

Memorandum

November 29, 1967

To: The Commission

From: Office of General Counsel

RE: Request made by the Wall Street Journal for access to certain correspondents between the Commission and The New York Stock Exchange and the NASD.

In a letter dated October 19, 1967, addressed to Mr. Orval DuBois, Mr. Henry Gemmill, Washington Bureau Manager of the Wall Street Journal, requested one of the Journal's staff members to given access to correspondence with respect to certain subject matter between the Commission, and the NASD and the New York Stock Exchange. A copy of the request is attached hereto as Appendix A. The Division of Trading and Markets has compiled all correspondence which in its view may fairly be considered the subject of the request. Copies of those letters are attached hereto as Appendix B. Also attached as Appendix C are other letter which appear to be of a similar type and for which it might be expected requests will be made, if the letters in Appendix B are made available. The Division believes that disclosure of correspondence of this nature will impair the effectiveness of the informal procedure by which the Exchanges and the NASD are induced to take steps in the interests of investors.

This Office believes that none of the statutory exemptions in the Public Information Act provides a truly satisfactory basis for withholding the above letters, although several of the exemptions could be relied upon with varying chances of success.

One Exemption which the Commission could argue applies is that in Subsection (e)(4) of the Act for "trade secrets and commercial or financial information from a person and privileged or confidential." With respect to certain correspondence, such as submission by the NASD of a draft of a of a proposed new mark up policy (Appendix C), this exemption would seem to apply. There is a strong question, however, as to whether the type of argumentative presentation contained in certain of the letters from the NASD and the Exchange constitute the kind of "information" to which Congress had reference. Further, it would be difficult to argue that letters of inquiry from staff member of members of the Commission would be entitled to confidential treatment, even if the response thereto would qualify. Nevertheless, we regard this exemption as the most likely possibility.

Another possible exemption is that in subsection (e)(8) for “matters ... contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions.” It is questionable, however, whether the material requested is of the type described in the exemption, and it is doubtful that the Exchange or the NASD will be held to be “financial institutions” within the exemption. [Footnote: The Committee reports consistently employ only the term “financial institutions” in referring to this exemption without offering any synonym which might serve to explain the legislative purpose. See S. Rep. No. 1219, 88th Cong., 2d Sess., 99 7, 14 (1964); S. Rep. No. 813, 89th Cong., 1st Sess. P. 10 (1965) H. Rep. No. 1497, 89th Cong., 2d Sess., p. 11 (1966). Thus, a degree of ambiguity remains which might permit the assertion that the securities exchanges, and perhaps the NASD are financial institutions subject to this provision. However, the references made at the Congressional hearings on various bills preceding enactment of the Public Information Act appeared to be concerned solely with the problems of banking institutions. See Hearings on S. 1663 before the Senate Subcommittee on Administrative Practice and Procedure of the Committee of the Judiciary, 88th Cong., 2d Sess., pp. 179-180 (1964); and Hearings on H. Rep. No. 5012, etc., before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., p. 138 (1965).]

Another Exemption which might be argued applies is that in Subsection (a)(5) for the “inter-agency or intra-agency memorandums or letters...” on a theory that Commission oversight of statutory self regulation makes the Exchange or the NASD an agency or, for this purpose, a part of this agency. The policy behind this exemption that “full and frank exchange of opinions would be impossible if all internal communications were made public” (H. Rep. 10) seems strongly applicable here and is reflected in the Division’s view that disclosure would have an adverse effect upon its procedures, There does not appear to be any support in the legislative history, however, for the view that the communications are “internal.” That is that the Exchange or NASD are parts of the “agency” or are independent agencies. [Footnote: This latter position, that the Exchange or NASD are themselves agencies, might also require a conclusion that other provisions of the Administrative Procedure Act would be applicable to them in respect to their “agency” function -- a result which they and we might well find more objectionable than disclosure of correspondence.]

The exemption for “investigatory files compiled for law enforcement purposes.” Subsection (e)(7), appears from legislative history to relate solely to “enforcement purposes.” As distinguished from the kind of regulatory functions which give rise to the type of correspondence requested by the Journal. Nevertheless, it might be argued that the Commission’s power over the Exchanges and the NASD relates to “law enforcement”. [Footnote: See H. Rep.

No. 1497, 89th Cong., 2d Sess., p. 11 (1966); S. Rep. No. 813, 9th Cong., 1st Sess., p. 9 (1965); CF. S. Rep. 1219, 88th Cong., 2d Sess., pp. 3, 7, 14. See also Hearing on S. 1160 etc., before the Senate Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, 89th Cong., 1st Sess., p. 206 (1965); Hearings on H. Rep. 5012 etc., before a Subcommittee of the House Committee on Government Operations, 89th Cong., 1st Sess., pp. 27-28, 130, 138, 150 (1965).]

While there appear to be no letters in Appendix B which would clearly fall within the confidentiality exemption in Subsection (e)(4), it is recommended that, if the Commission should determine to make such information available, representatives of the Exchange and the NASD should be advised of the request and of the decision to make such information available so that their views may be obtained and they may take whatever steps they deem appropriate.

Attachments [Note: Attachments not included in provided original.]

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