

(b) in contravention of Rule 15c2-1 permitted securities carried for the account of customers to be hypothecated, or subjected to liens or claims of a pledgee for a sum which exceeded the aggregate indebtedness of all customers in respect of securities carried for their accounts; and

(c) in contravention of Rule 15c2-1 failed to furnish written notice to the pledgee at or prior to the time of each hypothecation that the pledged shares were carried for the accounts of customers and that the hypothecation did not contravene Rule 15c2-1. (Peter Mencher - 8/68)

26. FAILURE TO ADVISE CUSTOMER OF RISKS, ETC. IN CREDIT TRANSACTIONS  
(Rule 15c2-5)

During the period mentioned in paragraph A hereof, registrant wilfully violated and respondents wilfully aided and abetted such violations of Section 15(c)(2) of the Exchange Act and Rules 15c2-5(a)(1) and 15c2-5(a)(2) thereunder, in that registrant induced the purchase of the common stock of \_\_\_\_\_ by investors and in connection therewith registrant, directly and indirectly, offered and extended credit to them without delivering to such purchasers the written statements required by Rule 15c2-5(a)(1) setting forth, among other things, the exact nature and extent of the risks and disadvantages which such purchasers would incur in the entire transaction, including the loan arrangements, and all commissions, discounts and other remuneration received and to be received, in connection with the entire transaction including the loan arrangement, by registrant and other persons participating in the transaction; and without obtaining from purchasers and prospective purchasers information concerning their financial situation and needs, and reasonably determining that the entire transaction, including the loan arrangement, was suitable for said investors and without delivering to such persons a written statement setting forth the basis upon which respondents made such determination as required by Rule 15c2-5(a)(2).

(Assoc Secs. 8/68)

- (5) obtained the faith, trust and confidence of customers by creating the impression that registrant would act in such customers' best interest, without disclosing that registrant was acting adversely to the interests of such customers by charging unreasonable prices in order to generate profits for registrants.

27. COMMISSION APPROVAL MISREPRESENTED: RULE 15c1-3

Violated Section 15c(1) of the Exchange Act and Rule 15c1-3 thereunder in that he represented to customers that the Commission has passed upon and approved the financial standing, business, and conduct of registrant, and the merit of XYZ securities:

28. CONFIRMATIONS - (Rule 15c1-4) (see #22)

Failed, at or before the completion of each securities transaction, to give or send to each customer written notification disclosing:

- (1) whether registrant acted as a broker for such customer, as a dealer for registrant's own account, as a broker for some other person, or as a broker for both such customer and some other person; and
- (2) In case in which registrant acted as a broker for such customer and such other person:
  - (a) 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
  - (b) the source and amount of any commission or other remuneration received or to be received by registrant in connection with the transaction

29. FAILURE TO DISCLOSE COMMON CONTROL (RULE 15c1-5)

Fail to disclose to customers, before entering into contracts with or for such customers for the purchase or sale of XYZ and TUV securities, that registrant, Doe and Rae were controlled by, controlling, or under common control with IYZ and TUV (and if such disclosure was made orally, without supplementing such oral disclosure by the giving or sending of written disclosure at or before the completion of each transaction);

30. FAILURE TO DISCLOSE INTEREST IN DISTRIBUTION (RULE 15c1-6)

Sell (or, receive and will receive fees from customers for advising such customers to purchase) XYZ securities, without giving or sending to each such customer prior to completing each sale written notification that registrant was participating and otherwise financially interested in a primary (or secondary) distribution of XYZ securities;

31. MISREPRESENTING "AT THE MARKET" (Rule 15c1-8)

While participating and being financially interested in a distribution of XYZ securities, such securities not admitted to trading on a national securities exchange, represent to customers that XYZ securities were being offered to such customers "at the Market" and at prices related to the market without having reasonable grounds to believe that an independent market (or, knowing that no market) for XYZ securities existed other than that made, created, or controlled by registrant and by DEF, a broker-dealer acting in concert with registrant;

32. MISUSE OF PRO FORMA FINANCIALS (Rule 15c1-9)

Use a pro forma balance sheet dated May 16, 1964 and other financial statements, purporting to give effect to the receipt and application of part of the proceeds from a current distribution of XYZ stock, without clearly setting forth as part of the caption to each such statement in type at least as large as that generally in the body of each statement, the assumptions upon which each such financial statement was based;

33. FRAUD IN HANDLING PROCEEDS OF UNDERWRITING: "BEST EFFORTS:"  
"ALL OR NONE," "CONTINGENCY" (Rule 15c2-4)

While participating in a distribution of XYZ securities, other than a firm-commitment underwriting, accepted as a part of the sale price of such XYZ securities being distributed ---

Ordinary "best efforts" underwriting

On a "best efforts" basis but failed to promptly transmit the money (or other consideration) received to XYZ;

(OR)

"All or none" underwriting

On an "all or none" basis but failed to promptly deposit the money received in a separate bank account, as agent or trustee (or, failed to promptly transmit the money received to a bank which has agreed in writing to hold such funds in escrow; for the persons who have the beneficial interests therein, and to transmit or return such funds directly to the persons entitled thereto when the complete issue was sold;

(OR)

"Contingency" underwriting

On a basis which contemplated that payment would not be made to XYZ until 50% of the offering was sold (or \$200,000 of XYZ stock was sold; or until some other event or contingency occurred) failed to promptly deposit the money received in a separate bank account, as agent or trustee (or, failed to promptly transmit the money received to a bank which has agreed in writing to hold such funds in escrow) for the persons who have the beneficial interests therein, and to transmit or return such funds directly to the persons entitled thereto when 50% of the offering was sold (or not sold) (or when any other event or contingency occurred or failed to occur);

(OR)

Place fictitious bid and offer quotations and indications of interest in the "pink sheets" published by the National Quotation Service, and as a part of the aforesaid conduct failed to:

- (1) inform the National Quotation Service that registrant was furnishing and submitting such quotations:

- (a) as correspondent for DEF; and
  - (b) In furtherance of a joint account (or, guarantee of profit, guarantee against loss, commission, markup, markdown, indication of interest, accommodation, or any other) arrangement between registrant and DEF (and others), at a time when DEF (and others) were also submitting quotations with respect to XYZ stock to the National Quotation Service; and
- (2) inform GHI, JKL and other broker-dealers furnishing and submitting quotations with respect to XYZ stock to the National Quotation Service, that registrant had entered into a correspondent (or, joint account, guarantee of profit, guarantee against loss, commission, markup, markdown, indication of interest, accommodation (or other) arrangement with DEF (and others) in furtherance of which registrant and DEF furnished and submitted quotations with respect to XYZ stock to the National Quotation Service;

34. During the period from on or about December 31, 1965 to on or about March 31, 1968, Registrant wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder in that Registration made use of the mails and means and instrumentalities of interstate commerce to effect transactions in and to induce and attempt to induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances or commercial bills) otherwise than on a national securities exchange when Registrant's aggregate indebtedness to all other persons exceeded two thousand percentum (2,000) of its net capital, and registrant did not have and maintain net capital of not less than \$5,000.

(Moffat dba Wesco 1968)

35. REFERENCE BACK TO SCHEME

In carrying out the activities and course of business described in Paragraph A about, and during the period of time from June 1, 1962 to about January 30, 1963, registrant, Doe and Rae, singly and in concert, wilfully violated and wilfully aided and abetted in wilful violations of Section 5(a) and (c) of the Securities Act and Sections 10(b), 15(b), 15(c)(1) and 17(a) of the Exchange Act and Rules 10b-5, 15b-8, 15c1-3 and 17a-5 thereunder, in the manner and means more fully described in the referenced subparagraphs:

Section 5(a) and (c) of the Securities Act	Subparagraph (7)
Section 10(b) of the Exchange Act and Rule 10b-5 thereunder	Subparagraphs (1) through (9)
Section 15(b) of the Exchange Act and Rule 15b-8 thereunder	Subparagraph (1)
Section 15(c)(1) of the Exchange Act and Rule 15c1-3 thereunder	Subparagraph (8)
Section 17(a) of the Exchange Act and Rule 17a-5 thereunder	Subparagraph (9)

1. Jurisdictional paragraph 33 Act violation

While engaged in the activities set forth in paragraph above,  
, and made use of the mails and means and instruments of transportation and communication in interstate commerce.  
(L.A. Francis Ltd. 5/7/69)

2. Jurisdictional paragraph 1934 Act violation

While engaged in the activities set forth or referred to in Section II hereof, registrant, directly and indirectly made use of the mails and of the means and instrumentalities of interstate commerce. (Polycarpo 8/6/68)

3. Jurisdictional paragraph for cases charging violations of both the 33 and 34 Acts

While engaged in the activities as set forth or referred to in paragraphs A and B of Section II hereof, , directly or indirectly, made use of the mails and means and instruments of transportation and communication in interstate commerce, and of the means and instrumentalities of interstate commerce. (Peter Mencher 8/5/68)

NOTE: With respect to cases against broker-dealers it is not necessary, in most cases, to allege jurisdiction.  
(See 34 Act Section 15b4)



Section III and IV of Order in case where denial of application for registration is sought.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary and appropriate in the public interest and for the protection of investors, that public proceedings be instituted to determine:

- A. whether the allegations set forth in Section II hereof are true, and in connection therewith to offer Applicant, Volante, Behar and Sperling an opportunity to establish any defenses to such allegations;
- B. whether, pursuant to Section 15(b) of the Exchange Act, Applicant's application for registration as a broker and dealer should be denied; and
- C. whether, pursuant to Section 15(b) of the Exchange Act, it is necessary or appropriate in the public interest or for the protection of investors to postpone the effective date of registration of applicant until final determination of the question of denial of registration.

### IV

The Commission deeming it necessary and appropriate in the public interest and for the protection of investors that the effective date of registration of Applicant be postponed for fifteen (15) days;

IT IS ORDERED that the effective date of registration be, and the same hereby is, postponed until November 27, 1968.

IT IS FURTHER ORDERED, pursuant to Section 15(b)(6) of the Act that a hearing by affidavits (and oral arguments if requested by applicant) be held on November 20, 1968 before the Securities and Exchange Commission, Room 875, 500 North Capitol Street, Washington, D. C., on the question of whether it is necessary or in the public interest or for the protection of investors to postpone the effective date of such registration until final determination of the question of denial.

The following times and procedures shall be applicable to such postponement hearing:

- (1) all affidavits shall be filed no later than November 18, 1968;
- (2) oral argument will be deemed waived unless requested by November 18, 1968. If requested, oral argument will be heard at 10:00 a.m. EST, on November 20, 1968 at 500 North Capitol Street, Washington, D. C.; and
- (3) if the Applicant fails to file an affidavit the Commission may deem such respondent as having defaulted and may enter an order postponing the effective date of its registration as a broker-dealer pending final determination of the issues set forth in paragraphs (1) and (2) of Section III above.

IT IS FURTHER ORDERED that a public hearing for the purpose of taking evidence on the other questions set forth in Section III hereof be held at a time and place to be set, and before a hearing examiner to be designated by further order of the Commission. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the hearing with respect to consideration of the questions under paragraph A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post-hearing proceeding will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that each party file an answer to the allegations contained in this order for proceedings within 15 days after service upon it of said order, as provided by Rule 7 of the Commission's Rules of Practice. (17 C.F.R. 201.7)

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of this order for proceedings, the allegations of which may be deemed true as provided by Rule 6(e) and 7(e) of the Commission's Rules of Practice. (17 C.F.R. 201.6 and 201.7)

This order shall be served upon Volante, Behar and Sperling, Guido Volante, Jacques Behar, and Herman Sperling, personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer, or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

(Volante - 11/12/68)

Section III and IV of Order in Case seeking to suspend registration of registrant pending final determination of charges - hearing date set.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest to suspend the registration of Registrant.

### IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at 11:00 a.m. on December 30, 1968 at 230 Federal Building, 231 West Lafayette St., Detroit, Michigan to be heard by Mr. Markham, hearing examiner, pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post-hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension, the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon completion of the taking of all the evidence in this matter, the post-hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided

by Rules 6 (e) and 7 (e) of the Commission's Rules of Practice.

This order shall be served upon Registrant and Maxel V. Gray personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as a witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4 (c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

(M. V. Gray 12/16/68)

Section III and IV of suspension case - hearing date not set.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of Registrant.

### IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission may hereafter designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post-hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension, the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post-hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

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If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon Transmittal Securities Corporation's agent for service of process, Werner Galleski, Esq., Conston, Benedict and Mauskopf personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as a witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

Transmittal Securities Corp. 11/12/68

C - Failure to Supervise

Registrant and A failed reasonably to supervise, with a view to preventing the violations alleged in Paragraphs A, B and C, persons who were subject to their supervision and who committed such violations.

Registrant and A failed reasonably to supervise other persons subject to their supervision with a view to preventing violations of the Securities Act and of the Exchange Act and the rules and regulations thereunder, such persons having committed violations of said provisions as more particularly alleged and set forth in Paragraphs E through G and I of Section II of this order.



17a-3, 5

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

JUN 13 1968

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In the Matter of:	:	
	:	ORDER FOR PUBLIC PROCEEDINGS
L. D. Sherman & Co., Inc.	:	AND NOTICE OF HEARING PURSUANT
Lee D. Sherman	:	TO SECTION 15(b) AND 15A OF THE
Harry Reisberg	:	SECURITIES EXCHANGE ACT OF 1934.
	:	
File No. 8-11822	:	

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I

The Commission's public official files disclose that:

A. L. D. Sherman & Co., Inc. (Registrant), a New York corporation with its principal place of business at 52 Broadway, New York, New York is registered as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and has been so registered since January 26, 1964.

B. Lee D. Sherman is president, director and the owner of 10% or more of the equity securities of Registrant.

C. Harry Reisberg is the secretary-treasurer and a director of Registrant.

D. Registrant is a member firm of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

II

As a result of an investigation, the Division of Trading and Markets has obtained information which tends to show and which alleges that:

A. During the period from on or about March 30, 1968 to date Registrant wilfully violated and Lee D. Sherman and Harry Reisberg wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that Registrant failed to file with the Commission a report of financial condition for the year ended December 31, 1967 as required by said rule.

B. During the period from on or about December 29, 1967 to date Registrant wilfully violated and Lee D. Sherman and Harry Reisberg wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that Registrant failed to accurately make and keep current the following books and records:

1. General ledger;
2. Customers' ledger;
3. Securities failed to receive and failed to deliver ledger; and
4. Securities record or ledger.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford registrant and respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Section 15(b) and 15A of the Exchange Act and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant.

### IV

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at 10:00 a. m., June 17, 1968 at 26 Federal Plaza, New York, New York, before Sidney Gross, Hearing Examiner, or such other hearing examiner as the Commission may designate. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed

a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon the registrant, L. D. Sherman & Co., Inc., Lee D. Sherman and Harry Reisberg, personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making", within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

SERVICE LIST

Rule 23 of the Commission's Rules of Practice provides that all amendments to moving papers, all answers, all motions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions, all petitions for review of any initial decision, and all briefs shall be filed with the Commission and shall be served upon all other parties to the proceeding including the interested division of the Commission.

The attached Order for Proceedings has been sent to the following parties:

Securities and Exchange Commission  
Division of Trading and Markets  
500 North Capitol Street, N. W.  
Washington, D. C. 20549

The Securities and Exchange Commission  
New York Regional Office  
26 Federal Plaza  
New York, New York 10007

L. D. Sherman & Co., Inc.  
52 Broadway  
New York, New York

Lee D. Sherman  
52 Broadway  
New York, New York

Harry Reisberg  
52 Broadway  
New York, New York

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

AUG 8 1968

17a-3

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In the Matter of	:	ORDER FOR PRIVATE PRO-
	:	CEEDINGS AND NOTICE OF
	:	HEARING PURSUANT TO
AUCHINCLOSS, PARKER & REDPATH (FILE 8-3228)	:	SECTIONS 15(b), 15A AND
ALBERT G. REDPATH	:	19(a)(3) OF THE SECURITIES
	:	EXCHANGE ACT OF 1934

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I

The Commission's public official files disclose that:

A. Auchincloss, Parker & Redpath ("Registrant"), a partnership with its principal place of business at 2 Broadway, New York, New York 10004, has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") since January 17, 1936 and as an investment adviser pursuant to Section 203 of the Investment Advisers Act of 1940 since November 1, 1940.

B. Albert G. Redpath is the partner in charge of the New York office of Registrant.

C. Registrant is a member firm of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

D. Registrant is a member, within the meaning of Section 3(a)(3) of the Exchange Act, of the New York Stock Exchange, American Stock Exchange, Philadelphia-Baltimore-Washington Stock Exchange, and an associate member of the Boston Stock Exchange, national securities exchanges registered pursuant to Section 6 of the Exchange Act.

II

As a result of an investigation, the Division of Trading and Markets alleges that:

A. During the period from on or about March 22, 1968 to date, Registrant wilfully violated Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that Registrant failed to accurately make and keep current certain of its books and records including, but not limited to:

1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;
2. Ledgers (or other records) reflecting all dividends and interest received;
3. A securities record or ledger reflecting separately for each security as of the clearance dates all "long" and "short" positions;
4. Ledgers (or other records) reflecting securities in transfer; and
5. Blotters (or other records of original entry) containing an itemized daily record of all purchases and sales of securities, all receipts and deliveries of securities and all receipts and disbursements of cash and all other debits and credits.

B. Registrant and Albert G. Redpath failed reasonably to supervise persons under their supervision with a view to preventing the violations alleged in paragraph A of Section II of this Order.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford Registrant and respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a) of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant.

### IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission may hereafter designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The Hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post hearing procedures on that question as specified in Rule 19 of the

Commission's Rules of Practice will be applicable. After final determination of the question of suspension the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon Registrant and Albert G. Redpath personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary





1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;
2. Ledgers (or other records) reflecting the dividends and interest received;
3. A securities record or ledger.

B. During the period from on or about November 29, 1967 until January 11, 1968 Registrant willfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that Registrant failed to file with the Commission a report of financial condition for the calendar year 1967 within the time specified by said Rule.

C. Registrant and Robert Lehman failed reasonably to supervise persons under their supervision with a view to preventing the violations alleged in paragraphs A and B of Section II of the order.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford Registrant and respondent an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a) of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant.

### IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission may hereafter designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination

of the question of suspension the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

This order shall be served upon Registrant and Robert Lehman personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
JUL 5 1968

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In the Matter of	:	
ESTABROOK & CO.	:	ORDER FOR PRIVATE PROCEEDINGS AND
EDWARD H. JUNKINS, JR.	:	NOTICE OF HEARING PURSUANT TO
WILLIAM TYSON KEMBLE	:	SECTIONS 15(b), 15A and 19(a)(3)
8-7795	:	OF THE SECURITIES EXCHANGE ACT OF
JOHN MITCHELL	:	1934
	:	
	:	

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I

The Commission's public official files disclose that:

A. Estabrook & Co. ("Registrant"), a partnership with its principal place of business at 15 State Street, Boston, Massachusetts, has been registered with the Commission as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) since September 30, 1959.

B. Edward H. Junkins, Jr. is the managing partner of Registrant.

C. William Tyson Kemble is a general partner of Registrant.

D. Registrant is a member firm of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

E. Registrant is a member, within the meaning of Section 3(a)(3) of the Exchange Act, of the New York Stock Exchange, American Stock Exchange and the Boston Stock Exchange, national securities exchanges registered pursuant to Section 6 of the Exchange Act.

II

As a result of an investigation, the Division of Trading and Markets has obtained information which tends to show and it alleges that:

A. John Mitchell is employed by Registrant and supervises Registrant's national operations.

B. During the period from on or about April 18, 1968 to date Registrant wilfully violated and Edward H. Junkins, Jr., William Tyson Kemble and John Mitchell wilfully aided and abetted violations of

Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, in that Registrant failed to accurately make and keep current certain of its books and records, including, but not by way of limitation:

1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;
2. Customer ledger accounts;
3. Ledgers (or other records) reflecting dividends and interest received;
4. Ledgers (or other records) reflecting securities failed to receive and to deliver;
5. A securities record or ledger;
6. A record of the computation of aggregate indebtedness and net capital as of the trial balance date in accordance with the capital rules of at least one of the national securities exchanges of which registrant is a member.

C. During the period from on or about April 18, 1968 to date Registrant, while a member of a national securities exchange, wilfully violated and Edward H. Junkins, Jr., William Tyson Kemble and John Mitchell wilfully aided and abetted in the violation of Section 7(c)(1) of the Exchange Act and the rules and regulations which the Board of Governors of the Federal Reserve System prescribed thereunder in that Registrant, directly and indirectly, extended, maintained and arranged for credit to and for customers on securities (other than exempted securities) in contravention of the aforesaid rules and regulations. As part of the aforesaid conduct and activities, registrant, among other things, failed to promptly cancel or otherwise liquidate the transactions or unsettled portions thereof of customers who purchased securities (other than exempted securities) in special cash accounts and did not make full cash payment for the securities within 7 days after the date on which the security was so purchased.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford Registrant and respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a) of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of Registrant.

IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission may hereafter designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon the Registrant, Estabrook & Co., Edward H. Junkins, Jr., William Tyson Kemble and John Mitchell personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission,

Orval L. DuBois  
Secretary



of the means and instrumentalities of interstate commerce, of the mails and of the facilities of national securities exchanges, in connection with the purchase and sale of securities on national securities exchanges and otherwise employed devices, schemes and artifices to defraud, made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading and engaged in acts, practices and a course of business which would and did operate as a fraud and deceit upon registrant's customers and prospective customers. As part of the aforesaid conduct and activities, registrant, among other things, would and did:

- (1) expose to risk customers' funds and securities by failing to properly segregate customers' fully paid for and excess margin securities and by causing and allowing the commingling and hypothecation of such securities and in connection therewith solicit customers to effect transactions, purchase and sell securities, deposit securities and funds and maintain accounts with registrant through:
  - (a) false and misleading statements concerning the ability of registrant's cashiering, margin and accounting departments to perform the services necessary for proper handling of customers' accounts; and
  - (b) without disclosing that registrant was not properly segregating customers' fully paid for and excess margin securities.

C. In engaging in the acts and practices described in paragraph B of Section II of the order, registrant wilfully violated Section 15(c)(1) of the Exchange Act and Rule 15c1-2 thereunder, in the manner and by the means specified therein.

D. Registrant and Alastair C. Hall failed reasonably to supervise persons under their supervision with a view to preventing the violations alleged in paragraphs A, B and C of Section II of the order.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford registrant an opportunity to establish any defenses to such allegations;

B. What, if any remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a) of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of registrant.

IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission hereafter may designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and, upon completion of that phase of these proceedings, the hearing will be adjourned and post-hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension, the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all evidence in this matter, the post-hearing procedures shall be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and these proceedings may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon the registrant, Sutro & Co., and Alastair C. Hall, personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to



participate or advise in the decision in this matter except as witness or counsel in proceedings held pursuant to notice. Since these proceedings are not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, they are not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

OCT 31 1968

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In the Matter of	:	
FLEMING-JONES SECURITIES, INC.	:	ORDER FOR PRIVATE PROCEEDINGS
WILLIAM J. FLEMING, II	:	AND NOTICE OF HEARING PURSUANT
ROBERT E. JONES	:	TO SECTIONS 15(b) AND 15A OF
File No. 8-13437	:	THE SECURITIES EXCHANGE ACT
	:	OF 1934

I

The Commission's public official files disclose that:

A. Fleming-Jones Securities, Inc. ("Registrant"), a Tennessee corporation with its principal place of business at 1719 West End Building, Suite 622, Nashville, Tennessee 37203, is registered as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), and has been so registered since September 30, 1967.

B. Registrant is a member of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

C. William J. Fleming, II ("Fleming") is president and a director of registrant.

D. Robert E. Jones ("Jones") is secretary and treasurer and a director of registrant.

II

As a result of an investigation, the Division of Trading and Markets alleges that:

A. During the period from on or about April, 1968 to date registrant wilfully violated and Fleming and Jones wilfully aided and abetted in the violation of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that registrant failed to accurately make and keep current certain of its books and records including, but not limited to:

1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts; and
2. A record of the proof of money balances of all ledger accounts in the form of trial balances, and a record of the computation of aggregate indebtedness and net capital as of the trial balance date, pursuant to Rule 15c3-1.

B. During the period from about April 1968 to the date hereof, registrant wilfully violated Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder, and Fleming and Jones, singly and in concert, wilfully aided and abetted such violations, in that they made use of the mails and of the means and instrumentalities of interstate commerce to effect transactions in, and to induce the purchase and sale of securities (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, while registrant's aggregate indebtedness to all other persons exceeded 2,000 per centum of its net capital as computed in accordance with said Rule 15c3-1 and while registrant did not have and maintain minimum net capital of not less than \$5,000.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations.

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act.

### IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof, be held at a time and place to be fixed and before a hearing examiner to be designated by further order, as provided by Rule 6 of the Rules of Practice of the Commission.

IT IS FURTHER ORDERED that each party file an answer to the allegations contained in this order for proceedings within 15 days after service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice.

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceedings may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon the registrant, Fleming-Jones Securities, Inc., William J. Fleming, II and Robert E. Jones personally or by registered mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making", within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary



1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;
2. Customer ledger accounts.
3. Ledgers (or other records) reflecting securities failed to receive and to deliver.
4. A securities record or ledger.
5. A securities record or ledger reflecting separately for each security as of the clearance dates all "long" and "short" positions (including securities in safe-keeping) carried by such broker or dealer for his account; and
6. A record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to Rule 15c3-1.

C. Registrant wilfully violated and Conston, Benedict and Mauskopf wilfully aided and abetted in the violation of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that Registrant failed to file with the Commission a report of financial condition for the year ending December 31, 1967 within the time specified by said Rule.

D. During the period from on or about December 28, 1962 until March 28, 1968 Registrant wilfully violated and Conston, Benedict and Mauskopf wilfully aided and abetted in the violation of Section 15(b) of the Exchange Act and Rule 15b3-1 thereunder in that Registrant failed to promptly file an amendment on Form BD correcting information contained in its application for registration as a broker and dealer which had become inaccurate and incomplete.

E. During the period from on or about March, 1968 to date Registrant wilfully violated and Conston, Benedict and Mauskopf wilfully aided and abetted in violations of Section 15(c)(2) of the Exchange Act and Rule 15c2-1 thereunder in that Registrant made use of the mails and means and instrumentalities of interstate commerce to effect transactions in securities otherwise than on a national securities exchange and directly and indirectly hypothecate and arrange and permit, directly and indirectly, the continued hypothecation of securities carried for the accounts of customers under circumstances that permitted such securities to be commingled with securities carried for the account of persons other than bona fide customers of Registrant under a lien for a loan made to Registrant.

F. During the period from on or about March, 1968 to date Registrant, while transacting a business in securities through the medium of a member of a national securities exchange, wilfully violated and Conston, Benedict and Mauskopf wilfully aided and abetted violations of Section 7(c) of the Exchange Act and the rules and regulations which the Board of Governors of the Federal Reserve System prescribed thereunder in that Registrant, directly and indirectly, extended, maintained and arranged for credit to and for customers without collateral and on securities (other than exempted securities) in contravention of the aforesaid rules and regulations.

G. Registrant, Conston and Benedict failed reasonably to supervise persons under their supervision with a view to preventing the violations alleged in paragraphs B through F of Section II of this Order.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that public proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of Registrant.

### IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission may hereafter designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post-hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension, the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post-hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon Transmittal Securities Corporation's agent for service of process, Werner Gallecki, Esq., Conston, Benedict and Mauskopf personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as a witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary



ADMINISTRATIVE PROCEEDING  
FILE NO. 3-1774

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

NOV 12 1968

172-3  
10/5, 1501-2

In the Matter of	:	
JOSPEH A. BUONGIORNO, d/b/a	:	
J. A. B. SECURITIES COMPANY	:	ORDER FOR PRIVATE PROCEEDINGS
File No. 8-11911	:	AND NOTICE OF HEARING
J. A. B. SECURITIES COMPANY, INC.	:	PURSUANT TO SECTION 15(b)
File No. 8-13252	:	OF THE SECURITIES EXCHANGE
JOSEPH A. BUONGIORNO	:	ACT OF 1934
	:	

I

The Commission's public files disclose that:

A. Joseph A. Buongiorno, d/b/a J. A. B. Securities Company ("J.A.B."), sole proprietorship, having its office at 82 Beaver Street, New York, New York 10005, has been registered as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act") since April 10, 1964 and is still so registered.

B. J.A.B. has filed with the Commission Form SECO-5 pursuant to Rule 15b9-1 of the Exchange Act.

C. J.A.B. Securities Company, Inc. (J.A.B. Co., Inc.), a corporation, having its office at 82 Beaver Street, New York, New York 10005, has been registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act since July 1, 1967.

D. Joseph A. Buongiorno ("Buongiorno") is the president and treasurer of J.A.B. Co., Inc. and its sole director and sole stockholder.

E. On July 31, 1967 J.A.B. Co., Inc. filed with the Commission a Form B-D amendment stating that as of July 31, 1967 J.A.B. Co., Inc. was the successor of J.A.B. and was taking over substantially all of the assets and liabilities and continuing the business of a registered broker or dealer, to wit J.A.B.

F. J.A.B. Co., Inc. has filed with the Commission Form SECO-5 pursuant to Rule 15b9-1 of the Exchange Act.

II

As a result of an investigation, the Division of Trading and Markets has obtained information which tends to show and it alleges that:

A. During the period from on or about January 1, 1965 to August 30, 1967, registrants J.A.B. and J.A.B. Co., Inc. and Buongiorno singly and in concert wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder in that registrants and Buorngiorno, in connection with the offer, sale and purchase of various securities, directly and indirectly, employed devices, schemes and artifices to defraud, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading and engaged in transactions, acts and practices and a course of business which would and did operate as a fraud and deceit upon customers. As part of the aforesaid conduct and activites, registrants and Buorngiorno singly and in concert, among other things would and did induce persons to purchase, and sold to such persons, securities at prices which were not reasonably related to the market price of such securities.

B. During the period from on or about August 31, 1968 to date J.A.B. Co., Inc. wilfully violated and Buorngiorno wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder, in that J.A.B. Co., Inc. failed to accurately make and keep current certain of its books and records, including, but not by way of limitations:

1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;
2. Customer ledger accounts;
3. Ledgers (or other records) reflecting the following:
  - a. securities in transfer
  - b. dividends and interest received
  - c. securities borrowed and securities loaned
  - d. monies borrowed and monies loaned
  - e. securities failed to receive and failed to deliver.
4. A securities record or ledger reflecting separately for each security as of the clearance dates all "long" or "short" positions (including securities in safekeeping) carried by such member, broker, or dealer for his account.

III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that **private proceedings** be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford Buongiorno, J.A.B. and J.A.B. Co., Inc. an opportunity to establish any defense to such allegations; and

B. What, if any, remedial action is appropriate in the public interest pursuant to Section 15(b) of the Exchange Act; and

C. Whether pending final determination of the issues set forth in paragraph A and B hereof, it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration of J.A.B. Co., Inc.

IV

IT IS HEREBY ORDERED that a **private hearing for the purpose** of taking evidence on the questions set forth in Section III hereof be held at such time and place as the Commission may hereafter designate pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post hearing procedures on that question, as specified in Rule 19 of the Commission's Rules of Practice, will be applicable. After final determination of the question of suspension the hearing shall be reconvened by the hearing examiner for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon the completion of the taking of all the evidence in this matter, the post hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

Each party shall file an answer to the allegations contained in the order for proceedings within 15 days after service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice (17 CFR 201.7).

If any respondent fails to file the directed answer or fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided by Rules 6(e) and 7(e) of the Commission's Rules of Practice.

This order shall be served upon Buongiorno, J.A.B. and J.A.B. Co., Inc. personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of	:	
	:	
DELAFIELD & DELAFIELD (8-248)	:	ORDER FOR PUBLIC PROCEEDINGS
JOHN M. GATES	:	PURSUANT TO SECTIONS 15(b), 15A
FRANK L. MACE	:	AND 19(a)(3) OF THE SECURITIES
	:	EXCHANGE ACT OF 1934.
	:	

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I

The Commission's public official files disclose that:

- A. Delafield and Delafield (Registrant) a partnership with principal offices at 140 Broadway, New York, New York became registered as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) on April 29, 1942 and is still so registered.
- B. Registrant, is a member of the National Association of Securities Dealers, Inc., a national securities association, registered pursuant to Section 15A of the Exchange Act.
- C. Registrant is a member, within the meaning of Section 3(a)(3) of the Exchange Act, of the New York Stock Exchange, the American Stock Exchange, and other national securities exchanges registered pursuant to Section 6 of the Exchange Act.
- D. Mary Carter Paint Company (Mary Carter) (now Resorts International, Inc.) is a Delaware corporation which is primarily active in the development of a resort complex in Nassau Bahamas. The common stock of Mary Carter is traded on the American Stock Exchange.

II

As a result of an investigation, the Division of Trading and Markets has obtained information which tends to show, and it alleges that:

- A. At all times relevant herein, the individual persons named as respondents were associated with Registrant in the following capacities:

John M. Gates, Jr., general partner in charge of the Foreign Department and the Institutional Research and Sales Department.

Frank L. Mace, institutional trader working primarily from the New York Office.

B. On or about January 9, 1968 Registrant and Mace wilfully violated Sections 17(a) of the Securities Act of 1933, and Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 17 CFR 240.10b-5 thereunder, in that for the purpose of inducing the sale by others of certain securities namely, the common stock of Mary Carter (Class A), they effected a series of transactions in such securities creating actual and apparent trading in such securities and depressing the price of such securities and in connection with the offer and sale of such securities, they directly and indirectly employed a device, scheme and artifice to defraud, and engaged in transactions, acts and practices, and a course of business which would and did operate as a fraud and deceit upon purchasers and prospective purchasers of such securities. As part of the aforesaid conduct Registrant and Mace would and did:

1. on January 9, 1968 during the time between 2:00 p.m. and the close of the market, sell and cause to be sold 17,600 shares of Mary Carter common stock (Class A). During said period said transactions represented 83% of all market transactions in Mary Carter common stock (Class A) and the price of said securities dropped from \$29 1/4 to \$27 3/8 per share. The transactions effected on or about January 9, 1968 were effected by Registrant and Mace for the purpose of inducing a large shareholder of Mary Carter to sell to customers of Registrant 350,000 shares of Mary Carter common stock (Class A) at \$25 a share;
2. for the purpose of concealing Mace's identity, effect transactions in Mary Carter common stock in the name of two foreign banks without disclosing that such transactions were Mace's personal transactions;
3. effect for Mace's own account and for the account of others, short sales of the common stock of Mary Carter on the American Stock Exchange below the price at which the last sales thereof, regular way, were effected on such exchange, and effected short sales at the same price as the last sale price, regular way, when such last price was not above the next preceding different price at which a sale of such security, regular way, was effected on such exchange; and
4. use the facilities of a national securities exchange to execute sell orders marked "long" when in fact such sell orders were "short".

C. Registrant and Mace violated and wilfully aided and abetted violations of Section 10(a) of the Exchange Act and Rule 17 CFR 240.10a-1, thereunder, by means and in the manner described in paragraphs B(3) and (4) hereof.

D. During the period from about November 1, 1967 to about March 15, 1968 and while engaged in the acts and practices described in paragraph B(2) above, Registrant wilfully violated and Mace wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17 CFR 240.17a-3 thereunder, in that Mace directly and indirectly caused Registrant to make false and fictitious entries in its books and records and to fail to accurately make and keep current records relating to the business of Registrant as prescribed by Rule 17 CFR 240.17a-3 and in particular:

- 1) Registrant and Mace would and did record transactions in securities as having been effected for the account of two foreign banks, when in fact such transactions were for the personal account of Mace; and
- 2) Registrant would and did fail to record in its books and records that the sales described in paragraph B(4) hereof were "short" sales.

E. During the period from about November 1, 1967 to April 30, 1967 Registrant wilfully violated, and Mace wilfully aided and abetted violations of Section 7(c) of the Exchange Act and Regulation T promulgated by the Board of Governors of the Federal Reserve System in that while transacting a business in securities as a member of a national securities exchange, said respondents, directly and indirectly:

- 1) extended and arranged the extension and maintenance of credit to and for customers on securities (other than exempted securities) registered on a national securities exchange in violation of Sections 3 and 4 of Regulation T (12 CFR 220.3, 220.4); and
- 2) extended and arranged the extension of credit to and for customers without collateral and on collateral other than exempted securities and other than securities registered on a national securities exchange.

F. Registrant and Gates failed reasonably to supervise persons under their supervision with a view to preventing the violations of the Federal securities laws alleged in paragraphs B through E above.

G. While engaged in the activities described in paragraphs B and C above, Registrant and Mace made use of the mails and means and instruments of transportation and communication in interstate commerce and the facilities of a national securities exchange.

III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

- (a) Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations; and
- (b) What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a)(3) of the Exchange Act.

IV

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before a hearing examiner to be designated by further order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that each party file an answer to the allegations contained in the order for proceedings within 15 days after service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice.

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceedings may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true.

This order shall be served upon Delafield and Delafield, John M. Gates, and Frank L. Mace, personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer, or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary



UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

DEC 16 1968

17a-3  
12a-7  
15d-3-1

In the Matter of  
M. V. GRAY INVESTMENTS, INC.  
MAXEL V. GRAY

File No. 8-12190

ORDER FOR PRIVATE PROCEEDINGS AND  
NOTICE OF HEARING PURSUANT TO  
SECTIONS 15 (b) and 15A OF THE  
SECURITIES EXCHANGE ACT OF 1934

I

The Commission's public official files disclose that:

A. M. V. Gray Investments, Inc. (Registrant), a corporation with its principal place of business at 711 Bayliss Street, Midland, Michigan, has been registered with the Commission as a broker-dealer pursuant to Section 15 (b) of the Securities Exchange Act of 1934 (Exchange Act) since December 18, 1964, and is still so registered.

B. Maxel V. Gray (Gray) is president, a director, and owner of 75 percent of Registrant's stock.

C. Registrant is a member firm of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

II

As a result of an investigation, the Division of Trading and Markets alleges that:

A. During the period from about September 30, 1967, to date, Registrant wilfully violated and Gray wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder in that Registrant failed to accurately make and keep current certain of its

books and records, including, but not by way of limitation:

1. Ledgers (or other records) reflecting all assets and liabilities, income and expense and capital accounts;
2. Customer ledger accounts itemizing all receipts and deliveries of securities for such accounts;
3. Ledgers (or other records) reflecting securities in transfer; and records of collateral for moneys borrowed;
4. A securities record or ledger reflecting separately for each security as of the clearance dates all "long" and "short" positions (including securities in safekeeping) carried by such broker or dealer for his account or for the account of his customers.
5. A record of the proof of money balances of all ledger accounts in the form of trial balances and a record of the computation of aggregate indebtedness and net capital, as of the trial balance date, pursuant to Rule 15c3-1 and Rule 17a-3 (11).

B. During the period from on or about February 1, 1968, until the present, Registrant wilfully violated and Gray wilfully aided and abetted in the violation of Section 15 (b) of the Exchange Act and Rule 15b3-1 thereunder in that Registrant failed to promptly file an amendment on Form BD correcting information pertaining to officers and directors of Registrant contained in its application for registration as a broker and dealer which had been inaccurate and incomplete.

C. During the period from on or about November 1, 1967, to date, Registrant wilfully violated and Gray wilfully aided and abetted violations of Section 7(c)(1) of the Exchange Act and Regulation T promulgated by the Board of Governors of the Federal Reserve System thereunder, in that Registrant, while conducting a business in securities through the medium of a member of a national securities exchange, directly and indirectly extended, maintained credit and arranged for credit to and for customers on securities (other than exempted securities) in contravention of the aforesaid Section and Regulation. As a part of the aforesaid conduct and activities, Registrant, among other things, failed to promptly cancel or otherwise liquidate the transactions or unsettled portions thereof of customers who purchased securities (other than exempted securities) in special cash accounts and did not make full cash payment for the securities within seven days after the date on which the security was so purchased.

D. During the periods in question, Registrant and Gray failed reasonably to supervise those persons under their supervision with a view to preventing the alleged violations set forth in paragraphs A, B, and C of Section II above.

III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary that private proceedings be instituted to determine:

A. Whether the allegations set forth in Section II hereof are true and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations;

B. What, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b) and 15A of the Exchange Act; and

C. Whether, pending final determination of the issues set forth in paragraphs A and B above, it is necessary or appropriate in the public interest to suspend the registration of Registrant.

IV

IT IS HEREBY ORDERED that a private hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at 11:00 a.m. on December 30, 1968 at 230 Federal Building, 231 West Lafayette St., Detroit, Michigan to be heard by Mr. Markham, hearing examiner, pursuant to Rule 6(b) of the Commission's Rules of Practice. The hearing shall first consider the question raised in paragraph C of Section III hereof and upon completion of that phase of the proceeding the hearing will be adjourned and post-hearing procedures on that question as specified in Rule 19 of the Commission's Rules of Practice will be applicable. After final determination of the question of suspension, the hearing shall be reconvened by the hearing examiner at such time as the hearing examiner may designate, for the purpose of taking additional evidence on the questions remaining under paragraphs A and B of Section III. The record adduced with respect to the question raised under paragraph C of Section III shall be deemed a part of the record at the reconvened hearing with respect to consideration of the remaining questions raised under paragraphs A and B of Section III. Upon completion of the taking of all the evidence in this matter, the post-hearing procedures will be conducted pursuant to Rule 16(b) of the Commission's Rules of Practice.

If any party fails to appear at any hearing after being duly notified, such party shall be deemed in default and the proceeding may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true as provided

by Rules 6 (e) and 7 (e) of the Commission's Rules of Practice.

This order shall be served upon Registrant and Maxel V. Gray personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as a witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4 (c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

August 26, 1968

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In the Matter of	:
MERRILL LYNCH, PIERCE FENNER	:
& SMITH, INC. (8-7221)	:
WINTHROP LENZ	:
JULIUS H. SEDLMAYER	:
GILLETTE K. MARTIN	:
DEAN S. WOODMAN	:
GEORGE L. SHINN	:
ARCHANGELO CATAPANO	:
EDWARD N. McMILLAN	:
PHILLIP F. BILBAO	:
NORMAN H. HEINDEL, JR.	:
LEE W. IDLEMAN	:
LAWRENCE ZICKLIN	:
JAMES A McCARTHY	:
ELIAS A. LAZOR	:
CHESTER T. SMITH, JR.	:
INVESTORS MANAGEMENT CO., INC.	:
MADISON FUND, INC.	:
J. M. HARTWELL & CO.	:
J. M. HARTWELL & CO., INC.	:
HARTWELL ASSOCIATES	:
PARK WESTLAKE ASSOCIATES	:
VAN STRUM & TOWNE, INC.	:
FLESCHNER BECKER ASSOCIATES	:
A. W. JONES & CO.	:
A. W. JONES ASSOCIATES	:
CITY ASSOCIATES	:
FAIRFIELD PARTNERS	:
BURDEN INVESTORS SERVICES, INC.	:
WILLIAM A. M. BURDEN & CO.	:
THE DREYFUS CORPORATION	:

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ORDER FOR PUBLIC  
PROCEEDINGS  
PURSUANT TO  
SECTIONS 15(b),  
15A AND 19(a)(3)  
OF THE SECURITIES  
EXCHANGE ACT OF  
1934 AND 203 OF  
THE INVESTMENT  
ADVISERS ACT OF  
1940

I

The Commission's public official files disclose that:

A. Merrill Lynch, Pierce, Fenner & Smith, Inc. (Registrant), a Delaware corporation with offices at 70 Pine Street, New York, New York has at all times since February 10, 1959 been registered with the Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) and is the successor to the business of Merrill Lynch, Pierce, Fenner & Smith, a partnership.

B. Registrant is a member of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

C. Registrant is a member within the meaning of Section 3(a)(3) of the Exchange Act of the New York Stock Exchange, the American Stock Exchange and other national securities exchanges registered pursuant to Section 6 of the Securities Exchange Act of 1934.

D. Winthrop C. Lenz (Lenz) has been an executive vice-president of Registrant since February of 1966 and a member of the board and a director of Registrant since April of 1960. On April 10, 1968 Lenz was elected chairman of Registrant's executive committee.

E. Julius H. Sedlmayer, (Sedlmayer) has been a vice-president of Registrant since January of 1959 and became a member of the Board of Directors of Registrant in January of 1967.

F. Gillette K. Martin (Martin) has been a Senior Vice-President of Registrant since February of 1966.

G. George L. Shinn (Shinn) became a vice-president of Registrant in July of 1960 and has been a member of the Board of Directors of Registrant since April of 1965 and has served as a Senior Vice-President of Registrant since April of 1967.

H. Archangelo Catapano (Catapano) has been a vice-president of Registrant since April of 1967.

I. Edward N. McMillan (McMillan) has been a vice-president of Registrant since January of 1967 and became a member of the Board of Directors of Registrant on April 13, 1965. In April of 1967 he was made a Senior Vice-President of Registrant.

J. Dean S. Woodman (Woodman) has been a vice-president of Registrant since January of 1965.

K. Norman H. Heindel, Jr. (Heindel) became a vice-president of Registrant on April 10, 1968.

L. Phillip F. Bilbao (Bilbao) became a vice-president of Registrant on April 10, 1968.

II

As a result of an investigation the Division of Trading and Markets alleges that:

A. At all times referred to hereinafter the persons listed below held the positions indicated with Registrant (Registrant and the persons listed below are hereinafter collectively referred to as Registrant-Respondents):

1. Lenz - Executive Vice-President in charge of Underwriting;
2. Sedlmayer - Director of the Underwriting Division;
3. Martin - Head of the Corporate Buying Department of the Underwriting Division;
4. Woodman - In charge of the West Coast Underwriting Office;
5. Shinn - Director of the Research Division;
6. Catapano - Industry Specialist in the Industry Specialists Department of Research Division covering the Aero-Space and Defense-Electronic Industries;
7. McMillan - Director of the Institutional and Municipal Sales Division (now known as the Institutional and Equity Sales Division);
8. Bilbao - Manager of the Institutional Services Department which is a part of the Institutional and Municipal Sales Division;
9. Heindel - Manager of the New York Institutional Sales Office;
10. - Lee W. Idleman (Idleman), Lawrence Zicklin (Zicklin), James A. McCarthy (McCarthy), Elias A. Lazor (Lazor) and Chester T. Smith, Jr. (Smith) all salesmen in the New York Institutional Sales Office.

B. On or about June 24, 1966 Douglas Aircraft Co., Inc. (Douglas) issued a news release in which it stated that its earnings for the first six months of its 1966 fiscal year ending May 31, 1966 were 12 cents a share and that in the opinion of management earnings

for its 1966 fiscal year as a whole would be nominal, if any. On or about June 7, 1966 Douglas had released an earnings report for the first five months of its 1966 fiscal year which indicated that Douglas had earned 85 cents a share for that period.

C. From about April of 1966 through July of 1966 Registrant had been engaged in acting as prospective managing underwriter of a proposed Douglas offering of \$75,000,000 in convertible subordinated debentures the registration statement for which had been filed with the Commission on June 7, 1966. On July 12, 1966 the registration statement was made effective by the Commission and Registrant acted as managing underwriter.

D. During the period from on or about June 17, 1966 through on or about June 24, 1966 Registrant-Respondents singly and in concert wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act of 1933 and Sections 10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder in that Registrant-Respondents in connection with the sale and purchase of certain securities, namely, the common stock of Douglas directly and indirectly employed devices, schemes and artifices to defraud, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances in which they were made not misleading and engaged in transactions, acts and practices and a course of business which would and did operate as a fraud and deceit upon purchasers and prospective purchasers of such securities in that:

1. On or about June 17, 1966 through on or about June 22, 1966 Registrant-Respondents, because of Registrant's position as prospective managing underwriter of the Douglas offering of convertible subordinated debentures, obtained from Douglas management certain non-public material information including the following:

- (a) Douglas would report sharply lower earnings for the first six months of its 1966 fiscal year than it had reported for the first five months of the 1966 fiscal year;
- (b) Douglas had sharply reduced its estimates of earnings for the 1966 fiscal year in that it now expected to have little or no profit for the year; and
- (c) Douglas had substantially reduced its projections of earnings for its 1967 fiscal year.

2. During the period from on or about June 20, 1966 through on or about June 23, 1966 Registrant-Respondents disclosed the foregoing information to certain of their institutional and other large customers. Some of these customers thereafter sold from existing positions



and effected short sales of more than 190,000 shares of Douglas stock on the New York Stock Exchange and otherwise prior to the public disclosure of the information and without Registrant-Respondents or any such customers making any disclosures of the information to any of the purchasers of such stock. In connection with said activities, Registrant-Respondents received commissions from the execution of securities transactions for such customers and also compensation in the form of customer-directed "give-ups" certain of which had been conducting substantial brokerage business with Registrant during, before and after the time in which said activities occurred.

3. During the period from on or about June 20, 1966 through on or about June 23, 1966, while Registrant-Respondents were disclosing the information described in subparagraph 1 of paragraph D of Section II of this order to certain of their institutional and other large customers, Registrant-Respondents affected on behalf of other customers purchases of Douglas stock without disclosing to such customers the aforementioned information.

E. Registrant, McMillan, Lenz, Shinn, Heindel, Martin and Sedlmayer failed reasonably to supervise persons under their supervision with a view to preventing the violations alleged in paragraph D of Section II of this order.

F. The Respondents described below are hereinafter collectively referred to as Selling Respondents:

1. Respondent Investors Management Company, Inc., a corporation, at all times hereinafter mentioned was and still is a wholly owned subsidiary of the Anchor Corporation, with offices in Elizabeth, New Jersey, and as such, manages the investments of a number of registered investment companies. In connection with the activities set forth in paragraph G of Section II of this order Respondent Investors Management Company, Inc. acted on behalf of Fundamental Investors Inc. and Diversified Growth Stock Fund, Inc. registered investment companies under the Investment Company Act of 1940.
2. Respondent Madison Fund, Inc. was at all times hereinafter mentioned and still is a registered investment company with offices in New York City.
3. Respondent J. M. Hartwell & Co. was at all times hereinafter mentioned a partnership registered as an investment adviser pursuant to Section 203 of the Investment Advisers Act of 1940. Respondent J. M. Hartwell & Co., Inc., a corporation succeeded to the business of J. M. Hartwell & Co. and is also registered as an investment adviser pursuant to Section 203 of the Investment Advisers Act. The offices of both J. M. Hartwell & Co. and J. M. Hartwell & Co., Inc. are located in New York City.

4. Respondent Hartwell Associates was at all times hereinafter mentioned and still is a limited partnership with offices in New York City.
5. Respondent Park Westlake Associates was at all times hereinafter mentioned and still is a limited partnership with offices in New York City.
6. Respondent Van Strum & Towne Inc., a corporation, was at all times hereinafter mentioned and still is a wholly owned subsidiary of Channing Financial Corporation with offices in New York City, and manages the investments of a number of registered investment companies. In connection with the activities set forth in paragraph G of Section II of this order, Respondent Van Strum & Towne Inc. acted on behalf of Channing Growth Fund a registered investment company.
7. Respondent Fleschner Becker Associates was at all times hereinafter mentioned and still is a limited partnership with offices in New York City.
8. Respondents A. W. Jones & Co. and A. W. Jones Associates were at all times hereinafter mentioned and still are limited partnerships with offices in New York City.
9. Respondent City Associates was at all times hereinafter mentioned and still is a limited partnership with offices in New York City.
10. Respondent Fairfield Partners was at all times hereinafter mentioned and still is a limited partnership with offices in Greenwich, Connecticut.
11. Respondent Burden Investors Services, Inc. is a corporation and Respondent William A. M. Burden & Co. is a partnership, both with offices in New York City.
12. Respondent The Dreyfus Corporation was at all times hereinafter mentioned and still is a corporation registered as a broker-dealer under Section 15(b) of the Securities Exchange Act of 1934. The Dreyfus Corporation manages the investments of the Dreyfus Fund, a registered investment company, and in connection with the activities set forth in paragraph G of Section II of this order acted on behalf of Dreyfus Fund.

G. During the period from on or about June 20, 1966 through on or about June 24, 1966 Selling Respondents each wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that Selling Respondents in connection with the sale of certain securities,

namely, the common stock of Douglas, directly and indirectly, employed devices, schemes and artifices to defraud, obtained money and property by means of omissions to state material facts necessary in order to make the statements made in the light of the circumstances in which they were made not misleading and engaged in transactions, acts and practices and a course of business which would and did operate as a fraud and deceit upon purchasers and prospective purchasers of such securities, in that each of the Selling Respondents after directly and indirectly obtaining material information concerning the matters set forth in subparagraph 1 of paragraph D of Section II of this order from Registrant-Respondents, either sold from existing positions or effected short sales or induced and aided and abetted others to sell from existing positions or effect short sales in the shares of Douglas common stock on the New York Stock Exchange and otherwise. Said transactions were effected prior to the public disclosure of said material information and without Selling Respondents having made any disclosure of the information to any of the purchasers of such shares.

H. While engaged in the acts and practices described in paragraphs D and G of Section II of this order, Selling Respondents and Registrant-Respondents, directly and indirectly, made use of the mails and means and instruments of transportation and communication in interstate commerce.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary and appropriate in the public interest and for the protection of investors that public proceedings be instituted to determine:

- (a) Whether the allegations set forth in Section II are true, and in connection therewith to afford respondents an opportunity to establish any defenses to such allegations; and
- (b) What, if any, remedial action is appropriate in the public interest pursuant to the statutes administered by the Commission including Sections 15(b), 15A and 19(a)(3) of the Exchange Act and 203 of the Investment Advisers Act of 1940.

### IV

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before a hearing examiner to be designated by a further order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that each party file an answer to the allegations contained in the order for proceedings within 15 days after

service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice.

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be deemed in default and the proceedings may be determined against such party upon consideration of such order for proceedings, the allegations of which may be deemed to be true.

This order shall be served upon the Registrant, Merrill Lynch, Pierce, Fenner & Smith, Inc.; Winthrop Lenz; Julius H. Sedlmayer; Gillette K. Martin; George L. Shinn; Archangelo Catapano; Edward N. McMillan; Phillip F. Bilbao; Norman H. Heindel, Jr.; Lee W. Idleman; Lawrence Zicklin; James A. McCarthy; Elias A. Lazor; Dean S. Woodman; Chester T. Smith, Jr.; Investors Management Co., Inc.; Madison Fund, Inc.; J. M. Hartwell & Co.; J. M. Hartwell & Co., Inc.; Hartwell Associates; Park Westlake Associates; Van Strum & Towne, Inc.; Fleschner Becker Associates; A. W. Jones & Co.; A. W. Jones Associates; City Associates; Fairfield Partners; Burden Investors Services, Inc.; William A. M. Burden & Co.; and The Dreyfus Corporation personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceedings will be permitted to participate or advise in the decision upon this matter, except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

SERVICE LIST

Rule 23 of the Commission's Rules of Practice provides that all amendments to moving papers, all answers, all motions or applications made in the course of a proceeding (unless made orally during a hearing), all proposed findings and conclusions, all petitions for review of any initial decision, and all briefs shall be filed with the Commission and shall be served upon all other parties to the proceeding including the interested division of the Commission.

The attached Order for Proceedings has been sent to the following parties:

Securities and Exchange Commission  
Division of Trading and Markets  
500 North Capitol Street, N. W.  
Washington, D. C. 20549

Merrill Lynch, Pierce, Fenner  
& Smith, Inc.  
70 Pine Street  
New York, New York 10005

Winthrop C. Lenz  
77 Prospect Hill Avenue  
Summit, New Jersey

Julius H. Sedlmayer  
44 North Drive  
Plandome, New York

Gillette K. Martin  
227 Eakons Road  
Manhasset, New York

George L. Shinn  
Spring Valley Road  
Morristown, New Jersey

Archangelo Catapano  
16 Waylor Lane  
Syosset, New York

Edward N. McMillan  
Roundhill Road  
Greenwich, Connecticut

Phillip F. Bilbao  
58 Overlook Drive  
Chapaqua, New York

Norman H. Heindel, Jr.  
20 Masterton Road  
Bronxville, New York

Lee W. Idleman  
2 Dellbarton Drive  
Madison, New Jersey

Lawrence Zicklin  
18 Neptune Court  
Somerset, New Jersey

Elias A. Lazor  
Tower Mountain Drive  
Bernardsville, New Jersey

Dean S. Woodman  
1011 Lombard Street  
San Francisco, California

James A. McCarthy  
127 Essex Avenue  
Montclair, New Jersey

Chester T. Smith, Jr.  
2 Grace Court  
Apt. 3D  
Brooklyn, New York

Investors Management Co., Inc.  
Westminster Avenue & Parker Road  
Elizabeth, New Jersey

Madison Fund, Inc.  
660 Madison Avenue  
New York, New York 10021

J. M. Hartwell & Co.  
245 Park Avenue  
New York, New York 10017

J. M. Hartwell & Co., Inc.  
245 Park Avenue  
New York, New York 10017

Hartwell Associates  
245 Park Avenue  
New York, New York 10017

Park Westlake Associates  
245 Park Avenue  
New York, New York 10017

William A. M. Burden & Co.  
630 Fifth Avenue  
New York, New York

Van Strum & Towne Inc.  
85 Broad Street  
New York, New York

Fleschner Becker Associates  
330 Madison Avenue  
New York, New York

A. W. Jones & Co.  
80 Broad Street  
New York, New York

A. W. Jones Associates  
80 Broad Street  
New York, New York

City Associates  
20 Exchange Place  
New York, New York

Fairfield Partners  
170 Mason Street  
Greenwich, Connecticut

Burden Investors Services, Inc.  
630 Fifth Avenue,  
New York, New York

The Dreyfus Corporation  
2 Broadway  
New York, New York 1004

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION

JAN 17 1969

In the Matter of	:	
	:	
BLYTH & COMPANY, INC.	:	ORDER FOR PUBLIC PROCEEDINGS
GEORGE J. WUNSCH	:	PURSUANT TO SECTIONS 15(b),
JOHN G. BEUTEL	:	15A and 19(a) OF THE SECURITIES
LORING T. BRIGGS	:	EXCHANGE ACT OF 1934
	:	
File No. 8-2466	:	

I

The Commission's public official files disclose that:

A. Blyth & Company, Inc. (REGISTRANT), a Delaware corporation with principal offices at 14 Wall Street, New York, New York, and its predecessors have at all times since December 31, 1936 been registered with this Commission pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act").

B. REGISTRANT is a member of the National Association of Securities Dealers, Inc., a national securities association registered pursuant to Section 15A of the Exchange Act.

C. REGISTRANT is a member within the meaning of Section 3(a)(3) of the Exchange Act of the New York Stock Exchange, the American Stock Exchange and the Pacific Coast Stock Exchange registered pursuant to Section 6 of the Exchange Act.

D. George J. Wunsch (WUNSCH) was a vice president of REGISTRANT from approximately January 10, 1967 through approximately April, 1968.

E. Loring T. Briggs (BRIGGS) was a vice president of REGISTRANT from approximately March, 1962 through approximately July, 1967.

II

The Division of Trading and Markets, as a result of an investigation, has obtained information which tends to show and it alleges that:

A. From about April, 1962 to the present REGISTRANT has engaged in and continues to engage in, among other activities, transacting business as a dealer in various securities including, among others, bills, certificates, notes, bonds and other securities issued by the United States Treasury Department and by certain federal agencies (hereinafter referred to as "government securities").

B. From about April, 1962 through about April, 1968, WUNSCH was employed by REGISTRANT as head trader in its government securities department, and was manager of said department from approximately August 1, 1967 through approximately April, 1968.

C. From on or about January 24, 1964 through about April, 1968, John G. Beutel (BEUTEL) was employed by REGISTRANT as a trader and salesman of government securities.

D. From about April, 1962 through about July, 1967 BRIGGS was employed by REGISTRANT and from about May, 1963 was manager of REGISTRANT's government securities department.

E. From prior to January, 1964 to approximately November, 1967 Gustav Kress ("Kress"), now deceased, was employed by the Federal Reserve Bank of Philadelphia in Philadelphia, Pennsylvania as manager of its Bond and Custody Department.

F. During the period from approximately January, 1964 through November, 1967, REGISTRANT, WUNSCH, and BEUTEL, singly and in concert, wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that said respondents in connection with the purchase and sale of certain securities, namely government securities, did employ manipulative and deceptive devices and contrivances; did engage in inequitable and unfair practices in derogation of the maintenance of fair and honest markets in government



securities; and did, directly and indirectly, employ devices, schemes and artifices to defraud, did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading, and did engage in transactions, acts, practices and courses of business which would and did operate as a fraud and deceit upon purchasers, prospective purchasers, sellers and prospective sellers of such government securities. In connection with and in furtherance of the aforesaid activities, it is alleged as follows:

- (1) During all times relevant to the allegations contained herein there existed active trading markets in government securities. The market prices of said securities were materially influenced by new financings involving the issuance or re-issuance of government securities by the United States Treasury Department ("Treasury") where, the terms of the new issues, among other factors, were not those expected by persons associated or familiar with the government securities markets, or where the terms of the new issues would reasonably have been expected to affect investment decisions.
- (2) On certain days (hereinafter referred to as "release days"), between January, 1964 and September, 1967 the Treasury transmitted to the Federal Reserve Bank System on a confidential basis the terms of new government securities to be offered subsequent to each release day to securities dealers and to the public by the Treasury, pursuant to an established procedure whereby the confidentiality of the terms of such new financings would be maintained until a specific time on each respective release day determined by the Treasury for public announcement and dissemination of such information. During the period from approximately January, 1964 to November, 1967 Kress, by virtue of his position as manager of the Bond and Custody Department of the Federal Reserve Bank of Philadelphia, had access to such confidential information on each respective release day at a time prior to the public announcement and dissemination thereof.

(3) From January, 1964 and thereafter, prior to the time specified by the Treasury for public announcement and dissemination of the terms of new financings on each respective release day, BEUTEL and WUNSCH would and did, directly and indirectly, receive from Kress certain material non-public information relating to the terms of the applicable new financings, and BEUTEL and WUNSCH, in conducting REGISTRANT's business in its government securities department would and, did execute and cause to be executed for REGISTRANT's account purchases and sales of outstanding government securities during time periods prior to public announcement and dissemination of the terms of such new financings without disclosing such information to the persons buying such government securities from or selling such government securities to REGISTRANT, which information BEUTEL and WUNSCH knew or reasonably should have known would and did, after public announcement and dissemination thereof, affect the market prices of said government securities, purchased and sold, and the investment decisions of the purchasers and sellers thereof, and through the receipt of such non-public information by WUNSCH and BEUTEL as alleged herein they, for REGISTRANT's account, were able to and did effect transactions in outstanding government securities in an unlawful manner which resulted in advantage to REGISTRANT and detriment to the other parties to said transactions.

(4) In connection with the non-public confidential information revealed on release days by Kress to BEUTEL and WUNSCH as described in subparagraph 1 above, Kress would and did provide BEUTEL and WUNSCH with, among other things, the maturity dates and interest rates relating to various new government securities offerings.

G. REGISTRANT and BRIGGS, in connection with the activities described in paragraph F above, failed reasonably to supervise BEUTEL and WUNSCH, persons under their supervision, with a view to preventing the violations alleged in paragraph F above.

H. While engaged in the activities described in paragraphs F and G above, REGISTRANT, WUNSCH, BEUTEL and BRIGGS, directly and indirectly, made use of the mails and means and instruments of transportation and communication in interstate commerce.

## III

In view of the allegations by the Division of Trading and Markets, the Commission deems it necessary that public proceedings be instituted to determine:

- (a) whether the allegations set forth in Section II are true, and in connection therewith, to afford respondents BLYTH & COMPANY, INC., WUNSCH, BEUTEL and BRIGGS an opportunity to establish any defenses to such allegations; and
- (b) what, if any, remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a) of the Exchange Act.

## IV

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III thereof be held at a time and place to be fixed and before a hearing examiner to be designated by further order as provided by Rule 6 of the Commission's Rules of Practice.

IT IS FURTHER ORDERED that respondents file an answer to the allegations contained in the order for proceedings within 15 days after service upon them of said order as provided by Rule 7 of the Commission's Rules of Practice.

If respondents fail to file the directed answer or fail to appear at a hearing after being duly notified, they shall be deemed in default and the proceeding may be determined against them upon consideration of the order for proceedings, the allegations of which may be deemed to be true.

This order shall be served upon BLYTH & COMPANY, INC., GEORGE J. WUNSCH, JOHN G. BEUTEL and LORING T. BRIGGS personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceedings will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceedings is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

UNITED STATES OF AMERICA  
Before the  
SECURITIES AND EXCHANGE COMMISSION  
AUG 5 1968

In the Matter of	:	
PICKARD & COMPANY, INCORPORATED	:	
JOHN SACKVILLE-PICKARD	:	
PETER SACKVILLE-PICKARD	:	
JOSEPH V. SHIELDS, JR.	:	
JESS H. NEALY	:	ORDER FOR PUBLIC PROCEEDINGS
JOSEPH B. GORINSTEIN	:	AND NOTICE OF HEARING
C. EUGENE OSMENT, III	:	PURSUANT TO SECTIONS 15(b),
BENNETT M. BALDWIN	:	15A and 19(a)(3) OF THE
WILLIAM K. BARCLAY, III	:	SECURITIES EXCHANGE ACT
JOHN W. BENDALL, JR.	:	OF 1934 AND SECTION 203(d)
JACK FLITTMAN	:	OF THE INVESTMENT ADVISERS
JOHN MORELLI	:	ACT OF 1940
RALPH LUCA	:	
HERBERT RUDICH	:	
(8-10500; 801-3605)	:	

I

The Commission's public official files disclose that:

A. Pickard & Company, Incorporated (Registrant), a Delaware corporation, with principal offices at 55 Broad Street, New York, New York, became registered as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 (Exchange Act) on March 13, 1962, and became registered as an investment adviser pursuant to Section 203(c) of the Investment Advisers Act of 1940 (Advisers Act) on November 24, 1964, and is still so registered.

B. Registrant is a member of the National Association of Securities Dealers, Inc. (NASD), a national securities association, registered pursuant to Section 15A of the Exchange Act.

C. Registrant is a member within the meaning of Section 3(a)(3) of the Exchange Act, of the New York Stock Exchange (NYSE) and the American Stock Exchange (ASE), national stock exchanges registered pursuant to Section 6 of the Exchange Act.

D. John Sackville-Pickard (John Pickard) is president, a director and owner of 10% or more of the class A voting stock of registrant. Peter Sackville-Pickard (Peter Pickard) is vice-president, treasurer, secretary, a director and owner of 10% or more of the class A voting stock of registrant. Joseph V. Shields, Jr. (Shields) is executive vice-president and a director of registrant.

E. No registration statement has been filed with the Commission or is in effect with respect to the securities of Dyna Ray Corporation, a Delaware corporation.

## II

As the result of an investigation, the Division of Trading and Markets alleges that:

A. Jess H. Nealy (Nealy) was regional manager in charge of registrant's Phoenix branch office from about April, 1967 to about March, 1968; Joseph Gorinstein (Gorinstein) was manager of registrant's Miami branch office from about January, 1967 to about February, 1968; C. Eugene Osment, III (Osment) was manager of registrant's Phoenix office from about February, 1965 to about March, 1967; John W. Bendall, Jr. (Bendall) was a salesman for registrant from about January, 1966 to about September, 1966 and from about March, 1967 to about February, 1968; Bennett M. Baldwin (Baldwin) was a salesman for registrant from about February, 1965 to about February 1968; William K. Barclay, III (Barclay) was a salesman for registrant from about July, 1966 to about March, 1968; Jack Flittman (Flittman) was a salesman and head margin clerk for registrant from about October, 1966 to about January, 1968; John Morelli (Morelli) was a salesman and margin clerk for registrant from about December, 1966 to about March, 1968; Ralph Luca (Luca) was head cashier for registrant from about February, 1964 to about April, 1967; and Herbert I. Rudich (Rudich) was assistant cashier for registrant from about June, 1966 to about April, 1967 and head cashier from about April, 1967 to about February, 1968.

B. During the period from on or about May 25, 1967 to on or about August 17, 1967 registrant and Nealy, singly and in concert, wilfully violated and wilfully aided and abetted in violations of Sections 5(a) and 5(c) of the Securities Act of 1933 (Securities Act) in that they, directly and indirectly, made use of the means and instruments of transportation and communication in interstate commerce and of the mails to offer to sell, sell and deliver after sale shares of the common stock of Dyna Ray Corporation (Dyna Ray) when no registration statement was in effect as to said securities pursuant to the Securities Act.

C. During the period from on or about May 25, 1967 to on or about August 17, 1967 registrant and Nealy, singly and in concert, wilfully violated and wilfully aided and abetted violations of Section 17(a) of the Securities Act and Sections 10(b) and 15(c) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder, in that said persons, by use of the means and instrumentalities of interstate commerce and the mails, in offering, selling, purchasing and effecting transactions in securities, namely common stock of Dyna Ray, otherwise than on a national securities exchange, directly and indirectly, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading and engaged in transactions, acts, practices and a course of business which would and did operate as a fraud and deceit upon purchasers and prospective purchasers of such securities. As part of the aforesaid conduct and activities, said persons, singly and in concert, among other things, would and did:

- (1) recommend the purchase of, offer and sell to customers the speculative and unseasoned securities of Dyna Ray without first having made reasonable and diligent inquiry and in disregard of information as to the past and present financial condition and business operations of Dyna Ray;
- (2) maintain, dominate, control and manipulate the market for securities of Dyna Ray;
- (3) enter into an arrangement with Mac Elrod (Elrod), principal and controlling person of Dyna Ray, under which Elrod would make available to Nealy special inducements in the form of offering to an account which Nealy controlled and in which Nealy had a beneficial interest and certain customers securities of Dyna Ray at prices which were substantially below the prices at which registrant, Nealy and other broker-dealers were effecting transactions in such securities;
- (4) lend the prestige and name of registrant in connection with the trading market for the securities of Dyna Ray by arranging for registrant to place quotations for such securities in the National Daily Quotation sheets and in connection therewith quote prices for the common stock of Dyna Ray at prices ranging from about \$3.00 to approximately \$9.00 without having made reasonable and diligent inquiry as to the past and present financial condition of Dyna Ray, its products, offices, officers and principals;

- (5) purchase, offer to purchase, sell, offer to sell and effect transactions in the common stock of Dyna Ray by and through an account allegedly of a customer of the firm when in fact such offers and transactions were being made by Nealy and said account was being used as a trading account for Nealy and registrant and in connection therewith fail to disclose, by confirmations or otherwise, that registrant and Nealy had a beneficial interest in and control of said account; and
- (6) make untrue, deceptive and misleading statements of material facts and omit to state material facts to purchasers and prospective purchasers of common stock of Dyna Ray concerning, among other things:
  - (a) the financial condition, business operations, products, offices, officers and principals of Dyna Ray; and
  - (b) the activities described in subparagraphs (1) to (5) above.

D. During the period from on or about March 1, 1965 to on or about May 20, 1968, registrant, while transacting a business in securities as a member of a national securities exchange, wilfully violated and John Pickard, Peter Pickard, Shields, Nealy, Gorinstein, Osment, Baldwin, Barclay, Bendall, Flittman and Morelli, wilfully aided and abetted violations of Section 7(c) of the Exchange Act in that registrant, directly or indirectly, extended or maintained credit or arranged for the extension and maintenance of credit to and for customers on securities (other than exempted securities) registered on a national securities exchange, and on collateral other than securities registered on a national securities exchange, in contravention of Sections 3 and 4 of Regulation T (12 CFR 220.3, 220.4) adopted by the Board of Governors of the Federal Reserve System pursuant to Sections 7(a) and 7(b) of the Exchange Act.

E. During the period from on or about November 1, 1963 to on or about May 20, 1968, registrant wilfully violated, and John Pickard, Peter Pickard and Shields wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-4 thereunder in that registrant failed to accurately make, keep current and preserve accounts, correspondence, memoranda, papers, books and other records relating to the business of registrant as prescribed by Rules 17a-3 and 17a-4, including, but not limited to, blotters and records of original entry; ledgers reflecting all assets and liabilities, income and expense and capital accounts; ledger accounts for each customer and officer of registrant; ledgers reflecting securities borrowed and securities loaned, moneys borrowed and

moneys loaned, securities failed to receive and failed to deliver; securities record or ledger reflecting separately for each security all "long" or "short" positions; memoranda of each brokerage order whether executed or unexecuted; copies of all confirmations and notices; records authorizing the opening and maintenance of customers' accounts; records of all options; monthly trial balances, computations of aggregate indebtedness and net capital and working papers in connection therewith; employment records; record of all clearing transactions for other member firms; check books, bank statements, cancelled checks, and cash reconciliations; all bills receivable or payable, paid or unpaid; originals of communications received and copies of communications sent; minute books and stock certificate books; and all written agreements.

F. Registrant wilfully violated, and John Pickard, Peter Pickard and Shields wilfully aided and abetted violations of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder in that registrant failed to file with the Commission a report of financial condition duly certified containing the information required by Form X-17A-5 for the calendar year 1967 within the time required by Rule 17a-5.

G. During the period from on or about November 12, 1964 to on or about May 20, 1968, registrant wilfully violated, and John Pickard, Peter Pickard, Shields, Luca and Rudich wilfully aided and abetted violations of Sections 8(c) and 15(c)(2) of the Exchange Act and Rules 8c-1(a) and 15c2-1 thereunder in that registrant in effecting transactions in securities, directly and indirectly, hypothecated, arranged for and permitted the continued hypothecation of securities carried for the accounts of customers under circumstances in which (1) securities carried for the accounts of customers were commingled with securities carried for the accounts of other customers, without the prior written consent of each such customer; (2) such securities were commingled with securities carried for the accounts of customers other than bona fide customers of registrant under a lien for a loan to registrant; and (3) securities carried for the accounts of customers were hypothecated and subjected to liens of pledgees for a sum in excess of the aggregate indebtedness of such customers in respect of such securities.

H. During the period from on or about January 7, 1964 to on or about March 31, 1968, registrant wilfully violated, and John Pickard, Peter Pickard and Shields wilfully aided and abetted violations of Section 15(b)(1) of the Exchange Act and Rule 15b3-1 thereunder in that registrant omitted to disclose in amendments to its Form B-D filed with the Commission that certain persons were owners of 10% or more of its equity securities and failed to promptly amend its Form B-D with respect to changes in its officers and directors.



I. During the period from on or about March 1, 1965 to on or about March 31, 1965 registrant wilfully violated and John Pickard, Peter Pickard and Shields wilfully aided and abetted violations of Section 10(a) of the Exchange Act and Rule 10a-1 thereunder in that said persons, directly and indirectly, singly and in concert, in effecting short sales of securities on a national securities exchange failed to mark the orders for such transactions "short."

J. During the period from on or about November 6, 1967 to on or about January 25, 1968, Flittman wilfully violated and registrant wilfully aided and abetted violations of Section 9(a)(2) of the Exchange Act in that said persons, directly and indirectly, singly and in concert, through the use of the facilities of a national securities exchange, effected a series of transactions in the common stock of Rowland Products, Inc., transactions creating actual and apparent active trading in such securities for the purpose of inducing the purchase and sale of such securities by others.

K. During the period from on or about September 1, 1967 to on or about May 20, 1968, registrant wilfully violated and John Pickard, Peter Pickard and Shields wilfully aided and abetted violations of Section 15(c)(1) of the Exchange Act and Rule 15c1-4 thereunder in that registrant effected transactions in securities (other than commercial paper, bankers' acceptances, or commercial bills) with or for the accounts of customers without, at or before the completion of each such transaction, giving or sending to each such customer a written confirmation disclosing the capacity in which registrant acted in such transactions and other information required by said Rule 15c1-4.

L. During the period from on or about January 1, 1966 to on or about March 1, 1968, registrant wilfully violated, and Osment, Baldwin and Bendall wilfully aided and abetted violations of Section 15(c)(1) of the Exchange Act and Rule 15c1-7 thereunder in that registrant effected transactions of purchase and sale of securities (other than commercial paper, bankers' acceptances, or commercial bills), with or for customers' accounts in respect to which Osment, Baldwin and Bendall were vested with discretionary power, which transactions were excessive in size and frequency in view of the financial resources and character of such accounts and which were otherwise in violation of said provision.

M. During the period from on or about November 1, 1963 to on or about May 20, 1968 registrant, John Pickard, Peter Pickard, Shields, Nealy, Gorinstein, Osment, Baldwin, Barclay, Bendall, Flittman, Morelli, Luca and Rudich, singly and in concert, wilfully violated and wilfully aided and abetted violations of Sections

10(b) and 15(c)(1) of the Exchange Act and Rules 10b-5 and 15c1-2 thereunder in that said persons, directly and indirectly, in effecting transactions in securities through the facilities of national securities exchanges and otherwise, employed devices, schemes and artifices to defraud, obtained money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which would and did operate as a fraud and deceit upon customers. As part of the aforesaid conduct and activities, said persons, singly and in concert, would and did, among other things:

- (1) Accept orders for the purchase and sale of securities and effect transactions in securities on behalf of customers at a time when registrant was incapable of promptly consummating said transactions and at a time when:
  - (a) registrant's books and records were not current, contained numerous errors and could not be relied upon to accurately and promptly reflect the amount of securities or cash held for the account of customers;
  - (b) registrant did not have the facilities and personnel necessary in order to promptly consummate customers' securities transactions and to make prompt delivery of securities and cash to such customers; and
  - (c) registrant was not in compliance with the financial requirements imposed by the NYSE.
- (2) Obtain the trust and confidence of customers and induce said customers to effect transactions in securities and in connection therewith make false and misleading statements of material facts and omissions to state material facts concerning, among other things:
  - (a) registrant's ability to select profitable securities through the use of a new method employing a computer and certain graphs and charts;
  - (b) registrant's ability to determine the exact time when to purchase and when to sell such securities to insure profits; and
  - (c) the capability of such a method to guarantee customers profits and portfolio appreciation.

- (3) Induce persons to subordinate their securities and cash to the general creditors of registrant by means of false and misleading statements of material facts and omissions to state material facts concerning, among other things:
  - (a) the financial condition of registrant; and
  - (b) the extensive withdrawal of capital funds from registrant by certain of its officers and directors.
- (4) All of the acts and practices enumerated in paragraphs B through L of Section II.

N. Registrant, John Pickard, Peter Pickard and Shields failed reasonably to supervise persons under their supervision with a view to preventing the violations alleged in paragraphs B through M of Section II.

### III

In view of the allegations made by the Division of Trading and Markets, the Commission deems it necessary and appropriate in the public interest and for the protection of investors that public proceedings be instituted to determine:

- A. Whether the allegations set forth in Section II hereof are true and in connection therewith, to offer respondents an opportunity to establish any defenses to such allegations; and
- B. What, if any remedial action is appropriate in the public interest pursuant to Sections 15(b), 15A and 19(a)(3) of the Exchange Act and Section 203(d) of the Advisers Act.

### IV

IT IS HEREBY ORDERED that a public hearing for the purpose of taking evidence on the questions set forth in Section III hereof be held at a time and place to be fixed and before a hearing examiner to be designated by further order, as provided by Rule 6 of the Commission's Rules of Practice (17 CFR 201.6).

IT IS FURTHER ORDERED that each party file an answer to the allegations contained in this order for proceedings within 15 days after service upon him of said order as provided by Rule 7 of the Commission's Rules of Practice (17 CFR 201.7).

If any party fails to file the directed answer or fails to appear at a hearing after being duly notified, such party shall be

deemed in default and the proceedings may be determined against such party upon consideration of the order for proceedings, the allegations of which may be deemed to be true.

This order shall be served on the registrant, John Sackville-Pickard, Peter Sackville-Pickard, Joseph V. Shields, Jr., Jess H. Nealy, Joseph B. Gorinstein, C. Eugene Osment, II, Bennett M. Baldwin, William K. Barclay, III, John W. Bendall, Jr., Jack Flittman, John Morelli, Ralph Luca, Herbert Rudich, personally or by certified mail forthwith.

In the absence of an appropriate waiver, no officer or employee of the Commission engaged in the performance of investigative or prosecuting functions in this or any factually related proceeding will be permitted to participate or advise in the decision upon this matter except as witness or counsel in proceedings held pursuant to notice. Since this proceeding is not "rule-making" within the meaning of Section 4(c) of the Administrative Procedure Act, it is not deemed to be subject to the provisions of that Section delaying the effective date of any final Commission action.

By the Commission.

Orval L. DuBois  
Secretary

By Nellye A. Thorsen  
Assistant Secretary

**MAKING**  
**the**  
**RECORD**



**NATIONAL SHORTHAND REPORTERS  
ASSOCIATION**

## FOREWORD

This booklet has been written for the following groups and purposes:

[1] **THE BENCH:** To direct attention to and create understanding of the functions and problems of the court reporter, so that the influence and precept of presiding officers in all courts may be exerted toward the utmost protection of the rights of litigants as affected by the record.

[2] **THE BAR:** To impress upon attorneys the value of thoughtful cooperation between attorney and reporter, and the need for a better understanding of the functioning of the court reporter; to explain how the bar may cooperate in securing accurate records of trials, keeping in mind that the attorney, not the reporter, controls the record; and to reduce cost of litigation.

[3] **LAW SCHOOLS AND STUDENTS:** To start the young attorney upon the right path in making the record.

[4] **GENERALLY:** To acquaint the bench and the bar with the desire of the National Shorthand Reporters Association and its members to cooperate fully with Court and counsel in the preparation of court records.

THIS BOOKLET WAS ORIGINALLY PREPARED IN 1937 BY THE COMMITTEE ON PUBLIC RELATIONS OF THE ASSOCIATION UNDER THE SUPERVISION OF JOSEPH VAN Gelder, C.S.R., OF NEW YORK, N.Y. IT HAS GONE THROUGH TEN EDITIONS SINCE, AND WAS REVISED BY A COMMITTEE OF THE ASSOCIATION FOR THE NINTH EDITION. ACKNOWLEDGMENT IS MADE TO THE MANY REPORTERS WHO HAVE CONTRIBUTED TO THE SUBSTANCE OF ITS CONTENTS.

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### NATIONAL SHORTHAND REPORTERS ASSOCIATION

Founded 1899

ROBERT B. MORSE, *Executive Secretary*  
25 WEST MAIN STREET  
MADISON, WISCONSIN 53703

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## MAKING THE RECORD

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SOME years ago former Chief Judge Frederick E. Crane of the New York Court of Appeals commented as follows upon the ability of attorneys to express themselves:

*"It is surprising how few lawyers are able to think clearly and talk plainly. Many are the learned men of rank and standing in the profession who are unable to state in sequence the simplest facts of the case. To tell the story of what happened is either beneath them or beyond them, and yet this is the principal part of oral argument."*

From the other end of the country Judge Malcolm Douglas of the Superior Court of Seattle, Washington, said this:

*"Cultivate the use of good English. Nothing more quickly arrests the attention or captures the interest of judge and jury than a straightforward argument expressed in clear, simple, and classic English."*

In making these observations neither jurist had in mind the court reporter, whose trained mind and attentive ear even more readily note the shortcomings of attorneys in the use of English. What, then, it may well be asked, impels judges and reporters to make pointed comment on the inability of attorneys to express themselves precisely and comprehensibly?

The accelerated tempo of modern life is in some measure responsible for this condition. Older members of the bar will recall the meticulous care with which papers were drawn; the scrupulous deference to Court, opposing counsel, and witnesses at the trial; the deliberateness and scholarlyness of utterance which characterized the barrister of former years.

Congestion in the courts, pressure of economic necessity, and the nervous haste of modern-day life have apparently changed all this. Higher academic requirements for admission to the bar do not necessarily develop the ability to express thoughts clearly and effectively. Chopped enunciation; ragged sentences, slurred words, and poor grammatical construction are so commonplace today that the clear and precise user of the English tongue is the marked exception. This is to say nothing of the difficulty experienced by many lawyers in presenting fact and argument with logic and coherence.

Attorneys are ever mindful of the *effect* of their courtroom methods upon juries. Many fail to appreciate, however, that indistinct speech, poor selection of words, false starts, slovenly enunciation, and harsh, rasping, monotonous, or uncultivated delivery create an unfavorable impression upon those sought to be influenced. To that extent carelessness of speech may result in distinct disservice to the client.

Yet the bench and bar rely with confidence upon the ability of the court reporter—the one who is called upon to report verbatim the utterances of Court, counsel, and witness. Upon this “silent man” rests a grave responsibility: the protection of life, liberty, and property, through the sanctity of the record. Were it not for his trained ability, courts would not function with the celerity demanded by the present-day volume of litigation.

The responsibility for *making* the record devolves upon counsel under the supervision of the Court. The duty of *keeping* the record so made rests upon the shorthand reporter. It is made through him for the convenience of Court, counsel, and reviewing bodies. Were the reporter an automatic recording device, unendowed with human intelligence, the record in many instances would be unintelligible. The swallowing of sounds, the nods or shakes

of a witness' head in answer to questions, the accents of foreign witnesses, the unintentional elision of material words, the garbling of names and technical terms, and generally the use of unclear, inaudible, or technical speech; extraneous sounds such as coughs and sneezes; sirens, airplanes, and other noises outside the courtroom—all these necessitate a distinct and independent mental operation on the part of the reporter in the process of transmuting the sound heard into the *words* conveying intelligibility in a typewritten transcript. Through the exercise of intelligence, supplemented by skill and experience, the reporter is able to translate the verbal jumbles and slurs of all types of speakers into an accurate record.

#### AWARENESS OF THE RECORD

The legal participants in the trial of an action should never lose sight of the fact that their utterances are being recorded. Consciousness of the record and its importance will impel clarity of thought and speech and thereby promote accuracy and readability in the transcript.

Observance of the old adage of thinking before speaking will result in words being used correctly and false starts avoided, so that no one will remain in doubt as to the meaning or intent of the language used.

Awareness of the record will also result in the elimination of duplication of statement and repetition of questions previously put. This will effect a more orderly and logical presentation of evidence or argument, and reduce the cost of transcript.

Bearing in mind the importance of the finished record to Court, counsel, and litigants, it would seem self-evident that those concerned in *using* the record should exercise the greatest degree of care in its making, but the opposite is too often the case.



The curricula of our law schools rarely emphasize the factors which constitute the proper making of the record. In many parts of the country, bar associations conduct lectures for the benefit of attorneys, but these lectures cover almost every subject except that which is embraced herein.

It is to be hoped that the bar is interested in this subject to the extent of considering the factors discussed in the course of this booklet and endeavoring to carry them into practice.

#### INABILITY TO HEAR

Between the resonant utterances of the gifted orator and the almost inaudible mumblings of the incoherent witness lies a wide range of speech mannerisms and peculiarities. To the reporter in the North, for example, the liquid speech of a Southern attorney is sometimes difficult to understand. Rhetorical speakers often rise to heights of forensic eloquence, suddenly to descend to a whispered, inaudible completion of the thought cycle.

Nothing is more upsetting to the reporter than inability to hear distinctly each word uttered. Some attorneys in their fervor will lean across the jury box, talking softly to convey the more intimately and confidentially, as it were, the impress of their personality; others will from time to time turn their backs upon Court, witness, jury, and reporter, addressing their remarks to the opposite wall; while still others require the stimulus of ambulation to perfect their thoughts.

*It is perhaps more important that the reporter hear correctly than the judge, for the reporter can then repeat from his notes remarks unheard by Court or counsel.*

#### ECHOING

One of the most annoying practices of some lawyers is repeating the answers of witnesses while mentally attempt-

ing to frame the succeeding question. Reporters call this "echoing." Since the reporter is called upon to render a verbatim transcript, the needlessly repeated words so echoed, and the response of the witness which they may evoke, must be recorded, thus creating an unnecessary duplication, distracting to the reporter, time-wasting to the judge or reviewing body, and expensive to litigants.

It should be noted, however, that repetition at times can serve a useful function in clarifying the responses of the unintelligible witness whose inarticulate or heavily accented mumblings cannot be understood by Court, jury, or reporter, but can be understood by the lawyer because of his familiarity with the case.

#### OVERLAPPING

Much confusion, inaccuracy, time-wasting, and expense may be avoided if the lawyer is aware that the reporter is not a worker of miracles. Often in heated cross-examination both lawyer and witness will be speaking at the same time, with opposing counsel objecting; and when it is considered that all three may well be speaking at the rate of three, four or more words each second, it ought to be quite apparent that a verbatim record under such circumstances would indeed be a miracle. The duty to report presupposes the right of the reporter to hear; what he cannot understand he cannot record.

The reporter is mindful of the fact that in jury trials it is often necessary to shut off a witness about to give inadmissible testimony, but this does not exculpate the attorney constantly guilty of the practice of interrupting the Court or his opponent. The transcript in such cases may be replete with broken statements.

All too often at just such a spot, when the lawyer has drowned out the answer by another question which the

witness did not hear because he too was talking, will come the request: "Read the question, Mr. Reporter." And often, before the reading is finished and the reporter ready to resume writing, the lawyer or the witness is off again. Obviously, such a procedure puts an unnecessary burden on the reporter.

#### NAMES

Many proper names sound alike. Mr. Egan, Mr. Regan; Hoffman, Coffman; Terry, Perry; Morris, Norris; Hyman, Herman; Corcoran, Cochran—such pairs sound so similar that they are apt to be confused by the reporter, especially if they occur in the same case.

Proper names should be either spelled out or enunciated so slowly and clearly that there can be no doubt. Reporters are dealing with names day in and out: names of witnesses, names of counsel, names of securities, names of towns, names of corporations, and casual names mentioned in testimony. They are familiar with all common names and variations in spelling. When a reporter asks how to spell the name of Mr. White, do not regard him quizzically; he is merely striving for accuracy in the record. The name can be spelled variously "Wight, Weit, White, Whyte, Wite," and it may be "Wyatt." Names such as Przybylowicz, Gburczyk, or Joswoskoski certainly require spelling if anything is to be made of the usual attempted pronunciation of those tongue-twisters.

#### FIGURES AND LETTERS

When an attorney says "forty-one-o-six," the reporter must hesitate momentarily, and sometimes stop the proceedings, to ascertain whether counsel means \$41.06, \$4,106, or \$40,106, with or without the dollar sign. Simi-

larly, "two-twenty" may refer to an amount, a street number, cubic centimeters, two-decimal-twenty, or twenty minutes past two. In reading numbers of insurance policies some attorneys become hopelessly entangled by trying to give the millions, thousands, and hundreds of the digits, whereas the simple procedure of saying "policy number one-eight-seven-four-three-nine-two" enables the reporter to record without mental perturbation. "October nineteen sixty-two" may be either "October 1962" or "October 19, '62."

The practice of using letters to indicate boundary-points practically precludes accuracy, and is often accompanied by the squandering of much time and many pages of explanations that would be needless were numerals used instead. The typical question, "Tell the jury how that boundary is designated on the trial map," may bring the answer, if letters are used, "From B to AJ to HA, thence to P, D and T, and back to B." Consider the similarity of sound when letters such as B-C-D-P-V or M-N are poorly pronounced, and the doubt and uncertainty left by such confusion. Numerals are much more quickly and surely understood in speech.

#### EXHIBITS

Since counsel have to keep a record of exhibits during the trial of a case, it may be helpful to explain the procedure usually followed by reporters in marking exhibits. Exhibits for the plaintiff are marked "Plaintiff's Exhibit 1; 2," etc.; for the defendant, "Defendant's Exhibit A; B," etc. If the parties happen to be petitioner, complainant, People, respondent, the same method is used with the appropriate name. When the entire alphabet has been gone through, the next series is lettered "AA; AB; AC," etc.; then "BA; BB; BC"; then "CA; CB; CC," etc. This avoids

the cumbersome result which follows from just adding another letter, which can lead to confusion when having to refer to Exhibit AAAAA.

Another method is to number the exhibits of both sides. However, carelessness of counsel in referring to exhibits is quite prevalent, and reference to "Exhibit No. 2" might then mean either plaintiff's or defendant's.

Sometimes papers are marked for identification when first referred to, and later may or may not be offered in evidence. A paper or document marked for identification takes the next number in order, with the words "for identification" following the number. If it is later offered in evidence by the same party, it retains the same number or letter.

The reporter who is required to mark exhibits in court or during depositions should be given sufficient time to mark and index before the next question is asked or the next step taken.

When an exhibit is withdrawn, or when a photostatic or verified copy is substituted, the record should so note.

In making offer of an exhibit counsel should identify it briefly; e.g., "I offer in evidence letter dated February 10, 1943, from A. B. Jones to R. H. Smith." It often happens that two or more letters may bear the same date. Reference to them by date alone may not entirely clarify the record. Reference in succeeding questions to "this letter" or "that paper," without adequate identification, makes the record meaningless.

Such expressions as "over to about here," "about that long," "he had a bruise right here as big as that, and another over there, but not quite so large," become entirely meaningless when read in the typed record. The reporter is not permitted to draw a conclusion from a witness' gestures. The record must be clarified by Court or counsel.

[ 12 ]

If the witness nods his head or lifts an eyebrow in answer to a question, the notation "Witness nods" or "No audible answer" may appear in the record in the absence of insistence upon a spoken answer, and here again it should be remembered that the lawyer controls the record.

### OBJECTIONS

The succinct statement of objections on the record makes it possible for the Court to rule promptly. Judges prefer this practice. Counsel will often argue the merits of an offer or a question without actually objecting. Instead, when an objection is made the attorney should state first the fact that he is objecting; second, the grounds for his objection, concisely phrased; and finally, the arguments upon which he relies, if the Court permits it.

In those jurisdictions where it is necessary to take exceptions, they should be stated audibly, not *sotto voce*.

### ' ' OFF THE RECORD ' '

The reporter is often in a quandary about recording conversation between counsel at the bar. Oftentimes he hears a muttered "Conceded" or "I will agree to that" without having heard anything more than the sound of a whispered conversation, which he assumes has been the subject matter of the concession desired. Counsel undoubtedly expect the reporter to note the concession, but what it relates to may forever remain a mystery unless counsel make certain to state the concession or stipulation clearly on the record.

Again, Court or counsel will say "Off the record," the signal for the reporter to stop writing. Discussion continues apace until, after several minutes, Court or counsel becomes aware that something of importance is not being recorded. This could easily be avoided by a word to the reporter: "Let us go back on the record."

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If it were not for the terse phrase "Discussion off the record" which the reporter inserts in his transcript where such discussions have taken place, many hiatuses and failures to connect would remain unexplained.

#### GLOSSARIES

In cases involving abstruse terminology, trade names, or foreign names (technical, patent, international litigation), the trial of a lengthy action will be facilitated if a glossary of unusual terms is handed to the reporter at the outset. This will enable him to become acquainted with the terminology of the case, and tend to avoid interruption during the progress of the trial.

#### QUOTATIONS

It is an axiom among reporters that no one reads accurately from a printed or typewritten manuscript. Many are the hours spent by reporters after court is closed in verifying excerpts from cases cited in the course of trial or argument. Often this delay can be avoided and preparation of the transcript expedited by furnishing the reporter an extra copy of the citation quoted, the examination from which testimony may have been read, or the brief containing the legal citations.

At the least, the number of the case cited should be stated clearly, so that the reporter may, if need be, refer to the case to check the name or quotation or both.

In reading testimony into the record, counsel should *always* read the words "Question" and "Answer."

In general, quotations should be read clearly, with indications of punctuation. This is particularly necessary and important when the reporter may have no subsequent access to the original source. The beginning and end of

quoted matter should always be indicated by stating "Quote" and "Unquote."

#### FOREIGN WITNESSES

The reporter's difficulties with foreign witnesses arise principally from the fact that, while Court and counsel gather the *gist* of such witnesses' answers—the *thought* conveyed—the reporter is required mentally to break down *into individual words* the thought intended. This process takes time. When such witnesses talk at breakneck speed, the burden on the reporter is aggravated when counsel pile question on question before the answer is fairly out of the mouth of the witness. Instead, a brief pause between answer and question will result in greater facility in recording and in a more intelligible record.

The ear of the reporter becomes attuned through experience to the speech peculiarities of many nationalities, but he cannot decipher some of the outpourings of foreign witnesses without the sympathetic cooperation of Court and counsel.

While the reporter would prefer in many cases to have a foreign witness testify through an interpreter, the requirement that he do so must come from the Court. The judge may prefer to hear the witness present his story in his own way. Consideration for the reporter in such instances will enable him to unravel the language used.

When interrogating a witness through an interpreter it should be remembered that it is still the witness who is being examined, not the interpreter, and the questions should be addressed directly to the witness. Counsel's questions, "Ask him to state," and the interpreter's response, "He says that," focus attention upon the interpreter instead of the witness, and the record becomes a colloquy between counsel and interpreter.

The record can become quite confusing, as for example where the attorney says, "Ask him to tell us what happened then," and the answer from the interpreter is, "He says he hit him and then he hit him back and finally he hit him and knocked him down." The record is much clearer when it reads: "Question: Tell us what happened then. Answer: He hit me and then I hit him back and finally he hit me and knocked me down."

#### EXPERT WITNESSES

The expert witness furnishes another possible source of needless repetition and expense. If he speaks in technical language that no lay juror can be expected to understand, it results in much confusion, explanation, and repetition at the expense of the innocent litigant. A "pre-trial conference" with the expert should convince the attorney that the best interests of everybody concerned, including himself, will be served by couching his answers in commonly understood, homely language as far as that is possible.

#### LANGUAGE FAULTS

Anyone who listens attentively to the individual words of counsel during the course of a trial or argument will be amazed at the number of misspeakings: the use of "plaintiff" where "defendant" is meant, the incorrect reference to dates and exhibit numbers, the failure to connect a verb to the sentence after an intervening qualifying clause, the use of a poorly chosen or an incorrect word in the heat of argument, and so on.

While the reporter does not claim infallibility, errors which counsel in reading the transcript often attributes to the reporter are actually errors of counsel which creep into rapid-fire speech.

The reporter is permitted, except in jurisdictions where the certified transcript constitutes the bill of exceptions, to

do a certain amount of judicious editing without in any way changing the sense. Such editing is confined to correcting unintentional language faults in unsworn statements of Court and counsel. The sworn testimony of witnesses is, of course, reproduced exactly as given.

#### APPEARANCES

It should be the practice of counsel, upon commencing the trial of an action, to state to the reporter:

1. *The name of the case in which he is appearing.*
2. *The name of the attorney or firm of record.*
3. *The individual name or names of trial counsel.*
4. *The party represented: plaintiff, defendant, petitioner, etc.*

Reporters often have trouble in securing the appearances of counsel even upon specific request. It is important, of course, that the record show who actually appeared when the case was called. The reporter must also indicate in his notes each successive speaker.

Counsel having a collateral or subordinate interest may come into the courtroom after the case has commenced. A note of the appearance handed to the bailiff or attendant for the reporter will always be appreciated and will avoid omissions subject to possible question later. At the least, such counsel on rising should state his name and appearance in full for the record.

In some cases as many as ten or twenty attorneys may note their appearances. It is manifestly impossible for the reporter, while recording names and other information, to memorize them and to identify each speaker as he rises. When counsel, one of many, rises to address the Court, the mention of his name to the reporter is an act of thoughtfulness which will facilitate progress, avoid guesswork and possible error, and make interruption unnecessary.

## S P E E D

Reporters would like the legal profession to understand how the factors of sustained speed, even under ideal conditions, react upon the mental functioning of the reporter.

It cannot be gainsaid that the average speed of speech in the courts has increased substantially within the last thirty years. Words flashing through the air at a speed above 200 words per minute may be misheard the more readily because at such speeds speech often becomes slurred and indistinct. A speed of 200 words per minute, which is the *minimum* standard of reporting speed, involves the writing of more than three words per second. Each word must be written unhesitatingly as it falls upon the ear.

Reporting verbatim speech is far from a mechanical process, as many believe. The trained reporter follows the sense of all that he records; he follows the thread of argument, and even enjoys the thrust and parry of skilled and learned practitioners; his mental faculties are constantly alert to the necessities and requirements of an accurate record.

The degree of concentration and coordination required of the reporter in listening to words, recording them accurately, and following intelligently the progress of the trial, is probably not exceeded in any other type of work known to mankind. It must be borne in mind in this connection that the reporter has no control over the pace which he is required to follow; he is eternally chasing the last elusive word.

The Court will grant an occasional recess to the reporter, who is often reluctant to interrupt the trial to request it even when human frailties demand. Under ordinary circumstances a working day of 2½ or 3 hours in the morning and a similar period in the afternoon is a sufficient daily

tax upon the mental and physical resources of any reporter. In such a normal day he may write anywhere from 30,000 to 50,000 words.

The time-honored story of the tired reporter may be apropos at this point. After extended argument of a case, lasting until about 5 p.m., the reporter turned appealingly to the judge, stating that he was tired. The Court in a spirit of helpfulness turned to counsel with this request: "*Won't you please speed up?*" The reporter says he is tired."



## THE COURT REPORTER AND HIS WORK

**T**HE following, written by the late Leon F. Miller, Court Reporter, of Harrisburg, Pennsylvania, is a graphic description of the work of the court reporter. It merits careful reading and thoughtful consideration.

A common impression still prevails that anyone who claims the ability to write shorthand is competent to go into court and report the proceedings of a trial. Few people realize that the court reporter is as near an approach to a miracle as unaided human hands and brains have thus far accomplished. Many believe that all who write shorthand are reporters; many class the sixteen-year-old girl, painfully and slowly putting down in awkward symbols the carefully and deliberately dictated letter of the business man, at a speed little exceeding that of a skilled penman, with the reporter who, through years of study and unremitting toil, has gained the wonderful art of verbatim reporting. They might as well compare a six-year-old child, thumping on her toy piano, with the marvelous masters of music who hold the world entranced with their skill and genius. The ability of the one is as far removed from the ability of the other as is the humblest page boy from the presiding officer of the Senate or House.

The average rate of speaking which the reporter must record word for word in his notes is about one hundred and seventy-five words per minute. This speed is sometimes slackened to a hundred, often increased to two and even three hundred words per minute. This speed must be kept up hour after hour, under any and all conditions, with any and all kinds of language.

All through the day, the court reporter may be writing the jargon of the alley, language embodying certain trade customs, or the technical vocabularies of the engineer, the physician and the surgeon. Sometimes a trial will last a week, with most of the testimony technical in character

After a day of this exacting labor, he is frequently called upon to have transcribed by the next morning the entire proceedings of the day. This means hours of additional labor, dictating his notes to a typist, reading over his transcript, and checking it with his notes. For every hour of reporting in court, the reporter spends two hours dictating and reading the transcribed matter. For this Herculean labor, working at high tension, and under pressure that is enervating in the extreme, the reporter is paid, when calculated on an hourly basis, about the same rate as that received by a skilled mechanic, who performs his stated task and checks out when the whistle blows. Out of his compensation, the reporter must pay office maintenance, pay for materials and supplies, pay his typist for transcribing the dictated matter, and pay other costs.

The court reporter protects liberty and property rights, in that litigants must depend upon his faithful and accurate reproduction of the proceedings of the trial, wherein their rights may be prejudiced by his failure to note an objection of counsel or a ruling of the Court.

The ultimate disposition of millions of dollars in property rights each year is dependent upon the accurate and faithful record of the reporter. Frequently, verdicts amounting to thousands of dollars are set aside, and rightly so, because the jury has been swayed by sentiment rather than governed by facts and law. The reporter's faithful record is a check upon the jury's emotionalism, bias, or prejudice.

• • •

*The palest ink is more accurate  
than the most retentive memory.*

## THE NATIONAL SHORTHAND REPORTERS ASSOCIATION

**F**OUNDED in 1899, this Association numbers in its membership over 3500 of the leading shorthand reporters of the United States. It is a national professional organization of reporters in the United States.

Its objects, as stated in Article II of its constitution, are:

To secure the benefits resulting from organized effort,

To promote professional ethics,

To foster a scientific spirit in the profession,

To secure the maintenance of a proper standard of efficiency and compensation,

To enlighten the public as to the importance and value of the services performed by the competent shorthand reporter,

To promote and maintain proper laws relating to shorthand reporting, and, in general,

To advance the interests of the shorthand reporting profession.

In furthering these principles the N.S.R.A. has carried on a varied program year after year since the beginning of the century. Each year it holds an annual convention and a shorthand seminar attended by members and delegates from all parts of the country. The monthly journal of the Association, *The National Shorthand Reporter*, contains technical, educational, and legislative articles of professional concern.

The Association welcomes the interest, understanding

and cooperation of the bar in promoting standards. It is in the interest of the legal fraternity to support enactments for the improvement of reporting standards, and to be equally vigilant with reporters in preventing rulings, enactments, and decisions which tend to lower them.





INTERROGATION OF WITNESSES

OUTLINE OF PRELIMINARY QUESTIONS FOR SUSPECT WITNESS

- (1) Full name (including middle name)
- (2) Ever used any other names
- (3) Date and Place of Birth (if foreign born, date and place of naturalization)
- (4) Home address and telephone number or numbers
- (5) Any other homes, apartments or telephone numbers
- (6) Telephone Credit Card
- (7) Business address and telephone numbers
- (8) Names of all businesses located at business premises
- (9) Position held at employing firm
- (10) Schooling (major subjects, degrees, dates)
- (11) Military service (honorable discharge?)
- (12) Brief resume of positions held since school, with dates
- (13) Officer or director of any publically held companies
- (14) Location of all securities brokerage accounts
- (15) Location of all bank accounts (checking, savings, safe deposit boxes)

TESTIMONY CHECK LIST AND NOTES

Investigation Scope - Formal Order

Reporter

Self-Incrimination Warning  
Determine if claimed earlier

Commission personnel

Right to Counsel

Oath

Counsel for Witness

address:

phone:

---

<u>Witness Name</u>	<u>D.O.B.</u>	<u>Place of Birth</u>
<u>SS#</u>	<u>Aliases</u>	
<u>Addresses:</u>	<u>Home</u>	<u>Office</u>
How long:		
<u>Telephones:</u>	<u>Home</u>	<u>Office</u>
How long:		
<u>Credit Cards:</u>		
<u>Family info:</u>	<u>Military</u>	<u>Educ. Background</u>

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Occupational Background:

Names of all businesses  
and addresses

All activities in securities bus. :  
Location of all brokerage accounts

List all bank accounts (including foreign):

Relationship to case - Narrate

Acquaintance with listed persons and  
affiliates

Prior Convictions or arrests

SV Actions,  
including injunc.

Prior Investi-  
gative involemen:

# SECURITIES REGULATION

An Analysis Of Current Laws And Regulations Affecting The Securities Industry

Vol. 3, No. 9

May 5, 1970

## WITNESSES IN SEC INVESTIGATIONS

*A Primer for Witnesses and Their Counsel on the Scope of the SEC's Investigatory Powers.*

By Arthur F. Mathews

Preceding and underlying most SEC enforcement actions are SEC investigations, formal in nature, but differing significantly in structure and purpose from the adversary proceedings which may follow. In recent years, approximately 800 "open" enforcement cases have been actively pursued by the SEC staff in the investigatory stage at any given time.

The purpose of an SEC investigation is to determine whether any persons or entities have violated the federal securities laws or regulations and, if so, whether formal enforcement action should be taken. Severe criminal penalties, civil remedies, and administrative sanctions can be and often are imposed in SEC enforcement cases. These possibilities should pinpoint for participants in the securities markets, and particularly for their counsel, the importance of understanding the scope of the SEC's investigatory powers and the specific rights accorded to persons requested to testify or otherwise produce evidence in a Commission investigation.<sup>1</sup>

A person involved in an SEC investigation (hereafter

referred to as a "witness") may not be aware of his involvement until served with an SEC investigatory subpoena. The subpoena will direct him to appear to give oral testimony and/or produce books, records or documents. Willful failure to comply constitutes a statutory misdemeanor.<sup>2</sup>

### NATURE OF INVESTIGATION

Although the Commission has statutory authority to conduct either public or private investigations, historically over 99% of its investigations have been conducted privately.<sup>3</sup> The Commission has discretionary authority to publicize the results of a privately conducted investigation at any time it deems appropriate. From time to time it has published the results of such investigations even though it took no formal enforcement action.<sup>4</sup> Ordinarily, if formal enforcement proceedings follow an investigation, the action moves to a public forum, i.e., criminal prosecution or civil injunctive action in a federal district court or administrative proceedings before an SEC hearing examiner. Administrative proceedings generally are public, although the Commission can, and occasionally does, hold private administrative proceedings.

As a rule, the Commission does not publish the fact that it is conducting a particular private investigation, but there is no proscription against its doing so. The Commission may announce the existence of an investigation to reassure investors, the securities industry, and sometimes even Congress, that it is active in an area of current concern.

Two important points should be noted with regard to the generally private nature of the overwhelming majority of

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1. Elsen, "Securities Law Investigations," *The Review*, Vol. 2, No. 13 (July 14, 1969).

2. See, e.g., Section 21(e) of the Securities Exchange Act 1934; *United States v. Smith*, (SDNY 1968), SEC 34th Ann. Rep. 95-6 (1968) (defendant convicted after trial in 1969). See, SEC 35th Ann. Rep. 93 (1969); see also, *United Australian Oil, Inc.*, SEC 35th Ann. Rep. 54 (1969).

3. This article is concerned only with privately conducted investigations.

4. See, e.g., *Ward La France Truck Corp.*, 13 SEC 373 (1943).

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### IN THIS ISSUE

- Witnesses in SEC Investigations

SEC investigations. Only the Commission has authority to disclose information gathered in a private investigation. Rigid rules and regulations prohibit a staff officer or employee from making such information public or granting access to persons outside the SEC. If subpoenaed to testify or to produce documents in court concerning a private investigation, a staff officer or employee must decline to do so in the absence of explicit permission from the Commission itself.<sup>5</sup> However, during an investigation, the Commission often authorizes its staff to disclose private information obtained in the course of the investigation to other governmental and quasi-governmental or self-regulatory bodies and agencies. Information is shared pursuant to an active cooperative enforcement program designed to eliminate duplication of effort by agencies with overlapping or complementary responsibilities.

Among the recipients of Commission investigatory information are the Departments of Justice, Treasury, and State, the United States Attorneys Offices, the Post Office, appropriate state and local commissions and prosecutors, the NASD, the exchanges, and foreign governmental bodies such as the Canadian provincial securities commissions. Where it sees no conflict with its overall enforcement program, the Commission occasionally makes its investigatory material available to private litigants in civil actions alleging securities law violations. In such cases, the Commission generally insists that notice of disclosure of private SEC files be given to all parties to the suit and that all parties be granted equal access to the information.

## NATURE OF THE PROCEEDINGS

The examination of a witness in an SEC investigation is usually conducted in a formal manner in a quasi-judicial atmosphere. A staff attorney typically functions as an "officer" who directs and controls the examination. The officer administers a judicial oath to the witness, and in most cases an official reporter makes a contemporaneous, verbatim record. In spite of its formality, the investigatory examination is not an adversary proceeding or adjudicatory hearing; there are no parties and no issues. The proceeding is a non-adversary inquiry or interrogation, conducted to develop facts to enable the Commission to determine whether grounds exist for the institution of formal adversary proceedings.<sup>6</sup> The SEC investigatory process has been analogized to grand jury proceedings, and courts consistently have refused to impose judicial standards of proof upon these inquiries.<sup>7</sup>

## SCOPE OF INVESTIGATION

The permissible scope of an SEC investigation is broad. In a sense, the Commission has "jurisdiction to determine jurisdiction." It may conduct a threshold investigation to determine whether the affairs of any person come within the umbra of federal securities regulation.<sup>8</sup> Although some of the securities statutes contain provisions authorizing the Commission to require or permit the filing of a written statement by the subject of a pending or proposed investigation,<sup>9</sup> written statements have rarely been used. The filing of a written statement is not a jurisdictional requirement, and an investigation may be pursued without it.

The Commission can commence an investigation without the necessity of the prior finding of "probable cause" traditionally required before a search warrant can be issued by a magistrate or court. It need not have evidence that a violation is occurring in order to begin an investigation.<sup>10</sup> Nor is a company chartered under state law and regulated by a state immune from SEC investigation.<sup>11</sup> In *SEC v. National Securities, Inc.*,<sup>12</sup> the Supreme Court held that the Commission has jurisdiction over the relationship between insurance companies and their public shareholders even though, as a result of the McCarran Act, there is no federal jurisdiction over "the business of insurance" i.e., the relationship between the insurance companies and their insurance policy holders. As long as a Commission investigation is directed towards a "legitimate" or "public" purpose, federal courts traditionally have refused to attempt to halt

5. Rule 122 of the Securities Act, 17 CFR 230.122; Rule 04 of the Exchange Act, 17 CFR 240.0-4; Rule 2 of the SEC Rules Relating to Investigations, 17 CFR 203.2; *Appeal of Timbers and SEC*, 276 F.2d 501 (6th Cir. 1955) (Reversal of contempt order against SEC's General Counsel for refusal to produce documents pursuant to order of Federal district court when requested documents constituted a confidential report prepared by the staff in a pending private SEC investigation).
6. *White, Weld & Co., et al.*, 1 SEC 574, 575 (1936).
7. *Woolley v. United States*, 97 F.2d 258 (9th Cir. 1938); *Consolidated Mines of Calif. v. SEC*, 97 F.2d 704 (9th Cir. 1938); *SEC v. Tybrandtson*, 245 F. Supp. 818 (SDNY 1965); *Commercial Capital Corp. v. SEC*, 360 F.2d 856 (7th Cir. 1966), *cf.*, *Hannah v. Larcie*, 363 U.S. 420 (1960).
8. *SEC v. Wall Street Transcript Corp.*, CCH Fed. Sec. L. Rep. ¶92,576, (2d Cir. 1970).
9. Securities Act, Sec. 20(g).
10. *Consolidated Mines of California v. SEC*, 97 F.2d 704 (9th Cir. 1938); *SFC v. Vacuum Can Co.*, 157 F.2d 530 (7th Cir. 1946), *cert. denied*, 330 U.S. 820 (1947); *Okm v. SEC*, 46 F. Supp. 481 (SDNY 1942), *aff'd*, 130 F.2d 903 (2d Cir. 1942), *cert. denied*, 317 U.S. 701.
11. *McGarry v. SEC*, 147 F.2d 389 (10th Cir. 1945).
12. 393 U.S. 453 (1969).

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or control such investigations. Furthermore, federal courts have been unwilling to direct the Commission to commence an investigation.

There is no established procedure to enable a witness to argue before the Commission that the commencement of a formal investigation would not be in the public interest, or that a pending investigation should be terminated or restricted. After completion of an investigation, its subjects are not accorded a formal opportunity to appear before the Commission to rebut or comment on the staff's recommendations regarding formal enforcement action. The staff usually will make itself available for the presentation of arguments by the subjects or their counsel and will transmit to the Commission any oral or written presentation of the views submitted. From time to time, members of the securities bar have advocated the establishment of formal procedures to permit counsel for affected persons an opportunity to submit a statement to the Commission rebutting or commenting upon the staff's report. To date, the Commission has not been persuaded that formal procedures are necessary for administrative due process, or that they would be appropriate or useful in carrying out the Commission's enforcement and regulatory responsibilities.

#### FORMAL ORDER OF INVESTIGATION

The scope of a particular investigation is delineated by the "formal order of investigation" which commences the investigation and designates specific staff members as "officers" empowered to administer oaths, issue subpoenas, and otherwise conduct the investigation. The entry of a formal order is an interlocutory act, and is not appealable. The formal order usually designates the persons or entities, and the types of possible violative activities that the staff is authorized to investigate. However, parties not named in a formal order as subjects of an investigation may be subpoenaed to testify or to produce their own records as long as the testimony or records are relevant to the overall investigation. As in any other judicial or administrative forum, the subpoena requires a personal appearance and will not be satisfied by appearance of counsel.

#### RULES RELATING TO INVESTIGATIONS

All investigations conducted pursuant to a formal order are governed by a special body of administrative rules called the SEC "Rules Relating To Investigations."<sup>13</sup> These rules should not be confused with the SEC "Rules of Practice"<sup>14</sup> which govern the conduct and disposition of administrative proceedings before the Commission.

Rule 7(a) of the Rules Relating To Investigations grants a

subpoenaed witness the right to inspect a copy of the formal order, but not the right to obtain a copy for his own retention. On request he may be furnished a copy for retention if the Director of the SEC Division in which the investigation is being conducted makes a specific finding that "there exist reasons consistent both with the protection of privacy of persons involved in the investigation and with the unimpeded conduct of the investigation." In recent years, it has been the practice of the staff, upon request, to provide a copy of the formal order for retention by the principal subjects of the investigation, i.e., those persons specifically named in the formal order as possibly participating in statutory violations.

#### RIGHT TO COUNSEL: SEQUESTRATION

Rule 7(b) grants a witness the right to be accompanied, represented, and advised by legal counsel whether his appearance is pursuant to subpoena or purely voluntary. No special qualifications, examination, or admission procedures are required for practice before the SEC. An attorney may practice before the Commission if he is admitted to practice before the Supreme Court, the highest court of any state or territory or the courts of District of Columbia.

While the right to counsel generally implies counsel of one's own choice, this right is limited in SEC investigations by the sequestration rule. Rule 7(b) provides that "unless permitted in the discretion of the officer conducting the investigation no witness or the counsel accompanying any such witness shall be permitted to be present during the examination of any other witness called in such proceeding." [Emphasis added.] This language appears to grant a staff member conducting an investigation unbridled discretion to prevent an attorney from appearing for more than one witness in a particular investigation. In practice, the sequestration provision is rarely invoked with respect to counsel, and then only after senior staff officials have been consulted and a decision reached that multiple representation would raise conflicts of interest or seriously impede the orderly progress of the investigation. In two of the few instances where the rule was invoked, different courts reached different results, although both courts held the rule itself valid. In *United States v. Steel*,<sup>15</sup> a district court held that it was proper for the Commission to prevent the general counsel of the principal corporate subject of the investigation from representing a past officer of the corporation, who was also involved in the investigation. In *SEC v. Higashi*,<sup>16</sup> the Ninth Circuit held that the Commission had

13. 17 CFR 203.1 et seq., CCH Fed. Sec. L. Rep. ¶ 66,221 et seq.

14. 17 CFR 201.1 et seq., CCH Fed. Sec. L. Rep. ¶ 66,101 et seq.

15. 235 F. Supp 575 (SDNY 1965).

16. 359 F.2d 550 (1966).

acted improperly in preventing a corporation's attorney from appearing with a corporate director of a corporation whose activities were being scrutinized, after the attorney had appeared as counsel to several other persons associated with the corporation.

Counsel should consider the possibility of sequestration when he first learns that his individual or corporate clients may become involved in a Commission investigation. An appearance with a minor corporate official who may be on the periphery of the investigation can endanger a later appearance with a more central figure. At the outset counsel may find it useful to contact the conducting officer and discuss the possibility of multiple representation. Ordinarily, the Commission staff will give a preliminary indication as to whether it is likely to rely on the sequestration rule with respect to any witnesses with whom counsel otherwise would appear.

Counsel in an SEC inquiry must be constantly alert for the emergence of possible conflicts of interest among his clients. For example, the interests of an employer and an employee may conflict, and multiple representation may jeopardize the interests of one or both.

The sequestration provisions of Rule 7(b) also apply to witnesses, and here the SEC staff opts, in practically every instance, for sequestration. Additional persons are rarely permitted to be present when a witness is being questioned. Frequently, an employer will request permission to be present at the interrogation of an employee, or a principal corporate officer or director will ask to accompany co-officers or co-directors, but such requests almost always are denied. The rule is sometimes, but not always, relaxed when an attorney for one or more witnesses is himself asked to testify as a witness. When the activities of a corporation are being scrutinized, the Commission may take the testimony of both "in house" and "outside" counsel. Usually outside counsel will be allowed to appear as attorney for one or more witnesses, even though he may personally testify concerning certain corporate events and activities.

## APPOINTED COUNSEL

The issue of whether an indigent witness in an SEC investigation is entitled to appointed counsel at Government expense has yet to be litigated in the courts. Participants in the securities industry, the usual subjects of SEC investigations, generally are more affluent than defendants in cases involving "street crimes." Few persons subpoenaed to testify in SEC investigations are truly too poor to afford counsel. Nevertheless, the issue of the right to appointed

counsel has arisen in several SEC administrative proceedings, and it was a principal issue in a recent landmark opinion of the Federal Trade Commission.<sup>17</sup> In the past the SEC has taken the position that its administrative proceedings are remedial not penal in nature, and consequently that indigent respondents in such proceedings do not have a right to appointed counsel at Government expense. This argument was accepted without question in a Second Circuit case, *Boruski v. SEC*,<sup>18</sup> Relying on the analogy of *Boruski* and its progeny with regard to administrative proceedings and on Supreme Court cases holding that there is no constitutional right to counsel in an investigatory proceeding,<sup>19</sup> it has been the view of the Commission and its staff that there is no right to appointed counsel in SEC investigations. In spite of the prevalent view that no actual right exists under the decided cases, in one case of indigency that arose several years ago a staff member secured a legal aid attorney for the witness. Presumably, if free representation were unavailable, the SEC staff would forego taking testimony or requesting other evidence from the indigent.

In the light of recent court decisions expanding the rights of indigents in a variety of proceedings,<sup>20</sup> a court facing the issue today might well hold that an indigent witness in an SEC investigation is entitled to appointed counsel at Government expense. In the absence of provision for free counsel, a court might hold that testimony and other evidence provided by the indigent without counsel, and any fruits thereof, could not be used against the indigent in a future enforcement proceeding. In any event, reliance on Supreme Court decisions holding that there is no constitutional right to counsel begs the issue. The Commission has administratively incorporated a right to counsel in its Rules Relating to Investigations, presumably out of a sense of fairness to the subjects of investigations.<sup>21</sup> If the affluent subject is administratively accorded the right to counsel, the indigent subject should be provided similar protection, and, if he desires, provided with appointed counsel at Government expense.

17. *American Chinchilla Corp.* (Docket No. 8774, Dec. 23, 1969).

18. 340 F.2d 991 (1965); see also *Nees v. SEC*, 414 F.2d 211 (9th Cir. 1969); *A. T. Brod & Company (John Pappas)*, Sec. Ex. Act Rel. No. 8060 (1967); *Norman Pollisky, et al.*, Sec. Ex. Act Rel. No. 8381 (1968); *David T. Fleischman*, Sec. Ex. Act Rel. No. 8187 (1967).

19. *Hannah v. Larche*, 363 U.S. 420 (1960); *In Re Groban*, 352 U.S. 330 (1957).

20. See, e.g., *Goldberg v. Kelly*, 38 L.W. 4233 (1970); *Camara v. Municipal Court*, 387 U.S. 523 (1967).

21. 17 CFR 203.7(b), CCH Fed. Sec. L. Rep. ¶ 66,233. This was the Commission's policy before the passage of the Administrative Procedure Act, which some persons construe as granting an individual a right to counsel in investigations conducted by administrative agencies. But see, *Hannah v. Larche*, 363 U.S. 420 (1960).

## THE ROLE OF COUNSEL

The nature of a witness' right to counsel in an investigatory, fact-finding proceeding is quite different from the defendant's right to counsel in an adversary proceeding such as a suit for injunction or a criminal trial. In an SEC investigation the role of counsel is severely limited. Rule 7(c)<sup>22</sup> restricts counsel to three specific functions. He may "advise" the witness "before, during, and after the conclusion of such examination;" he may "question" the witness "briefly at the conclusion of the examination to clarify any of the answers given," and he may "make summary notes during such examination solely for the use of" the witness. At the investigatory stage no issues have been framed and no charges made. Counsel cannot produce rebuttal testimony other than the testimony he elicits from his own client at the conclusion of the examination in an attempt to clarify previous answers. He may offer only those documents the SEC officer allows him to include in the investigatory record.

The rules of evidence relating to competency and materiality, and the proscription against leading questions do not apply in an SEC interrogation. Counsel for a witness can make some relevancy objections, *i.e.*, that the question seeks to elicit information outside the scope or boundaries of the formal order, or that the demand for documents is improper. But the SEC staff member conducting the examination is the presiding officer who rules on all objections. Since he is also the person framing the questions and posing the demands for documents, he may be reluctant to concede that he has exceeded the scope of the formal order delineating his investigative authority. If counsel's objection is not sustained, the witness must answer or produce, or run the risk that the conducting officer will request the institution of subpoena enforcement proceedings. In court, an independent federal judge will pass on the merits of the objection. If the objection is overruled, failure to comply can lead to a contempt citation or to prosecution for a statutory misdemeanor or for other criminal offenses.<sup>23</sup>

The opinion of the district court in *SEC v. Isbrandtson*,<sup>24</sup> spells out the very limited grounds for objections by counsel:

"An S.E.C. inquiry is not governed by judicial standards of proof. Leading questions may be asked. Hearsay may be elicited. Investigators are, by the very nature of their task, (especially in nonpublic hearings) interested in obtaining clues and leads. Even rumors may furnish helpful material on the basis of which witnesses may be located and competent evidence unearthed."

The court observed that witnesses have the right "... to be protected against oppressive tactics, unduly repetitive questioning designed to coerce a witness or to compel him

to adopt the examiner's language, or any other procedure that violates standards of fundamental fairness and decency." However, "... the protective power of the court may not be invoked by a witness who is uncomfortable or embarrassed by a persistent and thorough examiner who is following out leads and checking possible inconsistencies."

## NO RIGHT TO APPEAR

If time and other factors permit, it is the Commission's usual practice to take the testimony under oath or otherwise interview all persons who are subjects of an investigation. Each subject thereby has an opportunity to provide evidence and to present his version of the facts, before decisions are made on enforcement action. A person who is not subpoenaed or otherwise contacted by the staff has no absolute right to appear,<sup>25</sup> although the SEC staff member conducting an investigation will invariably grant a request to be heard. If a subject fails to make a request, because he is unaware of the existence, direction or scope of the investigation, or for other reasons, the failure to interrogate him will not taint the results of the investigation. Neither the federal securities laws, the Administrative Procedure Act, nor any due process concepts enunciated by the courts, require the Commission or its staff to serve any type of formal notice on the subjects of an investigation.

## TRANSCRIPTS OF TESTIMONY

The provisions of Rule 7(c) allow a witness' counsel to make summary notes, but neither the witness nor his counsel is permitted to record the investigative hearing. The sequestration provisions effectively oust all but SEC-sanctioned stenographic personnel. Rule 6<sup>26</sup> reinforces this ouster by providing, in part, that "[t]ranscripts, if any, of formal investigative proceedings, shall be recorded solely by the official reporter, or by any other person or means designated by the officer conducting the investigation." [Emphasis added.] Thus, it is clear that a witness does not have a right to a stenographer of his own choosing. As a matter of practice, in most SEC investigations the oral testimony of witnesses is contemporaneously recorded verbatim by an official reporter.

22. 17 CFR 203.7; CCH Fed. L. Rep. ¶ 66,233.

23. See, e.g., *SEC v. Garcia, et al.* (M.D. Fla., No. 68-71-Civ. T. 1968), SEC 34th Ann. Rep. 105-06 (1968); see also, *Penfield Co. of Cal. v. SEC*, 330 U.S. 585 (1947); *SEC v. Isbrandtson*, 245 F. Supp. 518 (SDNY 1965); *United States v. Smith* (SDNY, 68 Cr. 655, 1968), SLC 34th Ann. Rep. 95-6 (1968); *SEC v. Olson*, 354 F. 2d 166 (2d Cir. 1965).

24. 245 F. Supp. 518 (SDNY 1965).

25. Rule 7(d) accords this right only in connection with public investigatory proceedings. 17 CFR 203.7(d), CCH Fed. Sec. L. Rep. ¶ 66,233.

26. 17 CFR 203.6, CCH Fed. Sec. L. Rep. ¶ 66,231.

Pursuant to Rule 6, a witness has an absolute right to inspect the official transcript of his testimony and to procure copies of any documentary evidence he has submitted. However, Rule 6 does not grant a witness the absolute right to retain a copy of the transcript of his testimony. The rule specifically states "that in a nonpublic formal investigative proceeding a person seeking a transcript of his testimony shall file a written request stating the reason he desires to procure such transcript, and the Commission may for good cause deny such request." [Emphasis added.] A witness may not refuse to testify on the ground that the SEC staff officer will not give him an advance commitment that he will be allowed to purchase a transcript of his testimony.<sup>27</sup> A staff officer has no authority to make such an advance commitment, even if he were disposed to do so. Division directors, and certain associate and assistant directors, who are high level staff officials, have delegated authority to grant, but not to deny, requests by witnesses to purchase copies of transcripts of their own testimony. Only the Commission itself can deny such a request.

The rules furnish no guidance as to what constitutes "good cause" for the denial of a witness' request to purchase a transcript of his testimony. Presumably, the main cause of denial would be the suspicion that the witness might circulate the transcript among prospective witnesses, thereby undercutting the effect of sequestration. In any event, the courts have held that the Commission need not spell out the basis for its refusal, and that its refusal is not a denial of due process of law.<sup>28</sup>

Although in 1962, at a plenary session, the Administrative Conference of the United States urged that each administrative agency accord witnesses in an investigation the absolute right to purchase transcripts of their testimony, the SEC specifically determined that it would not implement that recommendation. In practice, a witness's request to purchase a copy of his testimony is seldom denied by the Commission. Although a witness often requests permission to inspect, or purchase a copy of the transcripts of testimony of other witnesses, Rule 6 does not authorize this, and such requests almost invariably are refused.

Although a witness is not required to sign a copy of the transcript of testimony, an astute counsel will insist that his client inspect the transcript of his testimony and suggest any corrections, whether of stenographic errors or otherwise. Counsel should notify the SEC staff in writing of the proposed corrections and attempt to enter into a stipulation incorporating the corrections into the investigative record. In one recent perjury prosecution based on false testimony given in an SEC investigation, the government's case was seriously jeopardized, although ultimately not de-

feated, as a result of the failure of SEC personnel to read the transcript of testimony and make sure that it accurately reflected the details of the examination. It is conceivable that a similar failure by a witness or counsel to review and correct an investigative transcript could seriously handicap the defense in a subsequent enforcement action.

## DISCOVERY OF SEC FILES

Although a witness may be denied retention of a transcript of his own testimony or access to the testimony of others during the investigatory stage of an SEC case, his rights of access to investigatory materials are enlarged if he is named in an administrative, civil or criminal enforcement action. Under the pretrial discovery and related provisions of Rules 8, 11.1 and 15 of the SEC Rules of Practice, Rules 16 and 17 of the Federal Rules of Criminal Procedure, and Rule 34 of the Federal Rules of Civil Procedure, a defendant or respondent ordinarily will be able to obtain a copy of his own testimony in the investigative hearing. Furthermore, under the "Jencks Act,"<sup>29</sup> which has been specifically incorporated into Rule 11.1 of the SEC Rules of Practice, a defendant or respondent at trial can obtain copies of the investigative transcripts of any witnesses who testify for the government at trial.

However, defendants and respondents in enforcement actions have had little success in attempted discovery of internal staff memoranda, reports of investigation, criminal reference reports, and other materials utilized by the Commission as the basis for instituting, or recommending enforcement proceedings. Defendants and respondents may be entitled to discovery of certain exculpatory evidence, if any, in the possession of the SEC or other Government agencies, pursuant to the *Brady-Giles* doctrine, by which defendants are entitled to disclosure of any exculpatory evidence in the possession of the government that it does not use in its case.<sup>30</sup> However, even though the *Brady-Giles* doctrine will probably be applied in appropriate SEC cases, it will not be interpreted to require "the wholesale production of investigative material in administrative proceedings."<sup>31</sup>

## WARNINGS

In formal investigative inquiries conducted by the SEC, it is customary for the staff officer, prior to questioning, to give each witness an extensive warning. The witness will be

27. *In re SEC*, 84 F.2d 316 (2d Cir. 1936).

28. *Commercial Capital Corporation v. SEC*, 360 F.2d 856 (7th Cir. 1966).

29. 18 U.S.C. 3500.

30. *Brady v. Maryland*, 373 U.S. 83 (1963); *Giles v. Maryland*, 386 U.S. 66 (1967).

31. *Harris Chase & Co., Inc., Sec. Lit.*, Vol. Ref. No. 8804 (1969).



informed of his right to counsel, given an indication of the possible statutory provisions that may have been violated, the fact that any answers can be used against him in any subsequent proceedings brought by the SEC or any other governmental body, and that he may refuse to answer any questions that would tend to incriminate him.<sup>31</sup> The warning is not a recently established response to the "Miranda" case.<sup>32</sup> It has been given in accordance with Commission policy, firmly established for many years, that witnesses in SEC investigations should be accorded the fullest extent of their legal rights and dealt with in a fair and courteous manner. The sufficiency of the SEC warning was upheld in *Dosok v. United States*.<sup>33</sup> The defendant in a criminal prosecution claimed, among other things, that the warning given him in the prior SEC investigation was defective under *Miranda* because he possessed, but was not informed in *haec verba* of, a "right to silence." The Court rejected this contention, primarily basing its finding on the fact that as a witness, he "was not in custody on any of the occasions when his testimony was taken before the SEC investigators."

If the compulsion of an SEC investigatory subpoena does not amount to "custody" within the meaning of *Miranda*, it would appear that a witness subpoenaed to testify in an SEC investigation, like a witness subpoenaed to testify before other tribunals, does not possess an absolute "right to silence." In responding to a subpoena, the witness must either testify and produce the documents demanded, or plead a constitutional or other legally recognized privilege.

A witness, properly warned, who proceeds to testify and makes admissions or other inculpatory statements, cannot have his testimony suppressed thereafter on the ground that the SEC leads in the investigation were based on prior "non-custodial interviews" of the witness by other government agents, pursuant to their official duties, even if no warnings were given at such prior interviews.<sup>34</sup> A properly warned witness who foregoes pleading his constitutional privilege may not later argue that his testimony should be suppressed because he realizes by hindsight that it is incriminating.<sup>35</sup>

## CONSTITUTIONAL & LEGAL PRIVILEGES

The conduct of an SEC investigation is subject to the same testimonial privileges as a judicial proceeding.<sup>36</sup> In determining whether an asserted privilege is available, federal, not state, law governs. Although some states have, or are in the process of enacting, state laws creating an accountant-client privilege, no such privilege exists under fed-

eral law. Consequently, an accountant-client privilege will not be recognized in an SEC investigation held in a state where that statutory privilege exists. Moreover, a person can only plead his Fifth Amendment privilege against self-incrimination to bar production of personal documents that he himself owns. The federal courts have traditionally held that the accountant, not the client, owns the accounting workpapers produced when an accountant performs an audit or other accounting task for a client. Consequently, a witness in an SEC investigation cannot plead his personal Fifth Amendment privilege to bar production of accounting workpapers.<sup>37</sup>

Federal law recognizes no privilege with respect to transactions between a broker-dealer and his customer. A customer cannot prevent the production by his broker-dealer of the brokerage records relating to his account.<sup>38</sup> A broker-dealer cannot refuse to produce the names of his customers on the ground that they are mutual fund dealers who would be harassed by the Commission.<sup>39</sup>

A bank's customers have no privilege with respect to bank records that are the property of the bank as distinct from the customer's personal papers. While a depositor might be able to use his own Fifth Amendment privilege to prevent production of original cancelled checks, he would not be able to prevent the bank from providing the SEC with its microfilm and other records relating to his accounts.<sup>40</sup>

When books and records are subpoenaed in an SEC investigation, confusion often arises as to whether, and to what extent, a witness may plead his personal Fourth and Fifth Amendment rights with regard to production of, and testimony concerning, corporate books and records. It is clear that a witness cannot plead his personal Fifth Amendment privilege to bar production of corporate books and records. However, he need not give testimony about them once they are produced if such testimony would tend to incriminate

31. The typical warning is not set out in the SEC Rules Relating To Investigations or in any public releases or manuals of the Commission.

32. *Miranda v. Arizona*, 384 U.S. 436 (1966).

33. 405 F.2d 405 (8th Cir. 1968).

34. *SEC v. Dott*, 302 F.Supp. 169 (SDNY 1969).

35. *Maxfield v. United States*, 360 F.2d 97 (10th Cir. 1966).

36. *McMann v. SEC*, 87 F.2d 377 (2d Cir. 1937), cert. denied sub nom., *McMann v. Engle*, 304 U.S. 684.

37. See, e.g., *Application of Rashba and Pokart and Marvin Hayutin*, 271 F. Supp. 946 (SDNY 1967).

38. *McMann*, supra, note 36.

39. *Application of Lind*, CCH Fed. Sec. L. Rep. ¶91,310 (SDNY 1964).

40. *Galbraith v. United States*, 387 F.2d 617 (10th Cir. 1968); *Williams v. United States*, CCH Fed. Sec. L. Rep. ¶91,849 (SD Tex. 1965).

him. A Fifth Amendment privilege does not apply to corporate records, even to those of a "one man" corporation.<sup>41</sup> Dissolution of a corporation does not alter the status of the corporation's books and records: they remain unprotected by the Fifth Amendment and custodians may not refuse to produce them on the basis of their personal privilege against self-incrimination.

Only the corporation itself can raise a Fourth Amendment objection to production of corporate documents. Neither an officer, director, shareholder, nor a third party may interpose an unreasonable search and seizure objection on his own behalf to bar production of corporate documents.<sup>42</sup>

## IMMUNITY

An immunity provision appears in each of the federal securities statutes. Unlike some other federal or state immunity statutes, immunity does not follow automatically when a witness appears and testifies pursuant to an SEC investigatory subpoena. Before gaining immunity, a witness must affirmatively plead his privilege against self-incrimination, and thereafter be compelled to answer.<sup>43</sup>

As long as a witness is adequately informed of his privilege against self-incrimination before the questioning, there is no duty to inform him of the immunity provisions.<sup>44</sup> A witness who is adequately warned at the initial interrogation is not entitled to have the SEC staff officer repeat the warning each time questioning is resumed.<sup>45</sup>

From time to time in Commission-developed cases, the SEC, after consultation with the Department of Justice and other interested governmental agencies, does grant immunity to crucial witnesses. The immunity granted does not absolutely bar all prosecution of the immunized witness; rather, it bars the use of the witness' testimony and any fruits thereof from subsequent use in an attempted prosecution of the witness. This immunity probably extends to prosecutions for the same acts under other federal laws, state Blue Sky laws, and other state criminal laws.<sup>46</sup>

## FIFTH AMENDMENT PLEA

Whether, and under what circumstances, the SEC may draw an adverse inference based on a Fifth Amendment plea in an investigation, has nowhere been answered with clarity. Several recent Supreme Court decisions dealing with the consequences of Fifth Amendment pleas in other areas raise questions as to the permissible effect of a plea made by persons whose activities are regulated by the Commis-

sion.<sup>47</sup> The courts have not yet considered whether the Commission could revoke a broker-dealer's registration if the broker-dealer pleaded the Fifth Amendment in response to all questions regarding his activities in the securities industry.<sup>48</sup>

Before the recent Supreme Court decisions in non-SEC cases limiting the sanctions that may be imposed on the basis of a Fifth Amendment plea, the Second Circuit held in *N. Sims Organ & Company vs. SEC*<sup>49</sup> that the Commission could properly draw an adverse inference from a broker-dealer's refusal to testify in an administrative disciplinary proceeding. However, the continued viability of the *Sims* decision is questionable, and the Commission has avoided relying upon it when the issue has arisen in the past few years.<sup>50</sup>

Section 8(e) of the Securities Act makes a refusal by an issuer or an underwriter to cooperate in an investigation proper ground for the issuance of a stop order against a registration statement. Rule 261 of Regulation A provides that the Commission may suspend a Regulation A exemption if, among other things, the issuer or any promoter, officer, director or underwriter refuses to cooperate in an investigation. The foregoing provisions would probably be sustained by the courts as a necessary incident to the Commission's powers to administer the securities laws.

## REQUIRED RECORDS DOCTRINE

Although it has been stated that a witness may plead the Fifth Amendment in lieu of production of personal documents or books and records in an SEC investigation, counsel should be aware of the "required records doctrine"—a crucial limitation on the constitutional privilege, enunciated by a divided Supreme Court in *Shapiro v. United States*.<sup>51</sup>

41. *United States v. Guterman*, 272 F.2d 344 (2d Cir. 1959).

42. *Lagow v. United States*, 159 F.2d 245, 246 (2d Cir. 1946), cert. denied, 333 U.S. 858.

43. *United States v. Abrams*, 357 F.2d 539 (2d Cir. 1966).

44. *United States v. DiRoma*, 252 F.Supp. 886 (D.Mass. 1966).

45. *United States v. Kane*, 243 F.Supp. 886 (SDNY 1965); *United States v. DiRoma*, 252 F.Supp. 886 (D.Mass. 1966).

46. Cf. *Murphy v. Waterfront Comm. of New York Harbor*, 378 U.S. 52 (1964).

47. See *Spevak v. Klein*, 385 U.S. 511 (1967); *Gardiner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass'n., Inc. v. Comm'r. of Sanitation of the City of New York*, 392 U.S. 280 (1969).

48. See Morrison, "The Fifth Amendment," *The Review*, Vol. 3, No. 6 (March 19, 1970).

49. 293 F.2d 78 (1961).

50. See, e.g., *James De Mantos, et al.*, Sec. Ex. Act Rel. No. 8090 (1967); *J. A. Winston & Co., Inc.*, Sec. Ex. Act Rel. No. 7337 (1964); *Strathmore Securities, Inc.*, Sec. Ex. Act Rel. No. 8207 (1967); *aff'd*, 407 F.2d 722 (D.C. Cir. 1969); *Nees v. SEC*, 414 F.2d 211 (9th Cir. 1969).

51. 335 U.S. 1 (1948).

In essence, *Shapiro* held that when a business is affected with a public interest, and Congress mandates record keeping by participants in that business, even personal books and records must be available for inspection by the regulating government agency, in spite of the participant's personal Fifth Amendment privilege. The "required records" doctrine appears to apply to books and records that broker-dealers are required to keep under Section 17(a) of the Exchange Act and that investment advisers are required to keep under Section 204 of the Investment Advisers Act.

In *SEC v. Olsen*,<sup>52</sup> the Second Circuit ordered production of records, despite the defendant investment adviser's claim of personal constitutional privilege. It specifically left open for future decision the question whether evidence obtained in this manner could be used against the investment adviser in a subsequent criminal prosecution. There have been indications in other decisions that the Supreme Court may not adhere to the *Shapiro* decision the next time it faces the "required records" issue.<sup>52a</sup>

Three recent cases have involved the use of a broker-dealer's records in enforcement actions after they were voluntarily produced at the request of the SEC's staff. In *United States v. Mahler*,<sup>53</sup> and *United States v. Light*,<sup>54</sup> two related criminal prosecutions, the courts held that books and records obtained from defendant broker-dealers by the SEC could be turned over to the U. S. Attorney's Office for use in a criminal prosecution of the defendants, even though the SEC allegedly had promised to return the books and records and had not warned them or obtained their consent to turn them over to the prosecutor. In *Light* the court stated:

"[O]nce records have been voluntarily turned over to a government agent, the government is not guilty of fraud or deceit in failing to apprise the subject of a change in the character of the investigation, for he is made aware of the risks attendant upon a voluntary disclosure by the warning inherent in the request. . . . the Fourth Amendment would not bar their admission into evidence in the absence of a showing that they were obtained through fraud and deceit in the first instance."

However, in *Strathmore Securities, Inc. et al. v. SEC*,<sup>55</sup> a civil case affirming an SEC administrative sanction imposed against a broker-dealer, the Circuit Court for the District of Columbia criticized the SEC for delay in returning books and records, thereby limiting their availability for the conduct of defendants' business and for use in connection with their testimony in the investigatory hearing and the subsequent administrative proceedings.

## PARALLEL PROCEEDINGS

An SEC investigation pursuant to a formal order does

not terminate automatically when an enforcement action against one or more of the subjects is commenced. To protect the public the Commission may participate in or institute interim proceedings while pursuing an investigation aimed at a criminal prosecution. Thus, on facts that may ultimately result in a criminal indictment, the SEC may bring suit for injunction to halt continuing violations, commence an administrative proceeding against a broker-dealer to revoke his registration, or assist a bankruptcy trustee in conducting a public investigation of the debtor's affairs. Courts consistently have held that the enforcement remedies available to the Commission are not mutually exclusive, and that the institution of one type of enforcement proceeding does not preclude further investigation to determine whether other types of enforcement action should be taken.<sup>56</sup>

An SEC investigatory subpoena or other administrative process should not be utilized, in lieu of a grand jury subpoena, or civil or criminal discovery procedures, to gather evidence for use in a pending civil or criminal case. This appears to be the policy followed by the enforcement staff of the Commission. Under certain circumstances, the Commission may file a civil injunctive action alleging violation of one statutory provision (e.g., the registration provision of Section 5 of the Securities Act) and simultaneously continue using its investigatory subpoenas to explore possible violations of other statutory provisions (e.g., the antifraud provisions of Section 17 (a) of the Securities Act). The use of evidence gathered by investigatory subpoenas in the continued antifraud investigation to support the charges of registration violations in the pending civil injunctive case might be subject to question by the court.

In *United States v. Parrott*<sup>57</sup> and *United States v. Rand*,<sup>58</sup> the SEC was criticized for participating in parallel or sequential civil and administrative proceedings while a criminal case was in the process of development. However, in both cases the courts found that the specific purpose for the institution of the parallel civil or administrative proceedings was the production of evidence for a subsequent SEC criminal prosecution. Furthermore, the courts found that when

52. 354 F.2d 166 (1965). See also *SEC v. Sharkey*, 4 SEC Ind. Dec. 574 (WD Wash. 1945).

52a. See *v. Seattle*, 387 U.S. 541 (1967).

53. 254 F.Supp. 581 (SDNY 1966).

54. 394 F.2d 908 (2d Cir. 1968).

55. 407 F.2d 722 (D.C. Cir. 1969).

56. See, e.g., *Shasta Minerals & Chemical Company v. SEC*, 328 F.2d 285 (10th Cir. 1964); *SEC v. Andrews*, 88 F.2d 441 (2d Cir. 1937); *SEC v. Arthur Andersen & Co., et al.*, (SD Ind., 1965), Misc. No. 65-67; see also *Richard N. Cea, et al.*, Sec. Ex. Act Rel. No. 8662 (1969).

57. 248 F.Supp. 196 (D.D.C. 1965).

58. CCH Fed. Sec. L. Rep. ¶92,573 (ND Ohio 1970).

the defendants testified in the parallel proceedings, they were not warned adequately of the prospect that they might be subjected to criminal charges involving the very acts about which they were testifying. And in both *Parrott* and *Rand*, it appears that improper relief dismissal of each indictment was granted. The proper approach would have been to suppress in the criminal prosecutions any evidence relating to the defendants' testimony in the parallel administrative or civil proceedings.<sup>59</sup>

It is likely that appellate courts will restrict the decisions in *Parrott* and *Rand* to their facts and will not adopt a rule that parallel proceedings are improper *per se*. The use of the rationale in *Rand* as a precedent would be questionable in the light of the court's reliance on the Sixth Circuit opinion in *Detroit Vital Foods* which was later reversed by the Supreme Court in *United States v. Kordel*.<sup>60</sup> Furthermore, in *Rand*, the court's decision rested on a factual finding that the defendant had been granted immunity, as well as on the "parallel proceedings" issue. In *Parrott*, the court's decision turned in part on the problem of preindictment delay.

In *Kordel*, a crucial Food and Drug Administration case involving the parallel proceedings issue, the Supreme Court recently implied that as long as a defendant is properly warned and given an opportunity to plead his Fifth Amendment privilege in a civil case, the evidence adduced in the

civil case may be used to support a subsequent criminal prosecution. Applying the *Kordel* rationale to SEC enforcement actions, it appears that prior or parallel administrative or civil proceedings against a subject of an investigation will not preclude a subsequent criminal prosecution based upon the same acts as long as the respondent or defendant in the administrative or civil case is adequately warned of the risks of future criminal prosecution and of his option to plead his privilege against self-incrimination. The same reasoning has been applied with respect to participation by the Commission's staff in civil bankruptcy hearings while conducting a criminal investigation of the defendant.<sup>61</sup>

## CONCLUSION

Representation of a witness in an SEC investigation can be a difficult task. It should not be undertaken unless counsel is familiar at a minimum with the SEC Rules Relating to Investigations, and the administrative and judicial precedents as to the rights of witnesses balanced against the broad investigatory powers of the SEC's staff.

59. *United States v. Blue*, 384 U.S. 201 (1965).

60. *United States v. Detroit Vital Foods, Inc.*, 407 F.2d 570 (6th Cir. 1969), *rev'd* *United States v. Kordel*, 38 LW 4153 (Feb. 24, 1970).

61. *Thal v. Pitman (Commonwealth Financial Corporation)*, et al., 288 F.Supp. 786 (E.D. Pa. 1968), *aff'd.*, 408 F.2d 640 (3rd Cir. 1969). See also *United States v. Simon*, 373 F.2d 649 (2d Cir. 1967).

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