purchase of goods on credit to which defendant was not entitled is a "scheme or artifice" within section 215 of the Criminal Code. (Bettman v. U. S., 224 Fed. 313.)

On trial for taking letters from the post office in aid of a scheme to defraud, proved copies of letters mailed to accused were readmissible without otherwise accounting for the absence of the originals. (Trent v. U. S., 228 Fed. 648.)

Proved copies of letters sent to accused, who was charged with using the mails in a scheme to defraud, may be received in evidence without otherwise accounting for the originals. (Watlington v. U. S., 233 Fed. 247.)

Where, in a prosecution for using the Post Office Establishment in furtherance of a scheme to defraud, a witness testified that after signing certain letters addressed to defendant's firm he turned them over to the stenographer to copy, address, stamp, and mail, and that the routine of business in his office required her to attend to such duties, and it further appeared that defendant replied in due course to one of the letters, and that the other did not require a reply, there was sufficient prima facie evidence to authorize the admission of copies of the letters in evidence. (Emanuel v. U. S., 196 Fed. 317.)

In a prosecution for mailing certain letters in furtherance of a scheme to defraud, letters other than those counted on in an indictment, purporting to have been written by the company operated by defendant, to different persons throughout the country, and relating to transactions by the company with them, were admissible to show that the scheme contemplated for the use of the mails, and as bearing on the intent with which the business was done and the existence of a scheme to defraud. (*Brooks* v. *U.S.*, 146 Fed. 23.)

It was held that the mailing of letters might be shown by evidence of the custom and course of men's private offices and business. (*Watlington* v. *U.S.*, 233 Fed. 247.)

Proof of custom of banks to collect checks by mail was held competent, on prosecution for using the mails in furtherance of a scheme to defraud, where check of victim on a distant bank was deposited in local bank for collection; persons of ordinary business experience being presumed to know of such custom. (*Shea* v. *U.S.*, 251 Fed. 440.)

In trial for using the mails in a scheme to defraud, evidence held sufficient to show that mails were used by defendant, even if not disclosing that he placed any mail in post office or was ever present when any was so placed. "In connection with this testimony, we must also take into consideration the fact not only that the checks were received through the mail but that appellant intended that the scheme or plan should be carried out in the office of the corporation and that in the usual and ordinary course of business it could only be done through the mails, because the banks were widely separated and the telegraph company had refused to accept the certified checks and transmit the money." (*Federman* v. *U.S.*, 36 F. (2d) 441.)

CONSPIRACY INVESTIGATIONS

Title 18, Section 88 of the United States Code provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

The elements of this offense are:

One: That two or more persons conspired together to:

(a) Commit any offense against the United States; or

(b) Defraud the United States in any manner or for any purpose.

Two: That one or more of the conspirators committed an overt act to effect the object of the conspiracy.

THE CONSPIRACY

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means. (Duplex Printing Press Co. v. Derring, 254 U. S. 443.)

Proof of meeting of minds by intelligent and deliberate agreement to commit offense establishes "conspiracy", though agreement is not manifested by formal words. (Hoffman v. U. S., 68 Fed. (2d) 101.)

Under this section it is sufficient that it be the conspirator's purpose to commit a wilful fraud on the law, or some statutory requirement pertinent to be observed, in view of the present controlling conditions; and it is not necessary that there should be a conspiracy to do an act that is an offense or crime by some statute of the general Government, or to deprive the United States of its property or some property right. (U. S. v. Raley, 173 Fed. 159.)

This statute is broad enough in its terms to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of the Government. (Haas v. Henkel, 216 U. S. 462.)

One defendant alone cannot be convicted of conspiracy. (Bartkus v. U. S., 21 Fed. (2d) 425. Decamp v. U. S., 10 Fed. (2d) 984.)

Anyone who, after a conspiracy is formed and who knows of its existence, joins therein, becomes as much a party thereto, from that time, as if he had originally conspired. (U. S. v. Cassidy, 67 Fed. 698. U. S. v. Babcock, Fed. Case No. 14487.)

Act of one conspirator in furtherance of the Conspiracy binds each and all of the parties to the conspiracy and completes the offense as to all. (U. S. v. Richards, 149 Fed. 443. Bannon and Mulkey v. U. S., 156 U. S. 464.)

THE OVERT ACTS

Overt act required to constitute conspiracy must be separate and apart from the conspiracy, and done to carry into effect the object of the original combination. (U. S. v. Richards, 149 Fed. 443. U. S. v. Cole, 153 Fed. 801.)

Purpose of overt act is to show that the conspiracy was actually carried into operation. (U. S. v. Greene, 115 Fed. 343. U. S. v. Donau, Fed. Case No. 14983.)

Provision that there must be an overt act merely affords a "locus penitentia", so that before the act is done either one or all may abandon their design. (U. S. v. Britton, 108 U. S. 199.)

Acts of agents and employees are acts of principal and employer. (U. S. v. Howell, 56 Fed. 21.)

Letters are held to be overt acts. (Jones v. U. S., 179 Fed. 584.)

VENUE

The court in whose jurisdiction the conspiracy was formed has jurisdiction regardless of where the overt act was committed. "If the conspiracy be entered into within the jurisdiction of the trial court, the indictment will lie there, though the overt act is shown to have been committed in another jurisdiction." (Hyde v. Shine, 199 U. S. 62.)

Jurisdiction lies where overt acts were done regardless of where conspiracy was formed. (Arnold v. Weil, 157 Fed. 429. Hyde v. U. S. 225 U. S. 347.)

LIMITATIONS

Where there are successive overt acts during the period of the conspiracy, the period of limitation must be computed from the date of the last of them properly specified in the indictment, although some of them may have occurred more than three years before the indictment was found. (Brown v. Elliot, 225 U. S. 392. U. S. v. Brace, 149 Fed. 874.)

A conspiracy continues so far as the Statute of Limitations is concerned, so long as there is a course of conduct in violation of law to effect its purpose. (Ryan v. U. S., 213 Fed. 13.)

Conspiracy is a continuing crime, and when continuance is alleged with overt acts within the statute, prosecution is not barred. (Ware v. U. S., 154 Fed. 577. U. S. v. Barber, 157 Fed. 339.)

Statute does not begin to run until commission of an overt act and prosecution may be instituted within three years after commission of any overt act regardless of period of time elapsed since the conspiracy was first formed. (U. S. v. Bradford, 148 Fed. 413.)

Existence of the conspiracy during period alleged is question of fact for the jury. (Ware v. U. S., 154 Fed. 577.)

EVIDENCE

Broad latitude of proof and reception of circumstantial evidence is allowed in the trial of conspiracy charges. (U. S. v. Greene, 146 Fed. 803. Jones v. U. S., 162 Fed. 417.)

Other offenses of a similar nature can be proven to show intent, purpose, design, and knowledge (Jones v. U. S., 162 Fed. 417. Jones v. U. S., 179 Fed. 584.)

Declarations made by one conspirator while the conspiracy was in progress and relating to its object are admissible as a part of the res gestae against each conspirator. (Jones v. U. S., 179 Fed. 584.)

Prior intimacy of parties is admissible. (U. S. v. Greene, 146 Fed. 803.)

Letters between alleged co-conspirators are admissible. (U. S. v. Greene, 146 Fed. 789.)

Date of forming conspiracy is not essential. It is sufficient to show that the conspiracy existed before the date of the overt act alleged and continued to exist at the time the overt act was committed. (Bradford v. U. S., 152 Fed. 817.)

PLEADINGS IN CIVIL SUITS

This discussion is limited to actions instituted by the Commission under the Securities Act of 1933 and the Securities Exchange Act of 1934. It supersedes the General Counsel's Office Memorandum No. 36 dated September 30, 1936.

See paragraphs 35, 37, 38 and 39 of the Enforcement Manual for the procedure to be followed in securing authority to institute proceedings, in securing approval of proposed pleadings and in reporting action contemplated or taken. The provisions of these paragraphs are mandatory. If the authority to file an injunction suit is contingent upon consent to the entry of the decree the bill of complaint must not be filed until the executed consent has been secured.

INJUNCTION SUITS

Under both statutes the Commission is authorized to bring actions to enjoin "acts or practices which constitute or will constitute a violation * * *". Securities Act of 1933, Section 20(b). Securities Exchange Act of 1934, Section 21(e). While such actions are statutory they are governed by the provisions of the equity rules not inconsistent with the statute under which the proceeding is brought.

Applying Equity Rule 25 to such actions it would appear that the bill of complaint is sufficient if it contains: (1) the usual caption; (2) a short statement of the grounds upon which the court's jurisdiction depends; (3) the venue as to each defendant; (4) a short and simple statement of the ultimate facts upon which the injunction is sought, omitting any statement of evidence; (5) the prayer; and (6) the verification.

Jurisdiction

The jurisdiction of the court over the subject matter of the action can be alleged by stating "jurisdiction is conferred upon the court by Section 22(a) of the Securities Act of 1933 (or Section 27 of the Securities Exchange Act of 1934)".

Venue

Venue depends upon the provisions of the statute involved and is slightly different in the two statutes. See Securities Act of 1933, Section 22(a). Securities Exchange Act of 1934, Section 27.

It can be alleged, for example:

"The defendant, X Company, is a corporation organized and existing under and by virtue of the laws of the State of _____ and transacts business in the District of _____."

"The defendant A was at all times herein mentioned and now is, the president of X Company and is an inhabitant of the District of_____."

Parties Defendant

It has been the custom of some of the regional offices to include as defendants the issuing corporation and most, if not all, of its officers and directors. The better practice would be to include only those officers ordirectors who personally participated in the acts and practices constituting the violation or are responsible for the participation of others.

It is not necessary that each cause of action run against each defendant. For instance, in a recent suit filed by the Commission it was alleged that all of the defendants violated Section 5 of the Securities Act of 1933 while the allegations as to the violations of Section 17(a) ran only against one of them.

The Cause of Action

Clarity and coherence usually result from a brief narrative statement of the cause of action substantially in the language of the statute, avoiding a procession of "thats" and semicolons; such a pleading is in accordance with Equity Rule 25 -- "A short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence."

Naturally the "ultimate facts" differ in every case. Attached hereto are various sample paragraphs. These are submitted not as forms to be rigidly followed, but as examples which may be of assistance. They will be augmented from time to time.

The allegations should be in the conjunctive, such as "means *and* instruments of transportation *and* communication in interstate commerce *and* of the mails" or "for the purpose of sale *and* for delivery after sale".

While there is some question as to the right to an injunction based only on past acts and practices, the policy is to plead the past and present tense such as "Since on or about_____, 193___the defendants, and each of them, carried *and* caused to be carried and are now carrying *and* causing to be carried * * *".

A distinction must be made between ultimate facts and conclusions. The former are sufficient without explanation. The latter are not. For instance, the allegation "without being accompanied or preceded by any prospectus" is one of ultimate fact but the allegation "without being accompanied or preceded by a prospectus which meets the requirements of Section 10" is a conclusion which must be followed by a specification of the particulars in which the prospectus was deficient.

Except in certain jurisdictions such as Colorado, in alleging the untrue statements there is no need to quote each letter or pamphlet in the series of sales literature nor to set forth the dates of specific mailings. The time may be alleged as continuing, such as "Since on or about _____ ____, 193___ the defendants, and each of them, in the sale ***". The untrue statements may be summarized. However, care must be used to avoid alleging that an untrue statement of fact was made when the statement used was merely an expression of opinion. Promissory representations such as "the stock will be listed" must not be alleged unless we have proof of a contrary intent. It is essential to plead the respects in which any statement is untrue or contains a material omission and this should be done with clarity so that one reading the bill will gain an understanding of materiality.

When it is necessary to refer to a document it should be briefly described and the pertinent parts summarized. If it is attached to the pleadings as an exhibit it is usual to state "Attached hereto marked Exhibit ___ and by reference made a part hereof as though herein set out at length."

In most of our bills of complaint the first numbered paragraph is not a necessary part of the cause of action but merely a desirable means of informing the court of the nature of the proceeding. For example, "It appears to the plaintiff that the defendant is engaged and about to engage in acts and practices which constitute and will constitute violations of Section 5(a) of the Securities Act of 1933. The plaintiff therefore brings this action pursuant to Section 20(b) of such statute to enjoin such acts or practices, as more fully hereinafter set forth."

Generally speaking, exemptions are matters of defense which need not be negatived in the bill of complaint. For instance, there is no need for us to plead or prove that the security involved is not within any part of Section 3 of the Securities Act of 1933 nor is it necessary to plead or prove that the defendant is an issuer, underwriter or dealer nor that the transactions by an issuer did not involve any public offering. However, it is frequently desirable to negative some exemptions. For instance, it has been our practice to indicate the public character of the offering by a brief statement such as "offered and sold and are now offering and selling such securities to members of the public residing in the States of _____, _____ and elsewhere". In the case of sales by underwriters the defendant has been so classified. For example, "On or about _____ _____, 193___ the defendant _____ purchased with a view to distribution a total of _____ shares of the stock of X Corporation and since then sold and is now selling such securities to members of the public residing in the States of _____, _____ and elsewhere".

It must be noted, however, that if the exemption is a part of the paragraph describing the unlawful or prohibited acts or practices it must be specifically negatived. Section 15(a) of the Securities Exchange Act of 1934 has given particular difficulty in this connection. Please use the attached forms in actions involving violations of this section.

Since the remedies are statutory there is no need to allege immediate, irreparable damage or the want of an adequate remedy at law. However, it is desirable to allege the probability or threat of continuation of the acts and practices which constitute the violation, particularly if a preliminary

injunction is sought. If a temporary restraining order is to be sought the provisions of 28 U.S.C. 381 must be followed and the need for an immediate injunction must be set forth in the verified bill of complaint or in a separate affidavit.

Prayers

Needless to say, the prayer is based on the cause of action stated in the bill of complaint and should be confined thereto. A violation of Section 5(a) of the Securities Act of 1933 does not warrant a prayer for a decree enjoining violations in the sale of registered securities. However, in at least one case we have sought and secured a decree covering both Sections 5(b)(1) and 5(b)(2) although no violation of Section 5(b)(1) was alleged because of our inability to secure proof of jurisdictional facts in the use of the deficient prospectus. Although it was not anticipated when the action was started, the decree just mentioned was secured by consent.

As stated before, the cause of action should be stated in the conjunctive and in the past and present tenses. The prayer, however, requests an injunction as to any future acts or practices and should be in the disjunctive. For example, "the defendants, and each of them, from carrying *or* causing to be carried * * * for the purpose of sale *or* for delivery after sale * * * ".

While the cause of action alleges violations in connection with specific securities, the suit is to enjoin acts or practices which constitute or will constitute a violation and a decree limited to specific securities is too narrow. It would appear to be proper to pray for an injunction covering acts or practices in connection with the specific securities "or any other security".

A decree which merely paraphrases Section 17(a) of the Securities Act of 1933 is too broad. However, it should not be limited to the untrue statements or omissions specified in the cause of action but should be so drawn as to cover similar acts and practices in connection with the sale of the specified securities or any other securities. For example, the allegation "* * * represented that X Company was at all times earning money and operating at a profit, whereas in truth and in fact it never earned money and was at all times operating at a deficit", should appear in the prayer as "* * * any untrue statement * * * concerning the profits earned by the issuer of the security".

If a preliminary injunction is to be sought it must be requested in the prayer. If it is to be heard on an order to show cause rather than a notice of motion the prayer should request the issuance of such order.

If a temporary restraining order is to be sought the prayer must request its issuance, coupled with an order to show cause why a preliminary injunction should not issue.

Under the present equity rules it is not necessary to pray for the issuance of the subpoena requiring the defendants to appear and answer. It is customary to conclude the prayer with an omnibus clause; for example, "such other and further relief as is proper in the premises".

Verification

It has been the practice to verify all bills of complaint or petitions. The source of the information and the grounds of the belief which form the basis of allegations on information and belief should be summarized very briefly. For example see the attached suggested form.

DECREES

There is no need to repeat what has just been said about prayers. If the prayer of the bill of complaint is properly drawn the body of the decree will be copied therefrom verbatim.

The decree, however, should specify that it does not apply to acts and practices which are exempt from the operation of the statute; for example, a decree under Section 5 of the Securities Act of 1933 should contain a paragraph such as "It is further ordered that this decree shall not apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act of 1933." See also the attached form for decrees under Section 15(a) of the Securities Exchange Act of 1934.

It has been the practice to insert in the decree a paragraph by which the court retains jurisdiction. It was felt that by so doing the scope of a decree unnecessarily specific in its description of the practices restrained might, in certain instances, be enlarged on motion after term should it become apparent that effective relief had not been obtained. This procedure is now regarded as unnecessary in view of the general use of a paragraph at the foot of decrees enjoining similar practices, and *it is suggested that no such language be included in future decrees.*

Your attention is directed to Section 19 of the Clayton Act, 28 U.S.C. 383, which is apparently applicable to all preliminary or final injunctions, consent or otherwise, whether or not issued under the Clayton Act. Temporary restraining orders, however, are governed by 28 U.S.C. 381. The requirement of the Clayton Act that the reasons for the issuance of the injunction be set forth can probably be satisfied by an introductory paragraph along the following lines:

"This cause came on to be heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it appearing to the satisfaction of the court that the issuance of a preliminary injunction is necessary for the reason that, unless restrained, the defendants will engage in acts and practices which will constitute violations of Section 17(a) of the Securities Act of 1933, as amended, it is this _____ day of _____, ADJUDGED, ORDERED AND DECREED as follows, viz:"

Although failure to observe the requirements of this section does not vitiate a decree, proper practice demands scrupulous observance of its terms. *Larkin Packer Co. v. Hinderliter Tool Co.* (C.C.A. 10th, 1932) 60 F. (2d) 491, 494; *Lawrence v. St. Louis-San Francisco Ry. Co.* (1927) 272 U.S. 588, 591, 71 L. Ed. 1219, 47 Sup. Ct. 720.

Consent Decrees

In some instances we have had difficulty in finally disposing of cases in which consent preliminary injunctions have been entered. It is preferable in cases of consent to obtain a final decree disposing of the cause.

In obtaining consents to the entry of decrees it is important that the consent signed by the respondent recite that he admits the jurisdiction of the court as to the parties and the subject matter of the action. It has been noticed that many consents are qualified by words denying the allegations of the bill of complaint. It is suggested that it will be preferable in the event some such recitation is required by the respondent, that he be persuaded to qualify his consent by using language substantially as follows: "without admitting that he has violated the provisions of Section ___ of the Securities Act of 1933 (Securities Exchange Act of 1934)". Theoretically, at least, the judge before entering a decree should be satisfied that some violation of the law has occurred or is about to occur. If all of the facts are denied it is difficult for the court to make such finding. On the other hand, if only the conclusion drawn from the facts is denied, the court may disagree with the conclusion of the respondent and find from those facts that he has violated the law or is about to do so. *Swift & Company vs. U.S.* 276 U.S. 311 72 L. Ed. 587; 48 Sup. Ct. 317.

Decrees Pro Confesso

Whenever a bill may be taken pro confesso, you are urged to do so without delay and, upon the expiration of thirty days, to obtain a final decree. In view of the fact that under Section 15(b)(2)(C) of the Securities Exchange Act of 1934, as amended, an injunction restraining the continuation of practices in violation of the Securities Act of 1933 furnishes ground for the revocation or denial of broker-dealer registrations, neglect in this respect may have serious consequences.

In one instance a dealer failed to respond to a rule of the Supreme Court of the District of Columbia requiring him to show cause why a preliminary injunction should not issue restraining practices in violation of Section 17 of the Securities Act, and was consequently named, among others, in the preliminary injunction issued. The denial of his application for broker-dealer registration, filed after the entry of the decree, was based upon this injunction. No effort was made to take the bill pro confesso as to this defendant, although the time to file answer had expired. One year after the denial of his registration, he filed an answer to the bill and succeeded in having the preliminary injunction vacated and the suit dismissed as to him. The Commission was thus left with no alternative but to rescind its order denying registration and to permit it to become effective.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Attention is directed to the following requirements of Equity Rule 70-1/2:

"In deciding suits in equity, including those required to be heard before three judges, the court of first instance shall find the facts specially and state separately its conclusions of law thereon, and, in granting or refusing interlocutory injunctions, the court of first instance shall similarly

set forth its findings of fact and conclusions of law which constitute the grounds of its action. Such findings and conclusions shall be entered of record and, if any appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rules 75 and 76."

Prior to its amendment in November, 1935, the courts were in doubt whether the rule applied in granting or refusing interlocutory injunctions. The rule, as amended, specifically applied to such injunctions.

If, in granting or refusing the injunction, the court hands down a written opinion, the opinion may, by appropriate reference, stand as the findings of fact and conclusions of law required by Rule 70-1/2. *Stewart-Warner Corporation v. A.C. Spark Plug Co.* 5 F. Supp. 371, and cases cited.

This would not be so if the opinion is clearly insufficient for this purpose.

In *Briggs v. United States*, 45 F. (2d) 479 (C.C.A. 8) the court said:

"Until otherwise authoritatively held, we shall think the rule satisfied by a clear and concise statement by the trial court, whether called findings or opinions, which shows what he regards as the essential facts and applicable rules of law."

The trial court need not pass upon each separate request for findings. A statement of only such essential facts and legal conclusions as indicate the ground of decision is sufficient. *American Can Co. v. M.J.B. Co.* 52 F. (2d) 904. See *Parker v. St. Sure*, 53 F. (2d) 706 (C.C.A. 9).

Reference to the opinion in the decree may be made as follows:

"Ordered, that the opinion of the court in the above entitled cause dated _____ day of _____ 1938, stand as the findings of fact and conclusions of law required by Equity Rule 70-1/2."

It would appear better practice not to include in the decree itself the findings of fact and conclusions of law required by Rule 70-1/2, as their inclusion might conflict with Equity Rule 71 which provides:

"In drawing up decrees and orders, neither the bill, nor answer, nor other pleadings, nor any part thereof, nor the report of any master, nor any other prior proceeding, shall be recited or stated in the decree or order; but the decree and order shall begin, in substance, as follows: 'This cause came on to be heard (or to be further heard, as the case may be) at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz,'" (Here insert the decree or order.)

CONTEMPT PROCEEDINGS

Recent activities of the Commission in successfully prosecuting proceedings for contempt of injunctions (*Boise Petroleum Corporation*, District of Idaho, Eq. No. 1974, and *Peter Ivanoff*, Southern District of Washington) have given rise to questions of procedure and investigation of such matters.

Nature of Proceedings

There is no need to discuss the distinctions between civil and criminal contempt proceedings. Suffice to say here, a proceeding instituted for contempt of a decree enjoining acts or practices constituting violations of a statute is a criminal case. As such it is a separate action distinct from the injunction suit in which the decree was entered. *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 413 55 L. Ed. 797; 31 Sup. Ct. 492; *Bessette v. Conkey Co.*, 194 U. S. 324 48 L. Ed. 997; 24 Sup. Ct. 665; *Worden v. Searles*, 121 U. S. 14 30 L. Ed. 853; 7 Sup. Ct. 814; *Federal Trade Commission v. A. McLean & Son* (C.C.A. 7th, February 3, 1938)_____. F. 2nd _____.

Elements of the Offense

In investigating suspected contempts of injunctions and in preparing informations for filing in prosecuting such contempts, the following elements must be determined:

1. The existence and validity of the decree.

2. Service of a copy of the decree upon the respondent or actual notice by him of the contents of the decree.

3. Conduct of the respondent after entry of the decree, including

    a. Use of the mails or interstate commerce, and

    b. Commission of acts and practices restrained by the injunction.

    c. Specific and definite overt acts covering each step of such conduct.

    d. Affidavits to substantiate such overt acts.

Jurisdiction and Venue

Courts of chancery and other courts otherwise without criminal jurisdiction can punish for criminal contempt. *Middlebrook v. State*, 43 Conn. 257; *Merchants Co. v. Board of Trade*, 201 Fed. 20.

The proper venue for an action of criminal contempt of an injunction is not where the acts in violation of the injunction were committed but is the district and division of the district where the injunction was entered. *Merchants Co. v. Board of Trade*, 201 Fed. 20.

Institution of Proceedings and Trial

Although the practice has been followed in some cases of captioning a contempt proceeding in the name of the main case, *(Securities and Exchange Commission v. Boise Petroleum Corporation, et al.*, District of Idaho, Eq. No. 1974), it appears to be proper to style the case as a separate action.

"A criminal contempt is no part of the main case; it is a proceeding independent and apart, in the nature of a criminal prosecution, and it should have a title of its own, appropriate to indicate its character. " -- *Anargyros v. Anargyros Co.*, 191 Fed. 208, at 210.

Proceedings instituted against individuals who have violated the terms of decrees obtained by the Commission should be captioned "In the Matter of _____, Respondent; Securities and Exchange Commission, Relator." *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418 55 L. Ed. 797; 31 Sup. Ct. 492; *State of Oregon ex rel. Hewson v. Hewson*, 277 Pac. 1012; *Dorrian v. Davis*, 147 Atl. 338 (N.J.)

Since criminal contempt proceedings are brought to vindicate the authority of the court, it appears proper to request the court to appoint a Commission attorney to prosecute the matter. It has been held that in actions of criminal contempt the court has the power to and probably should appoint some attorney to prosecute the actions in its behalf, and that the attorney for the relator usually is the proper person to be so appointed. *McCann v. Stock Exchange*, 80 Fed. (2d); *Gompers v. United States*, 233 U.S. 604; 59 L. Ed. 1115; 34 Sup. Ct. 693. The purpose of such appointment is to advise the defendant that the proceeding is in criminal contempt rather than civil contempt. However, Judge Cavanah in *Securities and Exchange Commission v. Boise Petroleum Corporation*, et al., *supra*, refused to sign an order and said that the style of the case and the fact that the Commission was an agency of the United States and the Commission's attorney a United States officer was sufficient without further order to advise the respondents of the nature of the proceedings brought against them. To the contrary, Judge Bowen *In re Ivanoff*, Western District of Washington, Northern Division, No. 21, 169, entered such an order upon application of the Commission. A formal motion should be made in each case to eliminate a possible focal point of argument.

The defendant in criminal contempt proceedings is entitled to the same presumption of innocence as the defendant in any other criminal action. *Gompers v. Bucks Stove & Range Co.* 221 U.S. 418 55 L. Ed. 797; 31 Sup. Ct. 492; *Michaelson v. United States*, 266 U. S. 42 69 L. Ed. 162; 45 Sup Ct. 18. However, he is not entitled to a trial by jury, (*Eilenbecker v. District Court*, 134 U.S. 31 33 L. Ed. 801; 10 Sup. Ct. 424. *In re Debs*, 158 U.S. 564 39 L. Ed. 1092; 15 Sup. Ct. 900) except where specific statutory provision is made for jury trial, as in certain proceedings arising under the Clayton Act. Prior to the passage of the Clayton Act all proceedings for criminal contempt were tried without a jury. Under the Clayton Act, where disobedience of an order of the court also amounts to a crime the accused is entitled to a trial by jury except where the contempt is a disobedience of an order "entered in any suit or action brought or prosecuted in the name of or on behalf of the United States." 28 U.S.C. 386, 389; *Hill v. U. S. ex rel*, Weiner, 300 U.S. 105 81 L. Ed. 537; 57 Sup. Ct. 347. It seems clear that a contempt proceeding instituted by the Commission is for disobedience of an order entered in a suit brought on behalf of the United States and hence no right to a trial by jury exists.

It is not necessary to plead the details of the injunction or order out of which arises a contempt proceeding; the court will take judicial notice of the contents of its own orders. *Scoric* vs. *U.S.*, 217 Fed. 870. However, it probably is best to plead the injunction or order by reference. *Gompers v. Bucks Stove and Range Co.*, 221 U.S. 418; 55 L. Ed. 797; 31 Sup. Ct. 492.

The proceedings are properly instituted by the filing of a verified petition by the Commission through its attorney. The purpose of the petition is to inform the court of the contempt; therefore it is sometimes referred to as an information. The allegations may be upon information and belief but should be supported by affidavits based upon actual knowledge. *Kelly v. U.S.* 250 F. 947; *Ex parte Roth*, 39 P. (2d) 480 (Cal.); *Denny v. State*, 182 N.E. 313.

Upon the filing of the petition and affidavits there should be secured either an attachment of the body of the respondent or a rule to show cause directed to him. *In re Baum* 169 Fed. 410 (cert. den.). The petition and affidavits should recite the prior proceedings and that the respondent either was served with a copy of the decree or had actual knowledge of it. The petition should contain an allegation that in contempt of court the respondent has disobeyed the order and a definite prayer for attachement and punishment. *U. S. v. Taliaferro*, 290 Fed. 214; *U.S. v. Shipp*, 214 U. S. 386; 52 L. Ed. 1041; 29 Sup. Ct. 637 (a supplement in the official U. S. Reporter contains copies of all moving papers); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; 55 L. Ed. 797; 31 Sup. Ct. 492.

The petition should be specific and should allege clearly and definitely the overt acts upon which the Commission relies, so that the respondent when he is arraigned will know what answer to make to enable him to prepare a defense. *Sona v. Aluminum Co.*, 214 Fed. 936; *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418; 55 L. Ed. 797; 31 Sup. Ct. 492.

In one of the Commission cases the court's decision was based upon an affidavit submitted by the defendant which stood in effect as an agreed statement of facts. However, it is better practice to try a proceeding in criminal contempt upon oral testimony. The court can hear the evidence, or, if it wishes, refer the case to a master with instructions to report the case to the court. *U. S. vs Shipp*, 214 U.S. 386; 52 L. Ed. 1041; 29 Sup. Ct. 637; *U. S. vs. Anonymous* 21 F. 761. *In re Fellerman*, 149 F. 244.

That the acts that form the basis for the proceedings were done upon advice of counsel is no defense. It is pertinent only in mitigation, and is considered by courts in weighing the penalty to be imposed. *In re LaVarre*, 48 Fed. (2d) 216; *Prang & Co. v. American Crayon Co.*, 58 Fed. (2d) 715. *Clark v. U. S.* 289 U. S. 1; 77 L. Ed. 993; 53 Sup. Ct. 465.

PROCEEDINGS TO COMPEL APPEARANCE OF WITNESSES

In the case of contumacy or refusal to obey a subpoena, the United States courts, upon application by the Commission, may issue an order requiring the proposed witness to appear to give evidence or to produce documents. In re S. E. C. 84 F. 2d 316 (C.C.A. 2d), reversed on ground of mootness 299 U.S. 504; 81 L. Ed. 374; 57 Sup. Ct. 18. There appears to be no practical difference between the language of the two Acts. Securities Act of 1933, Section 22(b): "To appear before the Commission or one of its examiners designated by it". Securities Exchange Act of 1934, Section 21(c): "To appear before the Commission or member or officer designated by the Commission". Proper pleading requires the use of the language of the statute under which the original subpoena was issued. If under both, the two can be combined as "examiner and officer".

In cases in which the Commission intends to resort to the courts for the purpose of enforcing a subpoena duces tecum, the following procedure has been adopted. After the service of a first subpoena (which, of course, should be sufficiently descriptive of the documents required) and a refusal on the part of the individual summoned to produce them, notice of such fact should be sent to Washington together with a copy of the subpoena served and a description of the books or other documents required to be produced. This should be accompanied by a statement indicating the relevancy or materiality of the matter sought to the investigation. Thereupon, in cases where it appears proper to do so, the Commission itself by official action "deems relevant or material to the inquiry" the books or other documents demanded. This policy has been adopted because of the language of Section 19(b) of the Securities Act of 1933 and Section 21(b) of the Securities Exchange Act of 1934, although it is probable that the Commission may delegate to an officer the function of deeming the documents demanded to be relevant or material to the inquiry.

After this action has been taken by the Commission a second subpoena is to be issued directed to the same person, requiring the production of the books and other records deemed relevant or material by the Commission and upon the refusal of the person summoned to respond, court action may be instituted after obtaining Commission approval.

The application for an order to compel a witness to appear should be a petition. Like a bill of complaint, it should contain (1) a caption designating the Commission as petitioner and the proposed witness as respondent; (2) a short statement of the grounds upon which the court's jurisdiction depends; (3) the venue as to each respondent; (4) a short and simple statement of the ultimate facts; (5) the prayer and (6) the verification. *S. E. C.* v. *Jones*, 12 F. Supp. 210 (S.D.N.Y.), affirmed 79 F. 2d 617, reversed on other grounds 298 U.S. 1; 80 L. Ed. 1015; 56 Sup. Ct. 654.

Jurisdiction

Jurisdiction of the court over the subject matter of the proceeding is not conferred by the sections of the statute applicable to injunction suits but by Section 22(b) of the Securities Act of 1933 or Section 21(c) of the Securities Exchange Act of 1934.

Venue

The venue for such proceedings is likewise different than in injunction suits. The pertinent provisions of the statutes read: Securities Act of 1933, Section 22(b), where the respondent "is found or resides". Securities Exchange Act of 1934, Section 21(c), where the "investigation or proceeding is carried on" or where the respondent "resides or carries on business".

The Basis for the Proceedings

The ultimate facts which form the basis for such proceedings such as the order for investigation, the authority of the examiner or officer to issue the subpoena, the issuance and service thereof and the contumacy appear from the sample paragraphs attached hereto.

Prayer

The question has been raised as to whether or not the statute permits the order to issue ex parte. Without deciding this question our present policy is to give notice in all cases. Therefore the prayer should contain a request for an order to show cause, upon return of which the final order is to issue.

If the proposed witness is to produce books, records, etc. the lists thereof appearing in the subpoena may be incorporated into the prayer by reference, provided a copy of the subpoena is attached to the petition as an exhibit.

Verification

The verification follows the general form.

Order to Show Cause

The order to show cause will follow the general form. If the respondent is to be required to produce books, records, etc. they should be specified as they were in the subpoena, not merely incorporated by reference.

Order to Appear

The order requiring the proposed witness to appear should contain the general statement of hearing, consideration, etc. followed by the court's order to the respondent to appear before the Securities and Exchange Commission or an examiner (or officer) thereof to be designated by it. The order sets the date, time and place for the appearance and specifies whether the respondent is to give evidence or produce books, records, etc. or both. If it requires the production of books, records, etc. they should be specified just as they were in the subpoena.

If the respondent is to give evidence the order should provide for more than one day of hearing, if such be necessary to complete the examination. This can be done by such language as "and from day to day thereafter until the giving of evidence by the respondent has been completed".

When the order has been issued it must be served on the respondent. His appearance is pursuant to the court's order, not to a subpoena.

SAMPLE FORMS

The following paragraphs should be of assistance in preparing pleadings. They are submitted by way of example, not as forms which must be rigidly followed.

SECTION 5(a) SECURITIES ACT OF 1933

Bill of Complaint:

III.

Upon information and belief:

Since on or about _____, 193__, the defendants and each of them have been and are now making use of the mails and of means and instruments of transportation and communication in interstate commerce to sell the common capital stock of the X Corporation.

IV.

Upon information and belief:

Since on or about _____, 193__, the defendants and each of them have been and are now carrying and causing to be carried through the mails and in interstate commerce the common capital stock of the X Corporation for the purpose of sale and for delivery after sale.

V.

At no time herein mentioned has a registration statement as to such securities been in effect, as required by Section 5(a) of the Securities Act of 1933.

Decree:

* * * * enjoined and restrained from directly or indirectly

(a) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell, to attempt or offer to sell, to attempt or offer to dispose of, to solicit an offer to buy or to offer to buy* the common capital stock of the X Corporation or any other security through the use or medium of any prospectus or otherwise, unless and until there is in effect a registration statement as to such security as required by Section 5(a) of the Securities Act of 1933, or

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* The purpose of the inclusion of the words "offer to buy" in the statute is stated in H.R. Rep. No. 85 at page 11 as "preventing dealers from making offers to buy between the period of the filing of the registration statement and the date upon which such statement becomes effective". Therefore this phrase should be included in decrees involving dealers or persons who are likely to become dealers, but not in other cases.

(b) carrying or causing to be carried through the mails or in interstate commerce by any means or instruments of transportation the common capital stock of the X Corporation or any other security for the purpose of sale, attempt or offer to sell, attempt or offer to dispose of or solicitation of an offer to buy or for delivery after sale, unless and until there is in effect a registration statement as to such security as required by Section 5(a) of the Securities Act of 1933;

provided that the foregoing paragraphs (a) and (b) shall not apply to any security or transaction which is exempt from the provisions of Section 5 of the Securities Act of 1933.

SECTION 5(b) OF THE SECURITIES ACT OF 1933

Bill of Complaint:

III.

On _____, 193__, a registration statement filed with the plaintiff covering a proposed offering of preferred stock of the X Corporation became effective pursuant to the provisions of Section 8 of the Securities Act of 1933.

IV.

Upon information and belief:

Since _____, 193__, the defendants and each of them have been and are now using means and instruments of transportation and communication in interstate commerce and the mails to carry and transmit prospectuses relating to the preferred stock of the X Corporation hereinabove described. These prospectuses did not meet the requirements of Section 10 of the Act and the rules and regulations of the plaintiff promulgated thereunder, in that they did not contain the following statements and information required to be contained therein by Section 10 of the Act and the rules and regulations of the plaintiff promulgated thereunder:

(a) the names and addresses of the underwriters of such stock; and

(b) the estimated net proceeds to be derived from the sale of such stock.

V.

Upon information and belief:

Since _____, 193__, the defendants and each of them have been and are now carrying and causing to be carried through the mails and in interstate commerce the preferred stock of the X Corporation hereinabove described for the purpose of sale and for delivery after sale, without such stock being accompanied or preceded by (any prospectus) (a prospectus that meets the requirements of Section 10 in that the prospectus which did accompany or precede such stock did not contain the statements and information specified in Paragraph IV hereof).

Decree:

* * * * enjoined and restrained from directly or indirectly

(a) making use of any means or instruments of transportation or communication in interstate commerce or of the mails to carry or transmit any prospectus relating to the preferred stock of the X Corporation or any other security registered under the Securities Act of 1933 unless such prospectus meets the requirements of Section 10 of such Act, or

(b) carrying or causing to be carried through the mails or in interstate commerce the preferred stock of X Corporation or any other security registered under the Securities Act of 1933 for the purpose of sale, attempt or offer to sell, attempt or offer to dispose of or solicitation of an offer to buy or for delivery after sale, unless accompanied or preceded by a prospectus that meets the requirements of Section 10 of such Act.

SECTIONS 17(a)(1) AND (3) SECURITIES ACT OF 1933

Bill of Complaint:

III.

Upon information and belief:

Since on or about _____, 193__, the defendants and each of them in the sale of various securities as agent, broker and principal, offering, buying, selling and otherwise dealing and trading in securities issued by others by the use of means and instruments of transportation and communication in interstate commerce, and by use of the mails, have been and are now employing devices, schemes and artifices to defraud purchasers of such securities, and have been and are now engaging in transactions, practices and courses of business which operate as a fraud and deceit upon such purchasers, in that the defendants and each of them

(a) while purporting to act as agent in the purchase and sale of securities for the accounts of customers, charged such customers more than the actual price of securities bought and credited such customers with less than the actual price of securities sold, retaining for their own use and benefit the difference between the actual price and the price so charged or credited without the knowledge, approval or consent of such customers;

(b) induced customers to entrust money and securities to them for use in the purchase of other securities for the accounts of such customers and intended to and did convert such money and securities to their own use and benefit without the knowledge, approval or consent of such customers

Decree:

* * * * enjoined and restrained from, in the sale of securities as agent, broker or principal offering, buying, selling or otherwise dealing or trading

in securities issued by others by the use of means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly:

(a) while purporting to act as agent in the purchase or sale of securities for the accounts of customers, charging such customers more than the actual price of securities bought or crediting such customers with less than the actual price of securities sold;

(b) converting to their own use or benefit, without the knowledge, approval or consent of customers, money or securities entrusted to them by such customers;

or employing any other device, scheme or artifice to defraud or engaging in any other transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser similar to those specifically set forth above or of similar purport or object.

SECTION 17(a)(2) SECURITIES ACT OF 1933

Bill of Complaint:

Upon information and belief:

Since on or about _____, 193__, the defendants and each of them in the sale of the common capital stock of the X Corporation by the use of means and instruments of transportation and communication in interstate commerce, and by use of the mails, have been and are now obtaining money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading, by stating:

(a) that mining properties controlled by the defendant corporation were purchased for $500,000 when in fact such properties were purchased for not more than $50,000;

(b) that formal application had been made to the Albuquerque Curb Exchange to list the common capital stock of the defendant corporation, when in fact no such application has been made;

(c) that dividends have been paid regularly for the past two years when the fact is, and the defendants omit to state, that payments made as dividends were derived from capital funds and not from earnings.

Decree:

* * * * enjoined and restrained from, in the sale of the common capital stock of the X Corporation or any other security, by the use of means and instruments of transportation or communication in interstate commerce or by the use of the mails directly or indirectly obtaining money or property by means of untrue statements of material facts or omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they are made not misleading concerning:

(a) the price paid by the issuing corporation for its properties;

(b) the intent to list the securities of the corporation upon a stock exchange;

(c) the source of any dividends which have been paid

or any other untrue statements of material facts or other omissions to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they are made not misleading, similar to those specifically set forth above or of similar purport or object.

SECTION 15(a) SECURITIES EXCHANGE ACT OF 1934

Bill of Complaint:

III.

Upon information and belief:

Since January 1, 1937 the defendants, and each of them, as a part of a regular business not exclusively intrastate, engaged as brokers in the business of effecting transactions in securities for the accounts of others and engaged as dealers buying and selling securities for their own account as a part of a regular business. As such brokers and dealers the defendants, and each of them, made use of the mails and of means and instrumentalities of interstate commerce to effect transactions in and to induce the purchase and sale of securities (other than commercial paper, bankers' acceptances, commercial bills or an exempted security pursuant to the provisions of Section 3(a)(12) of the Securities Exchange Act of 1934) otherwise than on a national securities exchange without the defendants or either of them being registered with the Securities and Exchange Commission in accordance with Section 15(b) of the Securities Exchange Act of 1934.

Decree:

It is hereby ordered that the defendants and each of them, so long as their business is not exclusively intrastate, be and they are hereby permanently enjoined and restrained when engaged as brokers in the business of effecting transactions in securities for the accounts of others or when engaged as dealers in the buying and selling of securities for their own account as a part of a regular business, from making use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in or to induce the purchase or sale of any security (other than commercial paper, bankers' acceptances, commercial bills or an exempted security pursuant to the provisions of Section 3(a)(12) of the Securities Exchange Act of 1934) otherwise than on a national securities exchange, unless they are registered with the Securities and Exchange Commission in accordance with Section 15(b) of the Securities Exchange Act of 1934.

PROCEEDING TO COMPEL APPEARANCE OF WITNESSES

(Title of Court and Cause)

APPLICATION FOR AN ORDER REQUIRING APPEARANCE FOR THE PURPOSE OF PRODUCING CERTAIN BOOKS, PAPERS, RECORDS, REPORTS, AND OTHER DOCUMENTS.

The Securities and Exchange Commission, pursuant to Section 22(b) of the Securities Act of 1933, as amended (15 U.S.C.A. 77v), applies to this Honorable Court for an order requiring Consolidated Mines of California, a corporation, and Henry L. Wikoff, its president, and Frank S. Tyler, its secretary, to appear and produce certain books, documents, and records as required by subpoenas duces tecum issued by the Commission and respectfully represents, as follows:

I.

The respondent, Consolidated Mines of California, is a corporation duly organized and existing under the laws of the State of California. It has its principal place of business in the City of Santa Monica in the State of California, and Henry L. Wikoff and Frank S. Tyler are president and secretary, respectively, of said corporation and reside in Los Angeles County, California, all within the jurisdiction of this court.

II.

Jurisdiction is conferred upon this court by Section 22(b) of the Securities Act of 1933, as amended (15 U.S.C.A. 77v (b)).

III.

On November 5, 1937, the Securities and Exchange Commission, pursuant to Section 20(a) of the Act (15 U.S.C.A. 77t (a)), ordered that an investigation be made as to the facts and circumstances concerning alleged violations by Consolidated Mines of California of Sections 5 and 17 (a) of the Securities Act of 1933, as amended (15 U.S.C.A. 77e and q), and pursuant to Section 19(b) of that Act (15 U.S.C.A. 77s(b)), appointed officers for the purpose of that investigation and empowered them, and each of them, to administer oaths and affirmations, subpoena witnesses, compel their attendance and require the production of any books, papers, correspondence, memoranda or other records deemed relevant to the inquiry and to perform all of the duties in connection therewith authorized by law. A copy of the Commission order dated November 5, 1937, is annexed hereto marked Exhibit A and made a part hereof. At the time of the entry of said order the Commission had reasonable grounds to believe that Consolidated Mines of California had violated and was about to violate the provisions of Sections 5(a) and 17(a) of the Securities Act of 1933, as amended, as more fully appears from Exhibit A attached hereto and made a part hereof.

IV.

Acting pursuant to the order of November 5, 1937, John G. Sobieski, a duly designated officer of the Commission issued subpoenas duces tecum, annexed hereto marked Exhibits B and C and made a part hereof, directed to the

respondents, Comsolidated Mines of California, a corporation, and to Henry L. Wikoff, its president, and Frank S. Tyler, its secretary, requiring said respondents to appear and to produce certain books, papers, records, reports and other documents at the Los Angeles Branch office of the Commission, Room 427, 650 South Spring Street, Los Angeles, California, on the 22d day of November, 1937, at 10:00 o'clock, A.M. Personal service was made on the 13th day of November, 1937, by delivery of the original subpoenas, of which Exhibits B and C are copies, personally to Henry L. Wikoff, president, and Frank S. Tyler, secretary, respectively, as is shown by the return of service on the said copies of said subpoenas.

V.

On November 22, 1937, the respondents failed to appear as required by the subpoenas duces tecum above referred to and failed to produce the books, papers, records, reports and other documents required by the subpoenas duces tecum. Neither the respondents nor any of them appeared at the hearing. The failure of respondents to appear was contumacious in that Guy Graves, attorney for the respondents, had previously advised the representatives of the Commission that his clients would refuse to respond to any subpoena for mining records issued by the Securities and Exchange Commission until a Court ordered them to do so.

The refusal of the respondents to appear and to produce the books, papers, records, reports, and other documents, as required by the subpoenas duces tecum, has impeded and continues to impede the progress of the investigation.

VI.

All of the books, papers, records, reports, and other documents described herein and required to be produced by the subpoenas duces tecum are relevant and material and were at the time of issuance of said subpoenas and are now deemed by the Commission to be relevant and material to the investigation ordered by it, and more specifically to determine whether or not the representations set forth in detail in the Commission order of November 5, 1937, attached hereto marked Exhibit A, were untrue to the knowledge of Consolidated Mines of California, a corporation, in violation of Sections 17(a) and 24 of the Securities Act of 1933, as amended (77 U.S.C.A. q(a) and x).

VII.

On information and belief:

The books, papers, records, reports and other documents required to be produced by the subpoenas duces tecum are now and were at all times mentioned herein in the possession and control of respondents, Consolidated Mines of California, a corporation, and of Henry L. Wikoff, as president, and/or Frank S. Tyler, as secretary of said corporation.

WHEREFORE, the Applicant, Securities and Exchange Commission, respectfully prays:

(a) That an order to show cause issue forthwith directing respondents, Consolidated Mines of California, a corporation, and Henry L. Wikoff, its president, and Frank S. Tyler, its secretary, to appear before this Court upon a day certain to be fixed in the order, and show cause, if any there be, why an order should not issue requiring respondents, Consolidated Mines of California, a corporation, and Henry L. Wikoff, its president, and Frank S. Tyler, its secretary, to appear before the Securities and Exchange Commission, or an officer of the Commission designated by it, at such time and place as this Court may order, and there to produce the books, papers, records, reports and other documents described in the subpoenas duces tecum annexed hereto, marked Exhibits B and C.

(b) That upon return of the order to show cause, an order issue requiring respondents, Consolidated Mines of California, a corporation, and Henry L. Wikoff, its president, and Frank S. Tyler, its secretary, to appear before the Securities and Exchange Commission, or an officer of the Commission designated by it, at such time and place as this Court may order, and there to produce the books, papers, records, reports and other documents described in the subpoenas duces tecum annexed hereto, marked Exhibits B and C.

(c) That the Applicant, Securities and Exchange Commission, have such other and further relief as may be necessary and appropriate.

SECURITIES AND EXCHANGE COMMISSION

By _____
Allen E. Throop, General Counsel

_____
Howard A. Judy, Attorney

_____
John G. Sobieski, Attorney

REMOVAL PROCEEDINGS

It frequently occurs that offenders who have committed an offense against the United States in one judicial district are located in another judicial district. In such instances, it becomes necessary to remove them to the district of prosecution for trial. Marshals may execute warrants only within the district of the issuing court. It therefore becomes necessary to obtain a warrant of arrest in the district in which the offender may be found.

The federal statute covering this proceeding is title 18, section 591, United States Code which among other things provides, "* * * Where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the Marshal to execute, a warrant for his removal to the district where the trial is to be held."

Although there is no legal authority for the practice, some district judges refuse to order the removal of a defendant unless an indictment has been returned against him in the district of trial. Sometimes, however, a removal will be ordered on the basis of a commissioner's complaint in such district.

Therefore, in order to effect a removal, it is necessary for the prosecuting United States Attorney to forward to the United States Attorney for the district in which the defendant is found, the following papers:

ONE: Certified copies of the indictment.

TWO: Certified copies of the warrant of arrest with the Marshal's "not found" return indorsed thereon.

Or if no indictment has been returned, there must be:

ONE: Certified copies of the Commissioner's complaint.

TWO: Certified copies of the warrant of arrest with the Marshal's "not found" return indorsed thereon.

On the basis of these papers a complaint is filed in the district in which the defendant is located before either the federal court or a Commissioner and a warrant of arrest obtained in that district which is executed by the Marshal of that district, who brings the defendant before the issuing tribunal for hearing.

Ordinarily this is the Commissioner. He must then determine by evidence introduced by the government:

ONE: IDENTITY--That the person in custody is the defendant named in the indictment or complaint forwarded from the district of prosecution.

TWO: JURISDICTION--That an offense has been committed, over which the court in the district of prosecution has jurisdiction.

THREE: PROBABLE CAUSE--That there is probable cause to believe the person in custody guilty of the offense.

(*Green* v. *Henkel*, 183 U. S. 249; *Tinsley* v. *Treat*, 205 U. S. 20.)

A certified copy of the indictment is prima facie evidence of jurisdiction and probable cause, but it is not conclusive (*Tinsley* v. *Treat*, 205 U. S. 20; *Beavers* v. *Henkel*, 194 U. S. 73; *Hyde* v. *Shine*, 199 U. S. 62; *Green* v. *Henkel*, 183 U. S. 249). The identity of the person, however, must be proved by other evidence.

If the Commissioner finds these facts, he then certifies his findings to the district judge who will then ordinarily issue the warrant of removal. The court, however, may see fit to hold another hearing in which the same evidence is examined by the judge. The judge then either issues the warrant of removal or discharges the defendant.

There is no appeal from the court's ruling in a removal proceeding. As a matter of fact, though, there has grown up an indirect method of appeal on behalf of defendants, by obtaining a writ of habeas corpus directed to the Marshal in whose custody the defendant is committed. This writ tests out the proceedings previously outlined, and an appeal may be taken from an adverse disposition of the writ.

LIMITATIONS

Unless otherwise provided by a specific statute, no persons shall be prosecuted, tried or punished for any offense, wilful murder excepted, unless the indictment is found or the information filed within three years after such offense has been committed. (T. 18, Sec. 581, 582, U.S.C.).

These provisions of law do not apply to any person who is fleeing from justice (T. 18, Sec. 583 U.S.C.). In the case of *Streep* v. *U. S.*, (160 U. S. 128) the Supreme Court held that "in order to constitute a 'fleeing from justice' it is not necessary that the course of justice should have been in operation by the presentment of an indictment by a grand jury or by the filing of an information by the attorney for the government or by the making of a complaint before a magistrate. It is sufficient if it is a flight with the intention of avoiding being prosecuted, whether a prosecution has or has not actually begun. * * * It is not necessary that there is an intent to avoid the justice of the state having criminal jurisdiction over the same territory and the same act."

In this same decision it was stated that there can be no doubt that this section (T. 18, Sec. 583, U.S.C.) must receive the same construction as that previously given title 18, section 662, United States Code, relating to extradition of fugitives from one state to another, wherein the Supreme Court said: "To be a fugitive from justice * * * it is not necessary that the party charged should have left the state in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that, having within a state committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offense, he has left its jurisdiction and is found within the territory of another." (*Roberts* v. *Reilly*, 116 U. S. 80.).

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