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## Judicial and Administrative Remedies Available to the SEC for Breaches of Rule 10b-5

Arnold S. Jacobs

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## JUDICIAL AND ADMINISTRATIVE REMEDIES AVAILABLE TO THE SEC FOR BREACHES OF RULE 10b-5\*

By ARNOLD S. JACOBS†

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\* Copyright, Arnold S. Jacobs, 1978.

† Partner, Shea Gould Climenko & Casey, New York, New York; B.M.E. 1961, M.B.A. 1963, LL.B. 1964, Cornell University. This Article is dedicated to my father, who was a member of the 1929 class of St. John's University School of Law, and to my mother.

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## 1. INTRODUCTION

Despite the Supreme Court's narrow construction of Rule 10b-5<sup>1</sup> in recent years, plaintiffs continue to bring numerous actions under the Rule since it provides an effective remedy in more situations than any other statutory provision and remains broader than common law fraud. The tremendous growth in the utility of 10b-5 since its adoption in 1942 has been due in no small part to the activities of the Securities and Exchange Commission (SEC). On many occasions, the SEC has sought enforcement of 10b-5 and ancillary relief in the courts, and has imposed sanctions upon violators of 10b-5 in administrative disciplinary proceedings. Many of these court and administrative decisions are regarded as milestones in 10b-5 jurisprudence. It is the purpose of this Article to examine the wide range of remedies available to the SEC for violations of Rule 10b-5. Among the relief discussed will be those remedies obtainable only upon court order, those impossible administratively by the SEC itself, and the relief afforded to the SEC where a defendant consents thereto.

## II. REMEDIES AVAILABLE TO THE SEC IN CONTESTED COURT CASES

### A. *Injunctions*

Unlike the situations in which injunctions may be sought by private parties, Congress has expressly authorized the SEC to bring

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<sup>1</sup> 17 C.F.R. § 240.10b-5 (1978). Rule 10b-5 provides:

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

Rule 10b-5 (the Rule or 10b-5) was promulgated by the Securities and Exchange Commission (the SEC) under the Securities Exchange Act of 1934, § 10(b), 15 U.S.C. § 78j(b) (1976). The 1934 Act is codified in 15 U.S.C. §§ 78a-78jj (1976). The other major securities statute is the Securities Act of 1933, 15 U.S.C. §§ 77a-77bbbb (1976).

injunctive actions in section 21(e) of the Securities Exchange Act of 1934 as follows:

Wherever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of [the 1934 Act], the rules or regulations thereunder, the rules of a national securities exchange or registered securities association of which such a person is a member or a person associated with a member, the rules of a registered clearing agency in which such person is a participant, or the rules of the Municipal Securities Rulemaking Board, it may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.<sup>2</sup>

Several points are clear from the face of the statute. First, the words "any person . . . engaged or . . . *about to engage* in any acts or practices constituting a violation" indicate that a person can be enjoined even though his activities do not yet constitute a breach of the law.<sup>3</sup> Second, the statute requires "a proper showing [to be made for] a permanent or temporary injunction or restraining order." This wording suggests that the measure of a "proper showing" is identical for all three types of injunctions.<sup>4</sup> Subject to a few variations discussed later,<sup>5</sup> case law generally reflects this approach. Finally, section 21(d) contains no provision requiring that a bond be posted.

In *Hecht Co. v. Bowles*,<sup>6</sup> the Supreme Court explained the basis of a court's power to issue an administrative injunction:

A grant of *jurisdiction* to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made. . . . We are dealing here with the requirements of equity practice with a back-

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<sup>2</sup> 15 U.S.C. § 78u(d) (1976).

<sup>3</sup> *SEC v. Coffey*, 493 F.2d 1304, 1310 (6th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975) (court may enjoin a defendant who committed, is about to commit, or is committing a violation); *Kuehnert v. Texstar Corp.*, 412 F.2d 700, 704 (5th Cir. 1969) (court may enjoin potential fraud).

<sup>4</sup> *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975).

<sup>5</sup> See note 24 and accompanying text *infra*.

<sup>6</sup> 321 U.S. 321 (1944).

ground of several hundred years of history. Only the other day we stated that: 'An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity.' . . . The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied.<sup>7</sup>

Although the *Hecht* Court was construing the Emergency Price Control Act of 1942,<sup>8</sup> the principles enunciated therein apply equally to injunctions sought by the SEC. Thus, in the context of SEC enforcement actions, it has been stated that the grant or denial of an injunction is within the discretion of the trial court,<sup>9</sup> that equitable considerations may enter a trial judge's determination<sup>10</sup> so long as the court adheres to the precept that injunctions are designed to deter rather than to punish,<sup>11</sup> and that a judge has the flexibility required to mould each decree to the particular circumstances presented to achieve the fairest and most practical result.<sup>12</sup> Due to the broad discretion given a trial court, an appellate court will reverse

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<sup>7</sup> *Id.* at 329-30 (citations omitted).

<sup>8</sup> Pub. L. No. 77-421, 56 Stat. 23 (codified at 50 U.S.C. §§ 901-925 (1976)).

<sup>9</sup> See, e.g., *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 868-69 (2d Cir. 1968) (en banc) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969); *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477, 486-87 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); *SEC v. American Inst. Counselors, Inc.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,388, at 98,962 (D.D.C. 1975); *SEC v. Petersen*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,254, at 98,318 (D. Minn. 1975); *SEC v. M.A. Lundy Assocs.*, 362 F. Supp. 226, 232 (D.R.I. 1973); *SEC v. Computronic Indus. Corp.*, 294 F. Supp. 1136, 1138 (N.D. Tex. 1968).

<sup>10</sup> See, e.g., *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 808 (2d Cir. 1975); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1102 (2d Cir. 1972); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 868-69 (2d Cir. 1968) (en banc) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969); *SEC v. Geotek*, 426 F. Supp. 715, 726-27 (N.D. Cal. 1976); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 596 (E.D. Pa. 1976).

<sup>11</sup> See, e.g., *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 56 (2d Cir. 1976); *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); *SEC v. Koracorp Indus., Inc.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,532, at 99,702 (N.D. Cal. 1976), *rev'd in part, aff'd in part*, 575 F.2d 692 (9th Cir. 1978); *SEC v. J & B Indus., Inc.*, 388 F. Supp. 1082, 1084 (D. Mass. 1974); *SEC v. Computronic Indus. Corp.*, 294 F. Supp. 1136, 1138 (N.D. Tex. 1968).

<sup>12</sup> See, e.g., *SEC v. Geon Indus., Inc.*, 531 F.2d 39, 56 (2d Cir. 1976).

the grant or denial of an injunction only if it finds an abuse of discretion.<sup>13</sup>

It is against this background that the "proper showing" demanded by section 21(d) can be defined. The popular verbalization of the "proper showing" test is whether there is a reasonable likelihood that the defendant will commit violations in the future.<sup>14</sup> In the case of preliminary injunctions, the inquiry becomes whether there is a reasonable likelihood that the defendant will commit further violations *pendente lite*.<sup>15</sup> In another context, the Supreme Court has held that the plaintiff's past exposure to illegal conduct does not in and of itself show a present case or controversy calling for injunctive relief.<sup>16</sup> Consistent with this holding, courts have held that the SEC could not obtain an injunction unless some cognizable danger of recurrent violation exists.<sup>17</sup> Yet, the SEC has never been required to prove that the defendant has a natural inclination to violate the securities laws.<sup>18</sup> As will be discussed below, courts scrutinize a number of factors in determining whether or not the "proper showing" has been made.<sup>19</sup>

While the circuit courts of appeals have adopted a variety of standards to determine whether preliminary injunctions are appropriate in private actions,<sup>20</sup> these standards do not govern injunctive actions brought by the SEC.<sup>21</sup> Consequently, most courts hold that

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<sup>13</sup> SEC v. Senex Corp., 534 F.2d 1240, 1241 (6th Cir. 1976); SEC v. Shapiro, 494 F.2d 1301, 1308 (2d Cir. 1974); Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 389, 394, 405 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); SEC v. Koenig, 469 F.2d 198, 202 (2d Cir. 1972); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972).

<sup>14</sup> See SEC v. Management Dynamics, Inc., 515 F.2d 801, 807 (2d Cir. 1975); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100-01 (2d Cir. 1972); SEC v. Pearson, 426 F.2d 1339, 1343 (10th Cir. 1970); SEC v. Geotek, 426 F. Supp. 715, 727 (N.D. Cal. 1976); SEC v. Penn Cent. Co., 425 F. Supp. 593, 596 (E.D. Pa. 1976); SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); SEC v. Koracorp Indus., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,532, at 99,702 (N.D. Cal. 1976), *rev'd in part, aff'd in part*, 575 F.2d 692 (9th Cir. 1978); SEC v. Jet Travel Servs., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,317, at 98,608 (M.D. Fla. 1975); SEC v. J & B Indus., Inc., 388 F. Supp. 1082, 1084 (D. Mass. 1974); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 877 (S.D. Fla. 1974); SEC v. IMC Int'l, Inc., 384 F. Supp. 889, 893 (N.D. Tex.), *aff'd*, 505 F.2d 733 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975).

<sup>15</sup> See Matthews, *SEC Civil Injunctive Actions*, 5 REV. SEC. REG. 969 (1972).

<sup>16</sup> O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974), *quoted in* duPont v. Wyly, 61 F.R.D. 615, 634 (D. Del. 1973).

<sup>17</sup> See, e.g., SEC v. National Student Marketing Corp., 360 F. Supp. 284, 296 (D.D.C. 1973); SEC v. Keller Indus., Inc., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,453, at 92,239 (S.D.N.Y. 1972) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

<sup>18</sup> See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101 (2d Cir. 1972).

<sup>19</sup> See notes 29-62 and accompanying text *infra*.

<sup>20</sup> See JACOBS, *THE IMPACT OF RULE 10b-5* § 260.04[c][ii] (1978).

<sup>21</sup> SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975); SEC v. Briga-

the SEC need not allege or prove irreparable injury to get a preliminary or a permanent injunction.<sup>22</sup> Rule 65(b) of the Federal Rules of Civil Procedure, however, requires that a plaintiff seeking a temporary restraining order, in this case the SEC, demonstrate that irreparable injury will result unless the order is granted.<sup>23</sup> Thus, the SEC usually avoids the issue whether it is exempt from proving irreparable injury when seeking a temporary restraining order, by alleging that irreparable injury will ensue absent the order.<sup>24</sup> Nor need the SEC show that the balance of equities tips in its favor.<sup>25</sup> Finally, the inadequacy of other remedies — an ingredient which is often a prerequisite to the issuance of an injunction in a private action — need not be demonstrated in an SEC enforcement action.<sup>26</sup>

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doon Scotch Distribs., Ltd., 388 F. Supp. 1288, 1290 (S.D.N.Y. 1975); SEC v. American Inst. Counselors, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,388, at 98,962-63 (D.D.C. 1975); SEC v. Jet Travel Servs., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,317, at 98,608 (M.D. Fla. 1975); SEC v. Petersen, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,254, at 98,318 (D. Minn. 1975); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 875 (S.D. Fla. 1974).

<sup>22</sup> See SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975); SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 486 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); SEC v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1387 (S.D.N.Y. 1975); SEC v. Brigadoon Scotch Distribs., Ltd., 388 F. Supp. 1288, 1290 (S.D.N.Y. 1975); SEC v. Jet Travel Servs., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,317, at 98,608 (M.D. Fla. 1975); SEC v. J & B Indus., Inc., 388 F. Supp. 1082, 1084 (D. Mass. 1974); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 875 (S.D. Fla. 1974).

A showing of irreparable injury was required, however, in SEC v. Senex Corp., 534 F.2d 1240 (6th Cir. 1976), *aff'd* 399 F. Supp. 497, 508 (E.D. Ky. 1975). Cf. SEC v. Petersen, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,254, at 98,319 (D. Minn. 1975) (imminent threatened harm required to be shown).

<sup>23</sup> FED. R. CIV. P. 65(b).

<sup>24</sup> 3 L. LOSS, SECURITIES REGULATION 1980 (1961).

<sup>25</sup> See SEC v. Management Dynamics, Inc., 515 F.2d 801, 808 (2d Cir. 1975); cf. SEC v. Senex Corp., 534 F.2d 1240, 1241 (6th Cir. 1976) (injunction granted with no discussion of merits); SEC v. Petersen, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,254, at 98,318 (D. Minn. 1975).

<sup>26</sup> SEC v. Jet Travel Servs., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,317, at 98,608 (M.D. Fla. 1975).

Aside from the question of what constitutes a "proper showing," certain other issues pertinent to the issuance of injunctions sought by the SEC are noteworthy. First is the rule that a defendant cannot defeat the SEC's motion for an injunction either on the ground that the act constituting the violation cannot be performed, *see, e.g.*, SEC v. R.A. Holman & Co., [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,554, at 95,087 (S.D.N.Y. 1965), *aff'd*, 366 F.2d 456 (2d Cir. 1966); cf. Kuehnert v. Texstar Corp., 412 F.2d 700, 704 (5th Cir. 1969) (injunction available although attempt to defraud failed), or on the ground that no one was defrauded by the objectionable conduct. *See, e.g., id.* Second, judges rarely grant the SEC mandatory preliminary injunctive relief. *See, e.g.*, SEC v. Garfinkle, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,020, at 97,578 (S.D.N.Y. 1975). Third, SEC enforcement actions are not meant to be the sole device to police securities frauds. Diamond v. Oreamuno, 24 N.Y.2d 494, 502-03, 248 N.E.2d 910, 914-15, 301 N.Y.S.2d 78, 84-85 (1969). Private causes of action remain a necessary supplement to SEC enforcement proceedings. *See*

It appears that the touchstone for the courts in issuing preliminary injunctions at the request of the SEC is the presence of a reasonable likelihood that the defendant will commit securities violations in the future.<sup>27</sup> The inquiry to be made is a question of fact.<sup>28</sup> With these guidelines, several factors which courts utilize to ascertain if injunctive relief is warranted will now be discussed.

(1) *Past Conduct.* A number of courts have held that prior illegal conduct is highly suggestive of the likelihood of future violations.<sup>29</sup> Other courts have required the SEC to establish a strong prima facie case of a securities law violation, after which the burden is shifted to the defendants to prove that there is no reasonable likelihood that illegal acts will be repeated.<sup>30</sup> Under either approach, whether the inference of future violations is properly drawn depends upon all the facts.<sup>31</sup> Past illegal conduct, without more, therefore,

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JACOBS, *supra* note 20, § 8.01 & nn. 8-10. Fourth, the SEC can institute an injunctive action sua sponte, although no member of the public has informed the commission of the alleged violations. *See, e.g., SEC v. R.A. Holman & Co.*, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,554, at 95,093 (S.D.N.Y. 1965). Fifth, a court may properly condition its denial of an injunction to the SEC upon a defendant's restitution or disgorgement of profits, *see, e.g., SEC v. Bond & Share Corp.*, 229 F. Supp. 88, 97-98 (W.D. Okla. 1963), an injunction issuing only if the defendant fails to meet the conditions of the order. Sixth, if the SEC is denied injunctive relief, the court may, in its discretion, dismiss the complaint. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1310 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971). Seventh, the grant of a preliminary injunction does not insure that a permanent injunction will also be issued. *E.g., SEC v. Continental Tobacco Co.*, 326 F. Supp. 588, 592 (S.D. Fla. 1971), *rev'd*, 463 F.2d 137 (5th Cir. 1972); *see SEC v. Senex Corp.*, 534 F.2d 1240, 1241 (6th Cir. 1976). In fact, the SEC may obtain a permanent injunction although a court has denied it a preliminary injunction. *See id.* Finally, the SEC can obtain an injunction against misconduct which constitutes a crime as well. *See Wax, The Emerging SEC Injunction*, 17 N.Y.L.F. 785, 785 (1971).

<sup>27</sup> *See* note 14 and accompanying text *supra*.

<sup>28</sup> *See SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975).

<sup>29</sup> *See, e.g., id.*; *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 596 (E.D. Pa. 1976); *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); *SEC v. Galaxy Foods, Inc.*, 417 F. Supp. 1225, 1248-49 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 559 (2d Cir. 1977); *SEC v. American Inst. Counselors, Inc.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,388, at 98,963 (D.D.C. 1975); *SEC v. Blatt*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,281, at 98,444 (S.D. Fla. 1975); *SEC v. Petersen*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,254, at 98,319 (D. Minn. 1975); *SEC v. Kalvex, Inc.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,226, at 98,188 (S.D.N.Y. 1975); *SEC v. J & B Indus. Inc.*, 388 F. Supp. 1082, 1084 (D. Mass. 1974); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 877 (S.D. Fla. 1974); *SEC v. IMC Int'l, Inc.*, 384 F. Supp. 889, 894 (N.D. Tex.), *aff'd*, 505 F.2d 733 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975).

<sup>30</sup> *See, e.g., SEC v. Scott, Gorman Muns., Inc.*, 407 F. Supp. 1383, 1387 (S.D.N.Y. 1975); *SEC v. Rega*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,222, at 98,149 (S.D.N.Y. 1975); *SEC v. Globus Int'l, Ltd.*, 320 F. Supp. 158, 160 (S.D.N.Y. 1970).

<sup>31</sup> *See, e.g., SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975); *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir.



will not necessarily justify an injunction.<sup>32</sup>

(2) *Nature of the Prior Violation.* Where a defendant previously has been found to have violated the securities laws, additional factors enter the court's inquiry with respect to the injunction presently sought. Judges have considered, for example, whether the earlier violation was an isolated incident of mischief or indicative of the defendant's propensity to disregard the law.<sup>33</sup> Courts also have viewed the seriousness of the past violations<sup>34</sup> as well as the motive and intent of the defendant when engaging in the illegal activities.<sup>35</sup> Part of this inquiry is directed toward ascertaining whether the defendant acted in reliance on the advice of counsel. While such reliance is surely relevant to the question of the defendant's mental culpability, a defendant can be enjoined even if he acted in reliance on an attorney's advice.<sup>36</sup> In addition, the court will inquire whether the defendant has requested the SEC's advice on a close question.<sup>37</sup>

In analyzing the prior violation, courts also have examined the

1977); *SEC v. Kalvex, Inc.*, [1975-1976 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 95,226, at 98,188 (S.D.N.Y. 1975); *SEC v. Globus Int'l, Ltd.*, 320 F. Supp. 158, 160 (S.D.N.Y. 1970).

<sup>32</sup> Although a prior injunctive proceeding may be deemed to give rise to an inference of future violations, *see SEC v. D'Onofrio*, [1975-1976 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 95,201, at 98,019 (S.D.N.Y. 1975); *SEC v. Weisberger*, [1974-1975 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 95,108, at 97,943 (S.D.N.Y. 1975), there is no requirement that a court *must* enjoin a person who was enjoined in the past. *See SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154, 1162-63 (S.D.N.Y. 1971), *modified sub nom. Chris-Craft Indus., Inc.*, v. Piper Aircraft Corp. 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

<sup>33</sup> *See, e.g.*, *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975); *SEC v. Shapiro*, 494 F.2d 1301, 1308 (2d Cir. 1974); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968) (en banc) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 (E.D. Pa. 1976); *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); *SEC v. Commercial Inv. & Dev. Corp.*, 373 F. Supp. 1153, 1165 (S.D. Fla. 1974); *SEC v. Computronic Indus. Corp.*, 294 F. Supp. 1136, 1138 (N.D. Tex. 1968).

<sup>34</sup> *See, e.g.*, *Chris-Craft Indus., Inc., v. Piper Aircraft Corp.*, 480 F.2d 341, 387 (2d Cir.) (Timbers, J., dissenting), *cert. denied*, 414 U.S. 910 (1973); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100-01 (2d Cir. 1972); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597-98 (E.D. Pa. 1976); *SEC v. Iannelli*, [1974-1975 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 94,964, at 97,317 (S.D.N.Y. 1975); *SEC v. Lum's, Inc.*, 365 F. Supp. 1046, 1066 (S.D.N.Y. 1973).

<sup>35</sup> *See, e.g.*, *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968) (en banc) (Friendly, J., concurring), *cert. denied*, 394 U.S. 976 (1969); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 (E.D. Pa. 1976).

<sup>36</sup> *See, e.g.*, *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972); *SEC v. Lum's, Inc.*, 365 F. Supp. 1046, 1066 (S.D.N.Y. 1973); *SEC v. M.A. Lundy Assocs.*, 362 F. Supp. 226, 233 (D.R.I. 1973).

<sup>37</sup> *E.g.*, *SEC v. Torr*, 87 F.2d 446, 448-50 (2d Cir. 1937); *see SEC v. M.A. Lundy Assocs.*, 362 F. Supp. 226, 238 (D.R.I. 1973); *SEC v. Liberty Petroleum Corp.*, [1971-1972 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 93,209, at 91,348 (N.D. Ohio 1971).

degree of the defendant's complicity in<sup>38</sup> and the novelty of the violation.<sup>39</sup> Courts have enjoined defendants even where their breach of 10b-5 as found by the court represents an expansion of the Rule.<sup>40</sup> Finally, courts consider the elapsed time since the defendant's last breach.<sup>41</sup> It appears that the SEC's chances of obtaining the injunction rise as the time between violations decreases.

(3) *Cessation of Prior Conduct.* Whether a defendant ceases or continues his violative conduct also bears on the reasonable likelihood that he will violate the federal securities laws in the future. Cessation does not ipso facto justify denial of an injunction.<sup>42</sup> The defendant presents his strongest case when he had ceased his violations prior to learning of the SEC's actual or imminent investigation of his activities and its intention to take action against him.<sup>43</sup> If a defendant has stopped the activity after learning of the SEC's interest, he adds a little strength to his case.<sup>44</sup> A defendant who continues his activities despite the SEC's interest in the matter is in the weakest position of all.<sup>45</sup> Moreover, a court can take into account the

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<sup>38</sup> See, e.g., *SEC v. Manor Nursing Centers, Inc.*, 340 F. Supp. 913, 936 (S.D.N.Y. 1971), modified, 458 F.2d 1082 (2d Cir. 1972); *SEC v. Computronic Indus. Corp.*, 294 F. Supp. 1136, 1140 (N.D. Tex. 1968).

<sup>39</sup> See, e.g., *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 (E.D. Pa. 1976); *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284, 297 (D.D.C. 1973).

<sup>40</sup> See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90 (S.D.N.Y. 1970), modified, 446 F.2d 1301 (2d Cir.), cert. denied, 404 U.S. 1005 (1971).

<sup>41</sup> E.g., *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 (E.D. Pa. 1976); see *SEC v. Koracorp Indus., Inc.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,532, at 99,702 (N.D. Cal. 1976), rev'd in part, aff'd in part, 575 F.2d 692 (9th Cir. 1978); *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284, 297 (D.D.C. 1973).

<sup>42</sup> See *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972); *SEC v. Pearson*, 426 F.2d 1339, 1343 (10th Cir. 1970); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968) (en banc) (Friendly, J., concurring), cert. denied, 394 U.S. 976 (1969); *SEC v. Frank*, 388 F.2d 486, 492 (2d Cir. 1968); *SEC v. Scott, Gorman Muns., Inc.*, 407 F. Supp. 1383, 1387-88 (S.D.N.Y. 1975); *SEC v. National Student Marketing Corp.*, 402 F. Supp. 641, 651 (D.D.C. 1975); *SEC v. J & B Indus., Inc.*, 388 F. Supp. 1082, 1084 (D. Mass. 1974); *SEC v. Dott*, 302 F. Supp. 169, 171-72 (S.D.N.Y. 1969). For a discussion of older cases where an injunction was denied after the defendants ceased their acts, see Wax, *The Emerging SEC Injunction*, 17 N.Y.L.F. 785, 787 (1971).

<sup>43</sup> *SEC v. Dott*, 302 F. Supp. 169, 171-72 (S.D.N.Y. 1969); see *SEC v. Bond & Share Corp.*, 229 F. Supp. 88, 97-98 (W.D. Okla. 1963).

<sup>44</sup> See *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1100 (2d Cir. 1972); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 868 (2d Cir. 1968) (en banc) (Friendly, J., concurring), cert. denied, 394 U.S. 976 (1969); *SEC v. Frank*, 388 F.2d 486, 492 (2d Cir. 1968); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 (E.D. Pa. 1976); *SEC v. D'Onofrio*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,201, at 98,019 (S.D.N.Y. 1975); *SEC v. Garfinkle*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,020, at 97,579 (S.D.N.Y. 1975); *SEC v. J & B Indus., Inc.*, 388 F. Supp. 1082, 1086 (D. Mass. 1974); *SEC v. Broadwall Sec., Inc.*, 240 F. Supp. 962, 968 (S.D.N.Y. 1965).

<sup>45</sup> See *SEC v. IMC Int'l, Inc.*, 384 F. Supp. 889, 894 (N.D. Tex.), aff'd, 505 F.2d 733 (5th

adequacy of those procedures designed to prevent future violations adopted by the defendant after he discovers the prior breach.<sup>46</sup>

(4) *Disclaimer of Intent to Violate in the Future.* Although a defendant's disclaimer of intent to violate the federal securities laws in the future<sup>47</sup> mitigates against the need for an injunction, it does not preclude a court from granting an injunction.<sup>48</sup> The sincerity of the defendant may be evaluated by the court<sup>49</sup> in the light of the many other factors weighing in favor of granting an injunction.

(5) *The Defendant's Opportunity to Commit Future Violations.* A court should also consider the defendant's opportunity to commit the future violation that the SEC seeks to have enjoined.<sup>50</sup> Thus, persons who remain associated with a public company or with a brokerage firm are more likely to be enjoined than those who do not.<sup>51</sup> It follows that, when the SEC seeks an injunction regarding the securities of only one company, a court may deny the request if the defendant no longer works for that company and is no longer in the securities business.<sup>52</sup> The defendant's age<sup>53</sup> and health<sup>54</sup> may also be pertinent to this inquiry.

(6) *The Defendant's Admission of Guilt.* A judge is more likely to grant an injunction against a defendant who continues to

Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); *SEC v. Koenig*, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,536, at 92,561 (S.D.N.Y.), *aff'd*, 469 F.2d 198 (2d Cir. 1972); *SEC v. Broadwall Sec., Inc.*, 240 F. Supp. 962, 968 (S.D.N.Y. 1965).

<sup>46</sup> See *SEC v. Lum's, Inc.*, 365 F. Supp. 1046, 1067 (S.D.N.Y. 1973).

<sup>47</sup> The disclaimer should also encompass the rules of bodies other than the SEC that are mentioned in § 21(d), such as national securities exchanges.

<sup>48</sup> See *SEC v. Scott, Gorman Muns., Inc.*, 407 F. Supp. 1383, 1387-88 (S.D.N.Y. 1975); *SEC v. National Student Marketing Corp.*, 402 F. Supp. 641, 651 (D.D.C. 1975); *SEC v. J & B Indus., Inc.*, 388 F. Supp. 1082, 1084 (D. Mass. 1974).

<sup>49</sup> See *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1101 (2d Cir. 1972); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 (E.D. Pa. 1976); *SEC v. National Student Marketing Corp.*, 402 F. Supp. 641, 652 (D.D.C. 1975); *SEC v. Broadwall Sec., Inc.*, 240 F. Supp. 962, 968-69 (S.D.N.Y. 1965); *SEC v. Kamen & Co.*, 241 F. Supp. 430, 431 (S.D.N.Y. 1963). The defendant's sincerity is a question of fact. *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 n.4 (E.D. Pa. 1976).

<sup>50</sup> See, e.g., *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597-98 (E.D. Pa. 1976); *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1020 (S.D.N.Y. 1976), *aff'd in part, modified in part*, 574 F.2d 90 (2d Cir. 1978); *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284, 297, 300 (D.D.C. 1973).

<sup>51</sup> See, e.g., *SEC v. Shapiro*, 494 F.2d 1301, 1308 (2d Cir. 1974); see *SEC v. Parklane Hosiery Co.*, 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). In one case, the defendant's retirement from a municipal bond business did not prevent a court from enjoining him. *SEC v. Charles A. Morris & Assocs., Inc.* [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,756, at 93,306 (W.D. Tenn. 1973).

<sup>52</sup> See, e.g., *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 90 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

<sup>53</sup> See *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284, 300 (D.D.C. 1973).

<sup>54</sup> See *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 597 & n.5 (E.D. Pa. 1976).

contend that his prior conduct was blameless than a defendant who admits that his past acts violated the securities laws.<sup>55</sup>

(7) *The Defendant's Compensation to Injured Persons.* Another factor bearing on the propriety of an injunction is whether the defendant cured the injury he inflicted, by cancelling the transaction disgorging his profits or performing some other act.<sup>56</sup> The defendant's case is strongest where he acts before the SEC begins its investigation.<sup>57</sup>

(8) *Equitable and Policy Considerations.* Because a permanent injunction is a harsh remedy,<sup>58</sup> some judges will consider the injunction's effect on the defendant.<sup>59</sup> Prior to issuing the order, courts should attempt to determine if an injunction will so drastically interfere with the defendant's business that his victims may not be recompensed.<sup>60</sup> Weighing these considerations is analogous to the balancing of hardships in which the court will engage when a private party seeks a preliminary injunction.<sup>61</sup> Courts will deny a preliminary injunction on equitable grounds if the SEC delayed too long in bringing suit after starting its investigation.<sup>62</sup>

<sup>55</sup> See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1101 (2d Cir. 1972); SEC v. Penn Cent. Co., 425 F. Supp. 593, 597 (E.D.Pa. 1976); SEC v. Commonwealth Chem. Sec., Inc., 410 F. Supp. 1002, 1020 (S.D.N.Y. 1976), *aff'd in part, modified in part*, 574 F.2d 90 (2d Cir. 1978); SEC v. National Student Marketing Corp., 402 F. Supp. 641, 652 (D.D.C. 1975); SEC v. Kalvex, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,226, at 98,189 (S.D.N.Y. 1975); SEC v. D'Onofrio, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,201, at 98,019 (S.D.N.Y. 1975); SEC v. IMC Int'l, Inc., 384 F. Supp. 889, 894 (N.D. Tex.), *aff'd*, 505 F.2d 733 (5th Cir. 1974), *cert. denied*, 420 U.S. 930 (1975); SEC v. Lum's, Inc., 365 F. Supp. 1046, 1066 (S.D.N.Y. 1973).

<sup>56</sup> See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); SEC v. Lawson, 24 F. Supp. 360, 363 (D. Md. 1938).

<sup>57</sup> See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (2d Cir. 1972); SEC v. D'Onofrio, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,201, at 98,019 (S.D.N.Y. 1975).

<sup>58</sup> See SEC v. Koracorp Indus., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,532, at 99,702 (N.D. Cal. 1976), *rev'd in part, aff'd in part*, 575 F.2d 692 (9th Cir. 1978).

<sup>59</sup> See, e.g., SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1102 (2d Cir. 1972); SEC v. Petrofunds, Inc., 414 F. Supp. 1191, 1198 (S.D.N.Y. 1976); SEC v. National Student Marketing Corp., 402 F. Supp. 641, 652 (D.D.C. 1975); SEC v. M.A. Lundy Assocs., 362 F. Supp. 226, 233, (D.R.I. 1973); SEC v. National Student Marketing Corp., 360 F. Supp. 284, 297 (D.D.C. 1973); SEC v. Keller Indus., Inc., [1971-1972 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,453, at 92,239 (S.D.N.Y. 1972); *cf.* SEC v. Broadwall Sec., Inc., 240 F. Supp. 962, 967 (S.D.N.Y. 1965) (although effect on defendant is relevant, public interest superior to private interest when in conflict). *But see* SEC v. Culpepper, 270 F.2d 241, 252 (2d Cir. 1959); SEC v. Scott Taylor & Co., 183 F. Supp. 904, 909 (S.D.N.Y. 1959).

<sup>60</sup> See note 175 and accompanying text *infra*.

<sup>61</sup> See JACOBS, *supra* note 20, § 260.04[c][ii].

<sup>62</sup> See SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 486 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977); JACOBS, *supra* note 20, § 236. In a close case, the court may choose

After considering these factors, a judge who grants an injunction must then carefully define the scope of his order. An injunction issued in respect of a prior or anticipated 10b-5 breach typically restrains future breaches of the Rule.<sup>63</sup> Rule 65(d) of the Federal Rules of Civil Procedure, however, constrains the scope of any injunction granted by a federal judge by providing that "[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained . . . ."<sup>64</sup> Specificity in the order is needed so that the defendant is adequately apprised of the acts in which he may not engage. Specificity is also constitutionally mandated, since a court is prohibited from enforcing by contempt an injunction that is so nebulous that the defendant lacks the knowledge needed to comply.<sup>65</sup> Nevertheless, lower courts have incorporated the statutory language of the securities laws into injunctions,<sup>66</sup> enjoining acts that bear little resemblance to the defendant's allegedly illegal actions.<sup>67</sup> This is not to say, however, that an injunction's sweep must be narrow. An injunction may prohibit activities that were not involved in the previous illegal acts.<sup>68</sup> The persons whose

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to safeguard the public interest by resolving doubts in favor of granting the injunction. *See, e.g.,* *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 386 (2d Cir.) (Timbers, J., dissenting), *cert. denied*, 414 U.S. 910 (1973).

<sup>63</sup> Although construing a statute other than the 1934 Act, the Supreme Court, in *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941), considered the proper scope of injunctions issuing from federal courts, and enunciated principles which are equally applicable to 10b-5:

A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.

*Id.* at 435-36.

<sup>64</sup> FED. R. CIV. P. 56(d).

<sup>65</sup> *See* *United States v. Joyce*, 498 F.2d 592, 596 (7th Cir. 1974); *Finney v. Arkansas Bd. of Correction*, 505 F.2d 194, 213 (8th Cir. 1974).

<sup>66</sup> *E.g.,* *SEC v. Manor Nursing Center, Inc.*, 458 F.2d 1082, 1102-03 (2d Cir. 1972).

<sup>67</sup> *Id.* at 1102. *But see* *SEC v. Seaboard Sec. Corp.*, [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,697, at 95,564 (S.D.N.Y. 1966).

<sup>68</sup> *See, e.g.,* *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1102-03 (2d Cir. 1972); *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1020 (S.D.N.Y. 1976), *aff'd in part, modified in part*, 574 F.2d 90 (2d Cir. 1978); *SEC v. J & B Indus., Inc.*, 388 F. Supp. 1082 (D. Mass. 1974); *SEC v. North Am. Research & Dev. Corp.*, 375 F. Supp. 465, 468 (S.D.N.Y. 1974), *aff'd*, 511 F.2d 1217 (2d Cir.), *cert. denied*, 423 U.S. 830 (1975); *SEC v.*

actions may be affected by an injunction need not be limited to those who are primarily liable for the prior breach. A court can enjoin aiders and abettors of a violation, including officers of a corporation or of a broker-dealer.<sup>69</sup> There is also authority outside the securities area for the proposition that a court can hold a person who has violated the law to a higher standard of future conduct than someone who has not.<sup>70</sup> With these principles to guide them, courts have ordered defendants to amend their prior filings with the SEC,<sup>71</sup> directed a corporation to establish written guidelines for the dissemination of corporate information to the investment community,<sup>72</sup> prohibited a defendant from acting or continuing to act as a director or officer of any public company without the court's permission,<sup>73</sup> and directed a defendant to comply with the reporting requirements of section 16(a) of the 1934 Act.<sup>74</sup>

The obvious criticism of an injunction against future violations is that it commands a defendant to obey the law, something he is already obligated to do. There are, however, other direct and indirect consequences flowing from the injunction.<sup>75</sup> A direct effect is that the defendant can be prosecuted for civil or criminal contempt if he violates the injunction. A judge, acting without a jury, may impose a jail sentence of up to six months for criminal contempt.<sup>76</sup> In addition, numerous provisions of the securities laws impose restrictions on persons who have been permanently or temporarily enjoined.<sup>77</sup>

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Raffer, [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,632, at 98,836 (S.D.N.Y. 1970); SEC v. Seaboard Sec. Corp., [1964-1966 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 91,697, at 95,564 (S.D.N.Y. 1966); cf. SEC v. Universal Major Indus. Corp., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,229, at 98,214 (S.D.N.Y. 1975).

<sup>69</sup> E.g., SEC v. Aaron, No. 77-6091 (2d Cir. Mar. 12, 1978); SEC v. Barraco, 438 F.2d 97, 98-100 (10th Cir. 1971); SEC v. Resch-Cassin & Co., 362 F. Supp. 964, 981 (S.D.N.Y. 1973); see JACOBS, *supra* note 20, § 40.02 n.4 and cases cited therein; cf. SEC v. Coven, 581 F.2d 1020 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3584 (1979) (§ 17(a) of 1933 Act).

<sup>70</sup> See *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 488 (2d Cir. 1962).

<sup>71</sup> SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 487 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977).

<sup>72</sup> SEC v. Lum's, Inc., 365 F. Supp. 1046, 1067 (S.D.N.Y. 1973).

<sup>73</sup> SEC v. Techni-Culture, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,501, at 95,759 (D. Ariz. 1974).

<sup>74</sup> SEC v. Great Am. Indus., Inc., 259 F. Supp. 99, 110 (S.D.N.Y. 1966), *rev'd in part, vacated in part*, 407 F.2d 453 (2d Cir. 1968) (en banc), *cert. denied*, 395 U.S. 920 (1969).

<sup>75</sup> With respect to other advantages of the injunction route, see 3 L. LOSS, SECURITIES REGULATION 1980-83 (1961).

<sup>76</sup> *Frank v. United States*, 395 U.S. 147, 150 (1969); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966).

<sup>77</sup> Section 9(a)(2) of the Investment Company Act of 1940 makes it a crime for a person, who is permanently or temporarily enjoined, to serve in the capacity of employee, officer, director, member of an advisory board, investment advisor, or depositor of a registered investment company. 15 U.S.C. § 80a-9(a)(2) (1976). Section 9(c) permits the SEC (as distin-

## B. Ancillary Relief

In addition to the injunctions that may be granted pursuant to section 21(d) of the 1934 Act, the courts have ordered a number of other remedies in contested actions brought by the SEC. These other remedies are termed ancillary or equitable relief and include: disgorgement of profits; rescission; appointment of a receiver, trustee, or special agent; required filing of informational reports; and a court ordered freeze on the defendant's assets.

Several approaches have been suggested to justify the courts' power to grant ancillary relief.<sup>78</sup> The second circuit, in *SEC v.*

gushed from the staff) to lift or waive this disqualification. *Id.* at § 80a-9(c).

Rule 252(c)(4) of the 1933 Act proscribes the use of a Regulation A offering circular if the issuer or any of its affiliates has been temporarily or permanently restrained. 17 C.F.R. § 230.252(c)(4) (1978).

Rule 252(d)(2) prohibits the use of a Regulation A offering circular if any director, officer, principal, security holder, or promoter of the issuer, any underwriter of the offering or any partner, director, or officer of any such underwriter has been temporarily or permanently enjoined. *Id.* § 230.252(d)(2). Rule 252(f) allows the SEC to waive the prohibitions of Rules 252(c)(4) and 252(d)(2). *Id.* § 230.252(f).

Section 15(b)(4)(C) of the 1934 Act empowers the SEC, after notice and opportunity for a hearing, to censure, deny registration to, suspend for not more than one year, or revoke the registration of any broker-dealer who is permanently or temporarily enjoined. 15 U.S.C. § 780(b)(4)(C) (1976).

Section 15(b)(6) of the 1934 Act permits the SEC, after notice and opportunity for a hearing, to censure any person or to bar him for up to one year from being associated with a broker-dealer if he is permanently or temporarily enjoined. *Id.* § 780(b)(6) (1976).

Sections 203(e)(3) and 203(f) of the Investment Advisers Act of 1940 allow the SEC to discipline an investment adviser on the same grounds as §§ 15(b)(4) and 15(b)(6) of the 1934 Act permit the SEC to sanction a broker-dealer. *Id.* §§ 80b-3(e)(3), (f) (1976).

Under Rule II(e)(3) of the SEC's Rules of Practice, the SEC may censure or temporarily or permanently suspend from appearing or practicing before the SEC any attorney, accountant, engineer, or other professional or expert who was permanently enjoined. 17 C.F.R. § 201.2(e)(3) (1978).

Disclosure of a permanent or temporary injunction is specifically required in a Schedule 14D-1 (Item 2(f)), 3 FED. SEC. L. REP. (CCH) ¶ 24,284C (1979), a Form S-2 (Item 8(f)(3)), 2 FED. SEC. L. REP. (CCH) ¶ 7,143 (1976), and, by reference to Item 3(f)(3)(iii) of Regulation S-K, 5 FED. SEC. L. REP. (CCH) ¶ 70,961 (1979), in a Form S-1 (Item 16), 2 FED. SEC. L. REP. (CCH) ¶ 7,123 (1978), a Form 10 (Item 6), 4 FED. SEC. L. REP. (CCH) ¶ 27,303 (1978), a form 10-K (Item 14), 4 FED. SEC. L. REP. (CCH) ¶ 31,104 (1978), and a proxy statement (Item 6 of Schedule 14A), 2 FED. SEC. L. REP. (CCH) ¶ 7,282 (1976). In addition, case law may mandate disclosure of such an injunction in these or other documents. See *JACOBS supra* note 20, § 61.04[b] n.130.01 and accompanying text.

An injunction is required to be reported in various forms which a registered broker-dealer or a registered investment adviser must file with the SEC, the NASD, or a stock exchange.

Under some state blue sky laws, an injunction against a broker, dealer, or investment adviser permits the state administrator to invoke sanctions, UNIFORM SECURITIES ACT § 204(a)(2)(D), and an injunction relating to a registered security permits the state administrator to deny, suspend, or revoke his state registration of that security. *Id.* § 306(a)(2)(C).

<sup>78</sup> See *JACOBS, supra* note 20, § 15. As to the basis for equitable relief in private 10b-5 actions, see *id.* § 260.04 [a].

*Manor Nursing Centers, Inc.*,<sup>79</sup> has stated:

It is now well established that Section 22(a) of the 1933 Act . . . and Section 27 of the 1934 Act . . . confer general equity powers upon the district courts. Once the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the court possesses the necessary power to fashion an appropriate remedy. Thus, while neither the 1933 nor 1934 Acts specifically authorize the ancillary relief granted in this case, '[i]t is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded.' Moreover, as the Supreme Court said in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391 (1970): '[W]e cannot fairly infer from the Securities Exchange Act of 1934 a purpose to circumscribe the courts' power to grant appropriate remedies.' It is true that *Mills* . . . involved relief to private litigants. Nevertheless, we recently said that 'we deem the above statement [in *Mills*] to be fully applicable in enforcement actions by the SEC.' Accordingly, we reiterate our previous holding . . . that the SEC may seek other than injunctive relief to effectuate the purposes of the federal securities laws.<sup>80</sup>

In sum, the second circuit held that the policies underlying the 1934 Act permit courts to grant all necessary relief. Courts have traditionally relied on this approach as their basis for granting ancillary relief.

A second basis for granting ancillary relief is found in general principles of equity jurisprudence, under which federal and state courts may order any relief necessary to give effect to their injunctive decrees.<sup>81</sup> This approach is of limited utility since it is inapplicable where ancillary relief will not aid in effectuating the injunction or where no injunction is issued.<sup>82</sup> Finally, a properly framed mandatory injunction can itself provide many forms of ancillary relief. A few courts have adopted this approach.<sup>83</sup> As with injunctive relief,

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<sup>79</sup> 458 F.2d 1082 (2d Cir. 1972).

<sup>80</sup> *Id.* at 1103-04 (citations omitted); *accord*, *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390-91 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973); *SEC v. Radio Hill Mines Co.*, 479 F.2d 4, 6 (2d Cir. 1973); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 598 (E.D. Pa. 1976); *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976), *aff'd in part, modified in part*, 574 F.2d 90 (2d Cir. 1978); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 880-81 (S.D. Fla. 1974); *see SEC v. United Financial Group, Inc.*, 474 F.2d 354, 358 (9th Cir. 1973); *SEC v. Barraco*, 438 F.2d 97, 99 (10th Cir. 1971).

<sup>81</sup> *See* 1 J. POMEROY, EQUITY JURISPRUDENCE § 171(1) (5th ed. 1941).

<sup>82</sup> *See* note 94 and accompanying text *infra*.

<sup>83</sup> *See SEC v. Radio Hill Mines Co.*, 479 F.2d 4, 6 (2d Cir. 1973); *SEC v. American Inst.*



the decision whether ancillary relief should be granted is discretionary with the court. It should be noted, however, that the second circuit has held that all doubts as to the appropriateness of a remedy are to be resolved in favor of the SEC once it proves a violation.<sup>84</sup>

Courts have extended the rule that the SEC can obtain an injunction without proving all the elements of a 10b-5 violation required to be proven by a private litigant<sup>85</sup> to requests by the SEC for ancillary relief. Thus, the SEC can obtain ancillary relief by proving only those elements of a 10b-5 breach that it must show to be granted an injunction.<sup>86</sup> Of course, this showing is merely a prerequisite to a grant of ancillary relief; the court still may deny the relief as a matter of discretion.

Ancillary relief must be remedial and cannot be penal.<sup>87</sup> This proposition is consistent with the design of injunctions to deter rather than punish offenders.<sup>88</sup> Similarly, in a disgorgement proceeding, section 28(a) of the 1934 Act limits a defendant's liability for damages to "actual damages."<sup>89</sup> None of this, however, precludes ordering drastic measures<sup>90</sup> or limits the relief available in SEC enforcement proceedings to what could be obtained in a private action.<sup>91</sup>

The purpose of ancillary relief, as enunciated by the second circuit, is to contribute "to the effective enforcement of the securities laws by depriving defendants of gains made through violations, by deterring future violations, and by increasing the overall efficiency of Rule 10b-5 and similar actions."<sup>92</sup> This last point — increasing the efficiency of 10b-5 — undoubtedly refers to the simplicity of having all issues determined in one suit and avoiding inconsistent results between an SEC injunction proceeding and a private damage action.<sup>93</sup>

Counselors, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,388, at 98,963-64 (D.D.C. 1975).

<sup>84</sup> SEC v. Radio Hill Mines Co., 479 F.2d 4, 6 (2d Cir. 1973).

<sup>85</sup> See JACOBS, *supra* note 20, § 36 nn.17-23.

<sup>86</sup> See *id.* § 15 nn.22-23.

<sup>87</sup> SEC v. American Inst. Counselors, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,388, at 98,964 (D.D.C. 1975).

<sup>88</sup> See JACOBS, *supra* note 20, § 260.04[c][i]; note 11 and accompanying text *supra*.

<sup>89</sup> 15 U.S.C. § 78bb(a) (1976); see JACOBS, *supra* note 20, §§ 260.03[a], [e].

<sup>90</sup> SEC v. Radio Hill Mines Co., 479 F.2d 4, 6 (2d Cir. 1973).

<sup>91</sup> Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 391 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

<sup>92</sup> Chris-Craft Indus., Inc. v. Piper Aircraft Corp., 480 F.2d 341, 390-91 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

<sup>93</sup> See Note, *Ancillary Relief in SEC Injunction Suits for Violation of Rule 10b-5*, 79 HARV. L. REV. 656, 661-65 (1966).

Finally, since a court can grant ancillary relief in lieu of or in addition to issuing an injunction,<sup>94</sup> it can certainly order ancillary relief whether the SEC is seeking a temporary restraining order, a preliminary injunction or a permanent injunction. With this background, the particular forms of ancillary relief may now be examined.

### 1. Disgorgement

“Disgorgement” is a term of recent vintage which refers to suits instituted by the SEC to deprive defendants of gains realized from their 10b-5 breaches.<sup>95</sup> Numerous courts have approved of disgorgement as a proper form of relief in SEC actions.<sup>96</sup> Although the term is new, the concepts underlying disgorgement have been equated with the traditional equitable remedies of restitution and recoupment.<sup>97</sup> Consequently, courts must be wary of the potential overlap of recoveries from disgorgement and private damage actions directed at the same violation.<sup>98</sup>

Disgorgement orders have been justified on the grounds that the purposes of the 1934 Act would be defeated if defendants were able to retain their profit,<sup>99</sup> and that disgorgement necessarily renders violations unprofitable.<sup>100</sup> Moreover, since disgorgement may

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<sup>94</sup> See, e.g., *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); cf. *United States v. Moore*, 340 U.S. 616 (1951) (grant of restitution under Housing and Rent Act of 1947 although no injunction could issue).

<sup>95</sup> *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 880 (S.D. Fla. 1974).

<sup>96</sup> E.g., *SEC v. Shapiro*, 494 F.2d 1301, 1308-09 (2d Cir. 1974); *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390-91 (2d Cir.), cert. denied, 414 U.S. 910 (1973); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972); *SEC v. Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 598 (E.D. Pa. 1976); *SEC v. Galaxy Foods, Inc.*, 417 F. Supp. 1225, 1249 (E.D.N.Y. 1976), aff'd, 556 F.2d 559 (2d Cir. 1977); *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976), aff'd in part, modified in part, 574 F.2d 90 (2d Cir. 1978); *SEC v. Western Pac. Gold & Silver Exch. Corp.*, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,064, at 97,734 (D. Nev. 1975); *SEC v. Capital Growth Co., S.A.*, 391 F. Supp. 593, 598 (S.D.N.Y. 1974).

<sup>97</sup> *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 880 (S.D. Fla. 1974).

<sup>98</sup> For a discussion of the overlap of recoveries when the SEC obtains disgorgement and private litigants win damages under 10b-5, see *JACOBS*, *supra* note 20, § 260.03[h].

<sup>99</sup> See, e.g., *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976), aff'd in part, modified in part, 574 F.2d 90 (2d Cir. 1978); *SEC v. Jet Travel Servs., Inc.*, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,317, at 98,609 (M.D. Fla. 1975) (deterrence); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 881 (S.D. Fla. 1974).

<sup>100</sup> See, e.g., *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1104 (2d Cir. 1972); *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976), aff'd in part, modified in part, 574 F.2d 90 (2d Cir. 1978); *SEC v. Jet Travel Servs., Inc.*, [1975-1976 Transfer Binder] FED. SEC. L.

be considered a form of mandatory injunction, at least some of the factors courts weigh to determine whether to award the SEC an injunction are also relevant to the court's decision.<sup>101</sup>

The most difficult question concerning disgorgement is determining the amount which the defendant must pay.<sup>102</sup> The SEC is entitled to total, not partial, recovery from the defendant.<sup>103</sup> When a defendant wrongfully buys shares on the basis of inside information, courts have required him to disgorge the fair market value of the stock after disclosure of this information, less the cost of the shares to the defendant.<sup>104</sup> Subsequent market price movements of the stock do not change this formula. Thus, the defendant cannot reduce the amount he must disgorge if the market price falls after its initial post-disclosure rise, even though he later sells at a lower price.<sup>105</sup> For example, if the defendant buys at \$10, the stock's price rises to \$13 after disclosure, the market then drops, and the defendant sells at \$12, the defendant could be ordered to disgorge his \$3 per share paper profit, even though he realized an actual profit of only \$2 per share. Hence, he bears the risk of a subsequent downturn in the market. Of course, a court, in its discretion, may award to the SEC only the defendant's actual profits.<sup>106</sup> On the other hand, actual profits are not recoverable if the market continues to rise

REP. (CCH) ¶ 95,317, at 98,609 (M.D. Fla. 1975); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 881 (S.D. Fla. 1974). See also *JACOBS*, *supra* note 20, § 6.

<sup>101</sup> The factors relating to injunctions which seem most applicable are the defendant's past conduct, the nature of the prior violation, cessation of prior conduct, disclaimer of intent to violate in the future, the defendant's opportunity to commit future violations, and whether the defendant admitted his guilt.

<sup>102</sup> In one case, the defendant sought to reduce the amount he was ordered to disgorge, contending that since he had devoted his full time to the corporation responsible for the fraud, he should not be liable to the same extent as defendants who reaped profits without real personal effort. Rejecting this distinction, the court viewed the defendant's contention as providing an additional ground for disgorgement. *SEC v. Galaxy Foods, Inc.*, 417 F. Supp. 1225, 1250 (E.D.N.Y. 1976), *aff'd*, 556 F.2d 559 (2d Cir. 1977). It is suggested that the defendant in that case was attempting to analogize his particular circumstances to private damage actions wherein a defendant may escape liability for windfall damages to the extent that the security's appreciation after the fraudulent purchase results from his special efforts. See *JACOBS*, *supra* note 20, § 260.03[c][vi] n.13.

<sup>103</sup> See *SEC v. Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); *SEC v. Petrofunds, Inc.*, 420 F. Supp. 958, 960 (S.D.N.Y. 1976).

<sup>104</sup> *E.g.*, *SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); *SEC v. Texas Gulf Sulphur Co.*, 312 F. Supp. 77, 93 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

<sup>105</sup> *SEC v. Shapiro*, 494 F.2d 1301, 1309 (2d Cir. 1974); see *SEC v. Commonwealth Chem. Sec., Inc.*, 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976), *aff'd in part, modified in part*, 574 F.2d 90 (2d Cir. 1978).

<sup>106</sup> *E.g.*, *SEC v. Blatt*, [1975-1976 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 95,281, at 98,444 (S.D. Fla. 1975).

after the date of disclosure and the defendant sells at a price higher than the price on that date.<sup>107</sup> For instance, if the defendant buys at \$10, the stock's price rises to \$13 after disclosure, the market continues to appreciate, and the defendant ultimately sells at \$15, the SEC can obtain \$3 per share but not \$5 per share. It should be noted, however, that an analogy to the windfall measure of damages in private actions suggests that the entire \$5 per share in the above example should be disgorged.<sup>108</sup> Furthermore, a defendant need not disgorge any amount if he surrenders the shares at his cost to the corporation.<sup>109</sup> A tipper can also be required to disgorge his tippees' profits.<sup>110</sup>

Disgorgement is also appropriate relief in the case of a defendant who receives a stock option in violation of the Rule.<sup>111</sup> Upon exercising the option, the defendant should be required to disgorge the fair market value of the stock after disclosure of material information less the price at which the option was exercised. Disgorgement is proper although the corporation refused to let an optionee exercise his option, due to a pending SEC action, at a time when the stock price was quite high, and the stock price subsequently fell by the time of the court's hearing.<sup>112</sup>

There is little authority on the appropriateness of disgorgement of defendants who sell while possessing unfavorable material inside information. By analogy to the disgorgement of buyers, it would appear that a defendant-seller may be ordered to disgorge the difference between the price at which he sold his shares and the fair market value of the security after disclosure of the information.<sup>113</sup>

In addition to the base amount to be disgorged, courts can also order defendants to disgorge interest on that amount.<sup>114</sup> The rules which have developed in private damage actions as to the rate at which prejudgment interest is assessed, the principal amount on which prejudgment interest is computed, and the period of time for

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<sup>107</sup> SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971); see SEC v. Shapiro, 494 F.2d 1301, 1309 (2d Cir. 1974) (*dictum*).

<sup>108</sup> See JACOBS, *supra* note 20, § 260.03[c][vi].

<sup>109</sup> SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 89 n.19, 97 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971). Of course, this provides no fund for defrauded sellers. For a discussion of seller's rights, see JACOBS, *supra* note 20, § 260.03[h].

<sup>110</sup> SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 95 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

<sup>111</sup> As to stock options and violations of the Rule, see JACOBS, *supra* note 20, § 116.03.

<sup>112</sup> SEC v. Texas Gulf Sulphur Co., 331 F. Supp. 671, 672 (S.D.N.Y. 1971).

<sup>113</sup> See SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104-05 (2d Cir. 1972).

<sup>114</sup> *Id.*; see JACOBS, *supra* note 20, § 260.03[g].

which prejudgment interest is allowed<sup>115</sup> should apply equally to disgorgement suits brought by the SEC. Post-judgment interest should also be permitted in disgorgement actions.<sup>116</sup>

A related issue is whether a court may order disgorgement of profits plus the interest *earned* by the defendant on the illegal profits. In other words, if a defendant fraudulently sells securities to his victim for \$1,000 cash, and subsequently invests that \$1,000 in a high yield bond which earns \$200 during the period of time between the fraud and the judgment, can a court order disgorgement of \$1,200, or is disgorgement limited to \$1,000? The second circuit addressed this question, and held that the SEC was entitled to the base amount, but not to profits on the base amount or to the interest the defendant earned thereon.<sup>117</sup> The court drew support from the fact that such profits and earned interest were not recoverable in a private damage action, although it did not regard this argument as determinative.<sup>118</sup> In a subsequent decision, however, the second circuit for the first time awarded windfall damages to a defrauded buyer in a private damage action,<sup>119</sup> thus suggesting that such proceeds and earned interest are recoverable as well in disgorgement proceedings.<sup>120</sup> As a result, the SEC can now argue that it should be entitled to disgorgement of the base amount (\$1,000 in the example above) plus profits and earned interest on the base amount (\$200 in the example above). A court that orders disgorgement of these profits and earned interest, however, should not award prejudgment interest as well, because such an order would constitute double recovery for the use of the base amount.<sup>121</sup> Whatever the proper formula may be, a judge can order the defendants to divulge information required for the computation of the amount to be disgorged.<sup>122</sup>

A final question arises concerning to whom the disgorged amount should be paid. Courts often appoint a trustee<sup>123</sup> to distribute the disgorged funds to members of the public who have either

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<sup>115</sup> JACOBS, *supra* note 20, § 260.03[g].

<sup>116</sup> *Id.* § 260.03[g] & nn.37-38.

<sup>117</sup> SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104-05 (2d Cir. 1972). Even though prejudgment interest can be obtained by the SEC, the defendant may have earned a higher rate of interest on the money. The issue then becomes whether the SEC can recover earned interest at the higher rate rather than at the rate for prejudgment interest. *Id.*

<sup>118</sup> *Id.* at 1104.

<sup>119</sup> See JACOBS, *supra* note 20, § 260.03[c][vi] & nn.133-36.

<sup>120</sup> See *id.* § 260.03[c][vi] & n.137.

<sup>121</sup> See *id.* § 260.03[g] & nn.22-29.

<sup>122</sup> See notes 167-72 and accompanying text *infra*.

<sup>123</sup> See notes 161-64 and accompanying text *infra*.

purchased securities sold by the defendants or, alternatively, sold securities bought by the defendant.<sup>124</sup> Where the defendants traded in the over-the-counter market or on an exchange, the cases are in disagreement with respect to whether the funds should be paid to persons who were trading at about the same time as the defendants, to those whose stock certificates can be matched with the defendants' stock certificates by the transfer agent, or to those whose trade was paired with the defendants' trade by the market maker or the specialist. Similar questions arise in private damage actions.<sup>125</sup> The resolution of this issue in private damage actions should be persuasive for disgorgement proceedings as well. Instead of distributing the disgorged amounts to traders in the first instance, the second circuit, for example, has approved of payment to the corporation in an insider trading case.<sup>126</sup> Similarly, if the trustee cannot find the traders entitled to the disgorged funds, courts have ordered the remaining amounts paid to the corporation,<sup>127</sup> or held in the court's registry until the traders claim the funds.<sup>128</sup> A court can direct disposition of the unclaimed funds, even if it originally ordered that such funds be returned to the defendants.<sup>129</sup>

## 2. Rescission

Rescission is the act of voiding a prior relationship.<sup>130</sup> The Supreme Court has indicated that a court can order rescission in an SEC enforcement proceeding.<sup>131</sup> In addition, a defendant in an SEC

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<sup>124</sup> SEC v. Shapiro, 494 F.2d 1301, 1309 (2d Cir. 1974); SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105 (2d Cir. 1972), *modifying* 340 F. Supp. 913, 936 (S.D.N.Y. 1971); SEC v. Commonwealth Chem. Secs., Inc., 410 F. Supp. 1002, 1021 (S.D.N.Y. 1976), *aff'd in part, modified in part*, 574 F.2d 90 (2d Cir. 1978); SEC v. Jet Travel Servs., Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,317, at 98,609 (M.D. Fla. 1975); SEC v. Blatt, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,281, at 98,444 (S.D. Fla. 1975); SEC v. Golconda Mining Co., [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,504, at 98,358 (S.D.N.Y. 1969).

<sup>125</sup> See JACOBS, *supra* note 20, § 62 nn.31-36 & 42-44 and accompanying text, § 260.03[c][vii][3].

<sup>126</sup> See SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

<sup>127</sup> *E.g.*, SEC v. Texas Gulf Sulphur Co., 312 F. Supp. 77, 93-95 (S.D.N.Y. 1970), *modified*, 446 F.2d 1301 (2d Cir.), *cert. denied*, 404 U.S. 1005 (1971).

<sup>128</sup> *E.g.*, SEC v. Golconda Mining Co., 327 F. Supp. 257, 259-60 (S.D.N.Y. 1971).

<sup>129</sup> *Id.* The trustee's expenses usually are borne by the defendant. See SEC v. Blatt, [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,281, at 98,445 (S.D. Fla. 1975); SEC v. Golconda Mining Co., [1969-1970 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 92,504, at 98,358 (S.D.N.Y. 1969).

<sup>130</sup> See JACOBS *supra* note 20, § 260.03[c][vi].

<sup>131</sup> See SEC v. National Sec., Inc., 393 U.S. 453, 462 (1969); *accord*, SEC v. Weisberger, [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,108, at 97,944 (S.D.N.Y. 1975).

suit can be forced to offer rescission to defrauded public buyers,<sup>132</sup> even if the market value of the securities received by the public from the defendant then exceeds the market value of the securities which the public surrendered.<sup>133</sup>

Although there is a dearth of written authority concerning the factors a court should consider in determining whether to order rescission or to require the defendant to offer rescission, it is suggested that the controlling factors should be those used by courts to decide whether to grant or deny disgorgement.<sup>134</sup> This conclusion is consistent with the policies of the 1934 Act, since both rescission and disgorgement are remedies which render breaches of 10b-5 unprofitable.

### 3. Appointment of a Receiver, Trustee or Special Agent

The appointment of a receiver is yet another type of ancillary relief which the SEC can seek. A receiver is a person "specially appointed" by a district court judge "to take control, custody, or management" of a corporation or of property "that is involved in or is likely to become involved in litigation," in order to preserve the corporation's assets or the property.<sup>135</sup> Consistent with this broad description, courts have charged receivers, appointed at the SEC's behest,<sup>136</sup> with a wide variety of duties, such as investigating and making disclosures regarding specific topics,<sup>137</sup> filing reports with the SEC,<sup>138</sup> amending reports previously filed by the corporation with the SEC,<sup>139</sup> disseminating reports to shareholders,<sup>140</sup> holding a

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<sup>132</sup> *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 390-91 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973), *modifying* *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154, 1162 (S.D.N.Y. 1971). Similarly, a court should have the power to order a defendant to offer rescission to defrauded sellers. 480 F.2d at 390-91.

<sup>133</sup> *SEC v. Bangor Punta Corp.*, 331 F. Supp. 1154, 1162 (S.D.N.Y. 1971), *modified sub nom.* *Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341 (2d Cir.), *cert. denied*, 414 U.S. 910 (1973).

<sup>134</sup> See notes 95-101 and accompanying text *supra*.

<sup>135</sup> 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE*, § 2981, at 5 (1973) [hereinafter cited as WRIGHT & MILLER].

<sup>136</sup> Among the cases approving the appointment of a receiver are: *SEC v. Bull Inv. Group, Inc.*, [1974-1975 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 95,010, at 97,522 (D. Mass. 1975); *SEC v. Capital Growth Co., S.A. (Costa Rica)*, 391 F. Supp. 593, 598-99 (S.D.N.Y. 1974); *SEC v. R.J. Allen & Assocs.*, 386 F. Supp. 866, 878-79 (S.D. Fla. 1974); cases cited in JACOBS, *supra* note 20, § 15 n.19; see also *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972); *SEC v. Fifth Ave. Coach Lines, Inc.*, 435 F.2d 510, 518 (2d Cir. 1970).

<sup>137</sup> *SEC v. Koenig*, 469 F.2d 198, 202 (2d Cir. 1972); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972).

<sup>138</sup> *SEC v. Koenig*, 469 F.2d 198, 202 (2d Cir. 1972).

<sup>139</sup> *SEC v. Koenig*, [1972-1973 Transfer Binder] *FED. SEC. L. REP. (CCH)* ¶ 93,536, at

shareholders meeting,<sup>141</sup> taking charge of a defendant's books and records to prevent their destruction or alteration,<sup>142</sup> making corporate books and records available to shareholders,<sup>143</sup> maintaining the status quo,<sup>144</sup> and taking charge of a corporation,<sup>145</sup> even if it is solvent.<sup>146</sup> Pursuant to federal law, a receiver is required to manage and operate the property in his control according to the requirements of the law of the state where the property is located, in the same manner as the owner would be bound to do.<sup>147</sup>

Appointment of a receiver is an extraordinary, expensive, and drastic remedy<sup>148</sup> which should not be granted lightly.<sup>149</sup> The SEC, therefore, is sometimes reluctant to request a receiver.<sup>150</sup> When it does, a trial judge has the discretion to approve or deny the request.<sup>151</sup> Judges will appoint a receiver when one is deemed to be necessary to preserve the status quo<sup>152</sup> or to prevent diversion or waste of assets to the detriment of those for whose sake the SEC's injunctive action was brought.<sup>153</sup> In addition to these considerations, courts have weighed a number of other factors in the exercise of their discretion, such as the potentially harmful impact which the ap-

92,561 (S.D.N.Y.), *aff'd*, 469 F.2d 198 (2d Cir. 1972).

<sup>140</sup> SEC v. Koenig, 469 F.2d 198, 202 (2d Cir. 1972).

<sup>141</sup> *Id.*

<sup>142</sup> SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 870 (S.D. Fla. 1974).

<sup>143</sup> SEC v. Koenig, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,536, at 92,561 (S.D.N.Y.), *aff'd*, 469 F.2d 198, 202 (2d Cir. 1972).

<sup>144</sup> SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105 (2d Cir. 1972) (trustee); SEC v. Heritage Trust Co., 402 F. Supp. 744, 751 (D. Ariz. 1975).

<sup>145</sup> SEC v. Bowler, 427 F.2d 190, 196 (4th Cir. 1970); SEC v. Bartlett, 422 F.2d 475, 479 (8th Cir. 1970); SEC v. S & P Nat'l Corp., 360 F.2d 741, 750 (2d Cir. 1966); SEC v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963); Los Angeles Trust Deed & Mortgage Exch. v. SEC, 285 F.2d 162, 181-82 (9th Cir. 1960), *cert. denied*, 366 U.S. 919 (1961); 12 WRIGHT & MILLER, *supra* note 135, § 2981, at 8.

<sup>146</sup> SEC v. Keller Corp., 323 F.2d 397, 403 (7th Cir. 1963); SEC v. Heritage Trust Co., 402 F. Supp. 744, 753-54 (D. Ariz. 1975); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 878 (S.D. Fla. 1974).

<sup>147</sup> 28 U.S.C. § 959 (1976).

<sup>148</sup> SEC v. Heritage Trust Co., 402 F. Supp. 744, 751 (D. Ariz. 1975); SEC v. Brigadoon Scotch Distribs., Ltd., 388 F. Supp. 1288, 1293 (S.D.N.Y. 1975).

<sup>149</sup> SEC v. Heritage Trust Co., 402 F. Supp. 744, 751 (D. Ariz. 1975).

<sup>150</sup> Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188, 1202-03 (1975).

<sup>151</sup> SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 878 (S.D. Fla. 1974); *see* SEC v. Koenig, 469 F.2d 198, 202 (2d Cir. 1972).

<sup>152</sup> SEC v. Koenig, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,536, at 92,561 (S.D.N.Y.), *aff'd*, 469 F.2d 198 (2d Cir. 1972); note 144 and accompanying text *supra*.

<sup>153</sup> SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 878 (S.D. Fla. 1974); SEC v. Capital Counselors, Inc., 332 F. Supp. 291, 304 (S.D.N.Y. 1971) (quoting SEC v. H.S. Simmons & Co., 190 F. Supp. 432, 432-33 (S.D.N.Y. 1961)); *see* SEC v. Midland Basic, Inc., 283 F. Supp. 609, 619 (D.S.D. 1968).



pointment of a receiver could have on the defendant's legitimate activities,<sup>154</sup> whether the defendant's past actions indicate that he cannot be relied upon to implement the court's decision,<sup>155</sup> the nature of the defendant's fraud, the imminent danger that the property involved will diminish in value,<sup>156</sup> whether or not legal remedies are adequate,<sup>157</sup> what a balancing of the equities suggests<sup>158</sup> and the SEC's chances of success on the merits.<sup>159</sup> In determining if a receiver is needed, courts may also employ those factors considered in judging whether to grant or deny an injunction,<sup>160</sup> since appointing a receiver and granting an injunction are both extraordinary remedies.

A receiver is indistinguishable in his functions, if not in his name, from a trustee, a special counsel<sup>161</sup> and a special agent. A trustee is most commonly appointed in cases where disgorgement of profits has been ordered, and typically is instructed to find the persons who traded with the defendants,<sup>162</sup> and to distribute the disgorged amounts to them.

Courts sometimes appoint a person whom they call a trustee only to assign him to duties normally performed by a receiver. For example, one court instructed a trustee to report on the true state of the corporation and to help preserve the status quo.<sup>163</sup> The label affixed by a court to a person performing these functions should not affect the standard of care to be observed by him or the factors to be used by a court to determine whether or not the appointment is proper.<sup>164</sup>

A special agent also appears to be a receiver by another name. For this reason, the rules governing receivers should apply as well to special agents.<sup>165</sup> For instance, one court appointed a special

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<sup>154</sup> SEC v. Petrofunds, Inc., 414 F. Supp. 1191, 1198 (S.D.N.Y. 1976).

<sup>155</sup> SEC v. Koenig, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,536, at 92,561 (S.D.N.Y.), *aff'd*, 469 F.2d 198 (2d Cir. 1972).

<sup>156</sup> 12 WRIGHT & MILLER, *supra* note 135, § 2983, at 22-23.

<sup>157</sup> *Id.* at 23.

<sup>158</sup> *Id.* at 23-24.

<sup>159</sup> *Id.* at 24.

<sup>160</sup> See text accompanying notes 2-77 *supra*.

<sup>161</sup> Although expressing approval of the use of this tool in a proper private action, Judge Duffy declined to appoint a special counsel in SEC v. Parklane Hosiery Co., 422 F. Supp. 477, 486 (S.D.N.Y. 1976), *aff'd*, 558 F.2d 1083 (2d Cir. 1977). A special counsel was part of the relief granted in SEC v. American Inst. Counselors, Inc., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,388, at 98,963 (D.D.C. 1975).

<sup>162</sup> See notes 123-29 and accompanying text *supra*.

<sup>163</sup> SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105 (2d Cir. 1972).

<sup>164</sup> See JACOBS, *supra* note 20, § 260.03[d].

<sup>165</sup> See *id.* § 260.03[d].

agent to ascertain and report the true facts about a corporation when the corporation's management refused to do so in the face of a court order.<sup>166</sup>

#### 4. Reports and Accounting to the Court

In SEC enforcement actions, courts have ordered defendants to submit to the court or to a court-appointed receiver reports which detail certain information relating to the defendants' securities trading or to securities held by the defendants.<sup>167</sup> Courts refer to this remedy as filing a report<sup>168</sup> or an accounting.<sup>169</sup> These reports, which a judge can require to be in affidavit form,<sup>170</sup> have been held not to violate the fifth amendment or to constitute an unreasonable search and seizure.<sup>171</sup> Furthermore, a defendant cannot defeat this form of ancillary relief by arguing that the 1934 Act's reporting requirements are exclusive.<sup>172</sup>

#### 5. Freeze on the Defendant's Assets

District courts have temporarily frozen a defendant's assets as a form of ancillary relief in enforcement actions.<sup>173</sup> This order is most often granted while the court is attempting to determine how much the defendant must disgorge.<sup>174</sup> Its purpose is to prevent the defendant from dissipating, concealing, or disposing of his assets before he disgorges his illegal profit.<sup>175</sup> Some freeze orders permit the defendant to pay his living expenses out of his assets.<sup>176</sup>

Courts must carefully consider the facts before granting this order because of its drastic nature.<sup>177</sup> One court solicitously noted that district judges should be wary of freezing a defendant's assets,

<sup>166</sup> SEC v. Beisinger Indus. Corp., 421 F. Supp. 691, 696 (D. Mass. 1976), *aff'd*, 552 F.2d 15 (1st Cir. 1977).

<sup>167</sup> SEC v. Radio Hill Mines Co., 479 F.2d 4, 6 (2d Cir. 1973); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 880 (S.D. Fla. 1974).

<sup>168</sup> SEC v. Radio Hill Mines Co., 479 F.2d 4, 6 (2d Cir. 1973).

<sup>169</sup> SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 880 (S.D. Fla. 1974).

<sup>170</sup> SEC v. Manor Nursing Centers, Inc., 340 F. Supp. 913, 936 (S.D.N.Y. 1971), *modified*, 458 F.2d 1082 (2d Cir. 1972).

<sup>171</sup> SEC v. Radio Hill Mines Co., 479 F.2d 4, 7-8 (2d Cir. 1973).

<sup>172</sup> *Id.* at 6.

<sup>173</sup> SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105-06 (2d Cir. 1972); SEC v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1388 (S.D.N.Y. 1975); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 881 (S.D. Fla. 1974).

<sup>174</sup> SEC v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1388 (S.D.N.Y. 1975); SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 881 (S.D. Fla. 1974).

<sup>175</sup> SEC v. Scott, Gorman Muns., Inc., 407 F. Supp. 1383, 1388 (S.D.N.Y. 1975).

<sup>176</sup> See, e.g., *id.*; SEC v. R.J. Allen & Assocs., 386 F. Supp. 866, 870 (S.D. Fla. 1974).

<sup>177</sup> SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1105-06 (2d Cir. 1972).

not because it would be a hardship to the defendant, but because the freeze may destroy his business and leave him unable to pay his victims.<sup>178</sup>

### III. ADMINISTRATIVE REMEDIES OF THE SEC IN CONTESTED PROCEEDINGS

Rather than applying to a court for redress, the SEC may utilize its statutory powers and impose remedies in an administrative, quasi-judicial capacity. The most important grants of power are found in sections 15(b)(4)<sup>179</sup> and 15(b)(6)<sup>180</sup> of the 1934 Act, which permit the SEC to censure, limit the activities of, suspend, or revoke the registration of brokers, dealers and others.<sup>181</sup> Sections 19(h)(2)<sup>182</sup> and 19(h)(3)<sup>183</sup> of the Act also authorized the SEC to punish a member of a national securities exchange if it violates the 1934 Act, or a member of the NASD if it breaches the 1933 Act or the 1934 Act.<sup>184</sup> The question of whether or not the SEC can disbar a professional who appears before it is being litigated in the second circuit. The Commission can issue a report of investigation, discipline the NASD or a stock exchange, withdraw a security's registration under the 1934 Act, and suspend trading in a security for 10 days.<sup>185</sup> Section 203 of the Investment Advisers Act of 1940 authorizes the SEC to discipline investment advisers.<sup>186</sup> These administrative powers will be discussed in greater detail in the following sections.

#### A. *Disciplining Brokers, Dealers, and Persons Associated With Them*

Upon discovering a 10b-5 violation by a broker, dealer, or person who is associated with a broker or a dealer, or by a person who is seeking to become so associated, the SEC may pursue three courses of action. It may request that the Department of Justice institute a criminal action,<sup>187</sup> it may commence a court proceeding

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<sup>178</sup> *Id.* In § 21(e)(1) of the 1934 Act, Congress empowered the SEC to seek writs of mandamus, injunctions, and orders commanding any person to comply with the 1934 Act and the rules and regulations promulgated thereunder. 15 U.S.C. § 78u(e) (1976). This section, however, is rarely utilized in the 10b-5 context. *See Note, Ancillary Relief in SEC Injunction Suits for Violation of Rule 10b-5*, 79 HARV. L. REV. 656, 660 (1966).

<sup>179</sup> 15 U.S.C. § 78o(b)(4) (1976).

<sup>180</sup> *Id.* § 78o(b)(6).

<sup>181</sup> *See* text accompanying notes 187-277 *infra*.

<sup>182</sup> 15 U.S.C. § 78s(h)(3).

<sup>184</sup> *See* text accompanying notes 283-288 *infra*.

<sup>185</sup> *See* text accompanying notes 289-299 *infra*.

<sup>186</sup> 15 U.S.C. § 80b-3 (1976); *see* notes 279-82 and accompanying text *infra*.

<sup>187</sup> *See* JACOBS, *supra* note 20, § 263.

seeking to enjoin further violations,<sup>188</sup> or it may institute administrative disciplinary proceedings either at the time the breach is discovered or after the defendant has been convicted or enjoined.<sup>189</sup>

Sections 15(b)(4) and 15(b)(6) of the 1934 Act are the basis for the SEC's authority to impose administrative discipline.<sup>190</sup> Due to the similarity of their language, the sections will be treated together. The SEC uses section 15(b)(4) to discipline a registered broker or dealer. Section 15(b)(6) is employed to sanction a person associated with a broker or dealer, or a person seeking to become so associated. The term "person associated with a broker or dealer" is defined in section 3(a)(18) of the 1934 Act as follows:

The term "person associated with a broker or dealer" or "associated person of a broker or dealer" means any partner, officer, director, or branch manager or such broker or dealer (or any person occupying a similar status or performing similar functions), any person directly or indirectly controlling, controlled by, or under common control with such broker or dealer, or any employee of such broker or dealer, except that any person associated with a broker or dealer whose functions are solely clerical or ministerial shall not be included in the meaning of such term for purposes of section [15(b) of the Exchange Act] (other than paragraph (6) thereof).<sup>191</sup>

Sections 15(b)(4) and 15(b)(6) pertain to a broad range of persons. Registered brokers, registered dealers, and persons associated with a broker or dealer are clearly within their ambit. Under section 15(b)(6), the SEC also can sanction someone who has never been a broker, a dealer or a person associated with a broker or a dealer,<sup>192</sup> so long as that person is seeking to become associated with a broker or dealer.

Section 15(b)(4) authorizes the SEC to "censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer . . . ." <sup>193</sup> Section 15(b)(6) permits similar sanctions against other persons by authorizing the SEC to "censure or place limitations on the activities or functions of any person . . . or suspend for a period not exceeding twelve months or bar any such

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<sup>188</sup> See text accompanying notes 2-77 *supra*.

<sup>189</sup> See notes 211-15 *infra*.

<sup>190</sup> 15 U.S.C. §§ 78o(b)(4), (6) (1976).

<sup>191</sup> 15 U.S.C. § 78c(18) (1976).

<sup>192</sup> *Investors Management Co.*, 44 S.E.C. 633 (1971); *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S.E.C. 933 (1968).

<sup>193</sup> 15 U.S.C. § 78o(b)(4) (1976).

person from being associated with a broker or dealer . . . ."<sup>194</sup> Revoking the registration of a broker or a dealer under section 15(b)(4) and barring, as distinguished from suspending, an association with a broker or a dealer pursuant to section 15(b)(6), are sanctions of unlimited duration.<sup>195</sup> A bar order apparently can preclude association with all brokers and dealers, regardless of whether they are required to register under section 15(a) of the 1934 Act.<sup>196</sup> Pursuant to these powers, the SEC has imposed sanctions such as censure,<sup>197</sup> withdrawal of registration as a broker-dealer,<sup>198</sup> revocation of broker-dealer registration,<sup>199</sup> bar from any association with a broker, dealer, or investment adviser,<sup>200</sup> or from association with a broker or a dealer in a supervisory or proprietary capacity,<sup>201</sup> and suspension of any association with a broker or dealer.<sup>202</sup> Moreover,

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<sup>194</sup> 15 U.S.C. § 78o(b)(6) (1976).

<sup>195</sup> *Naftalin & Co.*, Administrative Proceeding File No. 3-3277 (May 17, 1973) (decision of Administrative Law Judge), reported in [1973 Transfer Binder] FED. SEC. L. REP (CCH) ¶ 79,379, at 83,110-11. This is not to say that a broker or dealer may not reapply for registration after a revocation. When the individual's reentry "would be consistent with the public interest," reinstatement can be ordered. *Id.* at 83,111.

<sup>196</sup> 15 U.S.C. § 78o(a) (1976). Thus, it could apply to brokers and dealers whose business is wholly intrastate or wholly on an exchange or which deal only in exempted securities, commercial paper, bankers' acceptances or commercial bills. These types of brokers and dealers are exempt from registration by § 15(a)(1) of the 1934 Act.

<sup>197</sup> *Albert Teller & Co.*, Exchange Act Release No. 12,104 (Feb. 12, 1976), 8 SEC DOCKET 1257.

<sup>198</sup> *Mississippi Valley Investment Co.*, Exchange Act Release No. 12,683 (Aug. 2, 1976), 10 SEC DOCKET 168; *Albert Teller & Co.*, Exchange Act Release No. 12,104 (Feb. 12, 1976), 8 SEC DOCKET 1257.

<sup>199</sup> *Contemporary Securities Corp.*, Exchange Act Release No. 13,261 (Feb. 14, 1977), 11 SEC DOCKET 1721; *A.J. White & Co.*, Exchange Act Release No. 12,614 (July 9, 1976), 10 SEC DOCKET 10; *Kenneth Bove & Co.*, Exchange Act Release No. 12,567 (June 22, 1976), 9 SEC DOCKET 954; *Scherl, Egener & Bassuk, Inc.*, Exchange Act Release No. 12,156 (Mar. 2, 1976), 9 SEC DOCKET 45; *Richard C. Spangler, Inc.*, Exchange Act Release No. 12,104 (Feb. 12, 1976), 8 SEC DOCKET 1257; *King Securities*, Exchange Act Release No. 11,939 (Dec. 18, 1975), 8 SEC DOCKET 755.

<sup>200</sup> *Gotham Securities, Corp.*, Exchange Act Release No. 12,956 (Nov. 5, 1976), 10 SEC DOCKET 899; *Edward C. Jaegerman*, Exchange Act Release No. 12,905 (Oct. 19, 1976), 10 SEC DOCKET 728; *Willard G. Berge*, Exchange Act Release No. 12,846 (Sept. 30, 1976), 10 SEC DOCKET 601; *A.J. White & Co.*, Exchange Act Release No. 12,614 (July 9, 1976), 10 SEC DOCKET 10; *C.R. Richmond & Co.*, Exchange Act Release No. 12,535 (June 10, 1976), 9 SEC DOCKET 846; *Gilbert F. Tuffli*, Exchange Act Release No. 12,534 (June 10, 1976), 9 SEC DOCKET 845; *Richard C. Spangler, Inc.*, Exchange Act Release No. 12,104 (Feb. 12, 1976), 8 SEC DOCKET 1257.

<sup>201</sup> *Richard B. Berdahl*, Exchange Act Release No. 13,139 (Jan. 6, 1977), 11 SEC DOCKET 1361; *Joseph S. Capkovic*, Exchange Act Release No. 12,683 (Aug. 2, 1976), 10 SEC DOCKET 168; *Joseph Elkind*, Exchange Act Release No. 12,485 (May 26, 1976), 9 SEC DOCKET 736.

<sup>202</sup> *Joseph S. Capkovic*, Exchange Act Release No. 12,683 (Aug. 2, 1976), 10 SEC DOCKET 168; *Gilbert F. Tuffli*, Exchange Act Release No. 12,534 (June 10, 1976), 9 SEC DOCKET 845; *Joseph Elkind*, Exchange Act Release No. 12,485 (May 26, 1976), 9 SEC DOCKET 736.

the SEC has required offenders, in certain circumstances, to apply to it for permission to become associated in the future with any broker or dealer in a non-supervisory capacity;<sup>203</sup> limited an offender's activities as a broker, as a dealer or as a person associated with any broker or dealer exclusively to the offer and sale at retail or particular securities;<sup>204</sup> expelled offenders from membership in a stock exchange<sup>205</sup> and the National Association of Securities Dealers (NASD);<sup>206</sup> and barred them from being associated with a member of any national securities exchange or registered securities association.<sup>207</sup>

In addition to the sanctions ordered pursuant to these statutory powers, the SEC occasionally has ordered the revocation of a brokerage firm's registration unless the principal offender is disassociated from the firm.<sup>208</sup> The SEC, however, cannot levy fines<sup>209</sup> or order respondents to pay their victims damages.<sup>210</sup>

Section 15(b)(4) sets forth in considerable detail the grounds for imposing sanctions. These grounds are incorporated into section 15(b)(6). Section 15(b)(4)(B) authorizes the SEC to impose sanctions if the broker-dealer or any person associated with it was convicted, within 10 years prior to filing an application for registration or at any time thereafter, among other things, of a crime (1) involving the purchase or the sale of any security; (2) arising out of "the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary"; or (3) involving "the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds, or securities."<sup>211</sup>

Section 15(b)(4)(C) allows the SEC to impose sanctions where

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<sup>203</sup> Richard B. Berdahl, Exchange Act Release No. 13,139 (Jan. 6, 1977), 11 SEC DOCKET 1361; Bruce William Zimmerman, Exchange Act Release No. 12,690 (Aug. 5, 1976), 10 SEC DOCKET 175.

<sup>204</sup> Bruce William Zimmerman, Exchange Act Release No. 12,690 (Aug. 5, 1976), 10 SEC DOCKET 175 (redeemable securities issued by registered investment companies).

<sup>205</sup> First Western Securities Co., Exchange Act Release No. 13,438 (Apr. 11, 1977), 11 SEC DOCKET 2232.

<sup>206</sup> Nassar & Co., Exchange Act Release No. 12,104 (Feb. 12, 1976), 8 SEC DOCKET 1257.

<sup>207</sup> First Western Securities Co., Exchange Act Release No. 13,438 (Apr. 11, 1977), 11 SEC DOCKET 2232.

<sup>208</sup> Shearson, Hammill & Co., 42 S.E.C. 811, 853 (1965); M.S. Wein & Co., 23 S.E.C. 735, 754-56 (1946); E.H. Rollins & Sons, 18 S.E.C. 347, 390-94 (1945).

<sup>209</sup> In contrast, stock exchanges and the NASD have the power to levy fines. 15 U.S.C. § 78o-3(b)(7) (1976).

<sup>210</sup> The SEC sometimes obtains damages for injured parties when it settles, rather than adjudicates, proceedings.

<sup>211</sup> 15 U.S.C. § 78o(b)(4)(B) (1976). Section 15(b)(4)(A) permits disciplinary action if the broker-dealer willfully filed a misleading application for registration.

the broker, dealer, or associated person is permanently or temporarily enjoined from, among other things: (a) acting as an investment adviser, underwriter, broker, or dealer; (b) engaging in or continuing any conduct or practice in connection with any such activity; or (c) engaging in or continuing any conduct or practice in connection with the purchase or the sale of any security.<sup>212</sup> An injunction proscribing infractions of 10b-5 clearly would be within the third of the enumerated criteria of section 15(b)(4)(C) and, in addition, might satisfy one or both of the others. The SEC can discipline a broker-dealer even though the district court in the injunction proceeding did not find the relevant violation to be willful.<sup>213</sup> Nor can the respondent successfully defend against the sanction by contending that it did not violate or threaten to violate the injunction.<sup>214</sup> In fact, the broker cannot collaterally attack the injunction in the SEC's disciplinary proceeding.<sup>215</sup>

Subsection (D) is the broadest of the section 15(b)(4) subdivisions. It permits the SEC to discipline a broker-dealer who "willfully" violates any provision of the 1933 Act, the 1934 Act, the Investment Advisers Act of 1940,<sup>216</sup> the Investment Company Act of 1940,<sup>217</sup> or the rules and regulations issued thereunder, or who is unable to comply with any of these provisions.<sup>218</sup> The SEC, therefore, can censure, limit the activities of, suspend for up to twelve months, or revoke the registration of a broker-dealer who willfully breaches Rule 10b-5.<sup>219</sup> The word "willfully" is not defined in the 1934 Act, although it appears in sections 6(b),<sup>220</sup> 9(e),<sup>221</sup> 15(b)(4)(A), 15(b)(4)(D), 15(b)(4)(E), 15(b)(6), 15A(1)(2)(B),<sup>222</sup> 19(h)(2),<sup>223</sup> 19(h)(3),<sup>224</sup> 19(h)(4), 32(a),<sup>225</sup> and 32(c)(2).<sup>226</sup> A number of cases have

<sup>212</sup> 15 U.S.C. § 78o(b)(4)(C) (1976).

<sup>213</sup> *Shuck v. SEC*, 264 F.2d 358, 361 (D.C. Cir. 1958); *Light, Wofsey & Benesch, Inc.*, 27 S.E.C. 763, 765 n.5 (1948).

<sup>214</sup> *Frank P. Todd*, 40 S.E.C. 303 (1960); *J.D. Creger & Co.*, 39 S.E.C. 165, 170-71 (1959).

<sup>215</sup> *Gibbs & Co.*, 40 S.E.C. 963, 967-68 (1962); *J.D. Creger & Co.*, 39 S.E.C. 165, 170 (1959); *Kaye, Real & Co.*, 36 S.E.C. 373, 375-76 (1955); *James F. Morrissey*, 25 S.E.C. 372, 381 (1947).

<sup>216</sup> 15 U.S.C. §§ 80b-1 to -21 (1976).

<sup>217</sup> *Id.* §§ 80a-1 to -52.

<sup>218</sup> *Id.* § 78o(b)(4)(D).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* § 78f(b); see *JACOBS, supra* note 20, §§ 3.02[a], 10.02.

<sup>221</sup> 15 U.S.C. § 78i(e) (1976); see *JACOBS, supra* note 20, § 3.02[c].

<sup>222</sup> 15 U.S.C. §§ 78o(b)(4)(D), (E), (b)(6); 78o-3(1)(2)(B) (1976).

<sup>223</sup> *Id.* § 78s(h)(2); see text accompanying notes 283-88 *infra*.

<sup>224</sup> 15 U.S.C. § 78s(h)(3), (4) (1976); see text accompanying notes 283-88 *infra*.

<sup>225</sup> 15 U.S.C. § 78ff(a) (1976).

<sup>226</sup> *Id.* § 78ff(c)(2). It is interesting to note that the word "willfully" does not appear in §

construed the term willfully and its cognates. The present scope of willful activity, however, must be viewed in light of the 1976 decision of the Supreme Court in *Ernst & Ernst v. Hochfelder*.<sup>227</sup> In that case, the Court held that intent to deceive, manipulate or defraud is required in private damage actions brought under 10b-5.<sup>228</sup> The Court, however, specifically left open the question whether recklessness will satisfy the scienter requirement in a private action.<sup>229</sup> It must be determined, therefore, if the definitions of willfulness adopted by the Commission and the courts prior to 1976 remain viable after *Hochfelder* and whether the post-*Hochfelder* cases construing the term evidence a changed attitude.<sup>230</sup>

The most popular pre-*Hochfelder* definition of willful in the context of a SEC administrative proceeding was: "intentionally committing the act which constitutes the violation. There [was] no requirement that the actor also [have been] aware that he [was] violating one of the Rules or Acts."<sup>231</sup> Neither specific intent to defraud,<sup>232</sup> evil intent,<sup>233</sup> nor evil purpose<sup>234</sup> was an ingredient of this formulation. Courts fleshed out this definition by citing conduct they deemed willful, such as disseminating an offering circular

15A(b)(7), which deals with violations by members of NASD or a stock exchange of those organizations.

<sup>227</sup> 425 U.S. 185 (1976).

<sup>228</sup> *Id.* at 212-15; see JACOBS, *supra* note 20, § 63.

<sup>229</sup> 425 U.S. at 193 n.12; see JACOBS, *supra* note 20, § 63. The second circuit recently has held that proof of recklessness is sufficient to establish a violation of 10b-5 in a private damage action. See *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 44-47 (2d Cir.), *cert. denied*, 99 S. Ct. 642 (1978) (mem.).

<sup>230</sup> Aside from the problems flowing from *Hochfelder*, the particular statutory provision in which the word willfully appears may also bear upon its interpretation. Thus, the term may not have the same meaning in the criminal context of § 32(a) as it does in the administrative milieu of §§ 15(b)(4) and 15(b)(6). See JACOBS, *supra* note 20, § 7 n.1. The cases, however, contain no nuance of such a distinction.

<sup>231</sup> *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1975); *accord*, *Hanly v. SEC*, 415 F.2d 589, 596 n.6 (2d Cir. 1969); *Dlugash v. SEC*, 373 F.2d 107, 109 (2d Cir. 1967); *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 793, 802 & n.15, 803 (D.C. Cir. 1965); *Capital Funds, Inc. v. SEC*, 348 F.2d 582, 588 (8th Cir. 1965); *Norris & Hirshberg, Inc. v. SEC*, 177 F.2d 228, 233 (D.C. Cir. 1949); *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949); *Underhill Securities Corp.*, 42 S.E.C. 689, 695-96 (1965); *Hamilton Waters & Co.*, 42 S.E.C. 784, 791 n.14 (1965); *Cady, Roberts & Co.*, 40 S.E.C. 907, 917 (1961); *Bruns, Nordeman & Co.*, 40 S.E.C. 652, 659 (1961); *MacRobbins & Co.*, 40 S.E.C. 497, 505 n.22 (1961), *remanded sub nom. Kahn v. SEC*, 297 F.2d 112 (2d Cir. 1961) and *Berko v. SEC*, 297 F.2d 116 (2d Cir. 1961); *Van Alstyne, Noel & Co.*, 33 S.E.C. 311, 339 & n.27 (1952), *modified*, 34 S.E.C. 593 (1953).

<sup>232</sup> *Hanly v. SEC*, 415 F.2d 589, 596 (2d Cir. 1969).

<sup>233</sup> *Nees v. SEC*, 414 F.2d 211, 220-21 (9th Cir. 1969).

<sup>234</sup> *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949); Comment, *SEC Enforcement of the Rule 10b-5 Duty to Disclose Material Information — Remedies and the Texas Gulf Sulphur Case*, 65 MICH. L. REV. 944, 961-62 n.92 (1967).



known to be false,<sup>235</sup> knowingly misrepresenting or being grossly careless or indifferent with respect to the truth of facts represented,<sup>236</sup> taking an action after the SEC has warned that the action will violate the law,<sup>237</sup> and deliberately ignoring that which one has a duty to know and recklessly stating facts about matters of which he is ignorant.<sup>238</sup> These cases appear to adopt reckless or knowing conduct as the standard for ascertaining willful behavior. Other authorities expanded on the meaning of "intentionally committing the act," and suggested that the respondent acted "intentionally" if he was aware of what he was doing,<sup>239</sup> or if the facts pointed to a violation and he nevertheless had an intent to perform the violative acts.<sup>240</sup> After *Hochfelder*, reckless or knowing seems to remain the standard by which willfulness is judged in SEC administrative proceedings.<sup>241</sup>

An issue which has not been fully analyzed by any court is the relationship between willfulness in the administrative context and the level of culpability needed to establish a 10b-5 breach in a private damage action or an SEC enforcement action.<sup>242</sup> Section 15(b)(4)(D) permits the SEC to sanction a respondent only if he "willfully violated" 10b-5 or some other provision. Therefore, the SEC must find that a specific provision of the securities laws was

<sup>235</sup> *Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798, 803 (D.C. Cir. 1965).

<sup>236</sup> *Dlugash v. SEC*, 373 F.2d 107, 109 (2d Cir. 1967).

<sup>237</sup> *Hughes v. SEC*, 174 F.2d 969, 977 (D.C. Cir. 1949). See also *Alexander Smith*, 22 S.E.C. 13, 19 (1946).

<sup>238</sup> *Hanly v. SEC*, 415 F.2d 589, 596 (2d Cir. 1969); *Dlugash v. SEC*, 373 F.2d 107, 109 (2d Cir. 1967). Furthermore, neither an attorney's opinion, *Shearson, Hammill & Co.*, 42 S.E.C. 811, 821 (1965), nor approval of state securities officials, *Associated Investors Securities, Inc.*, 41 S.E.C. 160, 169 (1962), necessarily negated willfulness.

<sup>239</sup> *Cady, Roberts & Co.*, 40 S.E.C. 907, 917 (1961); *Bruns, Nordeman & Co.*, 40 S.E.C. 652, 659 (1961); *MacRobbins & Co.*, 40 S.E.C. 497, 505 n.22 (1961), *remanded sub nom. Kahn v. SEC*, 297 F.2d 112 (2d Cir. 1961) and *Berko v. SEC*, 297 F.2d 116 (2d Cir. 1961); *Van Alstyne, Noel & Co.*, 33 S.E.C. 311, 339 n.27 (1952); *Mayflower Sec. Co. v. Bureau of Sec.*, 64 N.J. 85, 91, 312 A.2d 497, 500 (Sup. Ct. 1973); Case Comment, *A New Concept of Fraud on the Securities Exchange — A Comment on In re Cady Roberts & Co.*, 15 S.C. L. REV. 557, 568 n.37 (1963).

<sup>240</sup> See *SEC v. National Student Marketing Corp.*, 360 F. Supp. 284, 298 n.43 (D.D.C. 1973); *Associated Investors Sec., Inc.*, 41 S.E.C. 160, 169 (1962). Moreover, the second circuit appeared willing to accept negligence as the touchstone for willfulness. *Gross v. SEC*, 418 F.2d 103, 107 (2d Cir. 1969) (knew or should have known of illegal acts); *Dlugash v. SEC*, 373 F.2d 107, 109 (2d Cir. 1967) (knew or should have known; later speaks of recklessness); cf. S. REP. No. 379, 88th Cong., 1st Sess. (1963) (cannot willfully aid and abet if did not know and had no reasonable cause to know).

<sup>241</sup> *Edward J. Mawood & Co. v. SEC*, No. 77-1495 (10th Cir. Jan. 24, 1979); *Wasson v. SEC*, 558 F.2d 879, 887 (8th Cir. 1977); *Investors Research Corp., Administrative Proceeding File No. 3-4669* (initial decision of Administrative Law Judge) (July 19, 1976) (no change as a result of *Hochfelder*).

<sup>242</sup> See *JACOBS*, *supra* note 20, §§ 63, 118, 141.01.

violated *and* that the violation was willful. The requirement that the violation be willful clearly creates an added burden on the SEC when it seeks to sanction persons who breach provisions making innocent conduct actionable, such as section 12(1) of the 1933 Act.<sup>243</sup> On the other hand, where the SEC seeks to sanction offenders of 10b-5, the requirement that the violation be willful may or may not present additional difficulty. Although proof of scienter is still required in private damage actions,<sup>244</sup> it appears that, at least in some circuits, negligence is now sufficient in SEC enforcement actions.<sup>245</sup> Thus, to sanction an offender of 10b-5, the SEC will be required to find a greater degree of culpability than is needed to make out a violation of the Rule in an enforcement action. In this situation, therefore, it may be less burdensome for the SEC to uphold the Act by seeking a district court injunction than by utilizing its administrative powers against the broker-dealer.

Section 15(b)(4)(E) of the 1934 Act<sup>246</sup> permits the SEC to impose sanctions upon a person who *either* (1) "willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision" of the 1933 Act, the 1934 Act, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or the rules and regulations promulgated under any of those statutes *or* (2) fails reasonably to supervise a person who commits such a violation. It is apparent that the statute requires that the aiding, abetting, or other conduct by the person to be disciplined be willful. A literal reading of the section, however, does not mandate that the primary violation itself be willful. Similarly, a literal reading of section 15(b)(4)(E) does not require that either the failure to supervise or the violation of law by the supervised person be willful.<sup>247</sup>

Section 15(b)(6), as already noted, permits the SEC to impose penalties on persons who are associated, or who are seeking to be-

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<sup>243</sup> 15 U.S.C. § 77(e)(1) (1976).

<sup>244</sup> Ernst & Ernst v. Hochfelder, 425 U.S. 185, 201 (1976).

<sup>245</sup> See SEC v. Aaron, No. 77-6091, (2d Cir. Mar. 12, 1979); SEC v. Arthur Young & Co., No. 77-1768 (9th Cir. Feb. 1, 1979); SEC v. World Radio Mission, 544 F.2d 535, 540-41 (1st Cir. 1976); SEC v. Geotek, 426 F. Supp. 715, 726 (N.D. Cal. 1976); cf. SEC v. Coven, 581 F.2d 1020, 1027-28 (2d Cir. 1978), *cert. denied*, 47 U.S.L.W. 3586 (Mar. 5, 1979) (§ 17(a) enforcement action). *But see* SEC v. Blatt, 583 F.2d 1325, 1333-34 (5th Cir. 1978); SEC v. Cenco, Inc., 436 F. Supp. 193, 200 (N.D. Ill. 1977).

<sup>246</sup> 15 U.S.C. § 78o(b)(4)(E) (1976).

<sup>247</sup> For a discussion of a broker-dealer's duty to reasonably supervise, see JACOBS, *supra* note 20, § 214.02. Section 15(b)(4)(F) permits the SEC to impose sanctions if the broker-dealer is subject to an order under § 15(b)(6) "barring or suspending the right of such person to be associated with a broker or dealer."

come associated, with a broker or a dealer.<sup>248</sup> The grounds for ordering such sanctions are subsections (A), (B), (C), (D), and (E) of section 15(b)(4), discussed above.

Upon finding a ground for sanctioning a person under section 15(b)(4) or 15(b)(6),<sup>249</sup> the SEC may impose any of the enumerated sanctions which it finds to be in the public interest. In selecting the proper sanction, the SEC has deemed the following factors to be mitigating: that the offender had not previously been the subject of a disciplinary action by the SEC,<sup>250</sup> or of any other proceeding or action brought by or on behalf of the SEC,<sup>251</sup> had a good prior record in the securities business for a substantial period of time,<sup>252</sup> had voluntarily reported its financial problems at the earliest opportunity and had taken every possible step to correct them,<sup>253</sup> and had ceased to engage in those transactions that were the subject of the proceedings after a short period of time.<sup>254</sup> Other facts considered significant were that: only one transaction was involved;<sup>255</sup> the offense was novel;<sup>256</sup> the events giving rise to the proceedings were initiated by other parties;<sup>257</sup> the violative conduct represented the respondent's first venture in the securities business;<sup>258</sup> the conduct subject to question was wholly managerial in nature;<sup>259</sup> any profits

<sup>248</sup> See notes 191-96 and accompanying text *supra*.

<sup>249</sup> Where the sanction is severe, it has been held that the SEC must find a 10b-5 violation based on clear and convincing evidence before it may discipline a person pursuant to § 15(b)(4) or 15(b)(6). *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 824 (D.C. Cir. 1977). This degree of persuasion is much higher than "a mere preponderance of the evidence," but is less than "beyond a reasonable doubt." *Id.*

<sup>250</sup> *Dow Theory Letters, Inc.*, Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855.

<sup>251</sup> *Morton Schimmel, Esq.*, Exchange Act Release No. 12,254 (March 25, 1976), 9 SEC DOCKET 262.

<sup>252</sup> *Gilbert F. Tuffli, Jr.*, Exchange Act Release No. 12,534 (June 10, 1976), 9 SEC DOCKET 845; *Steadman Securities Corp.*, Administrative Proceeding File No. 3-3101 (Dec. 20, 1974) (initial decision), reported in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 80,038, at 84,867.

<sup>253</sup> *Edward C. Jaegerman*, Exchange Act Release No. 12,905 (Oct. 19, 1976), 10 SEC DOCKET 728.

<sup>254</sup> *Olde & Co.*, Exchange Act Release No. 11,952 (Dec. 24, 1975), 8 SEC DOCKET 895.

<sup>255</sup> *Gilbert F. Tuffli, Jr.*, Exchange Act Release No. 12,534 (June 10, 1976), 9 SEC DOCKET 845.

<sup>256</sup> *Black & Co.*, Administrative Proceeding File No. 3-3460, (July 12, 1974) (initial decision), reprinted in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79,921, at 84,389.

<sup>257</sup> *Olde & Co.*, Exchange Act Release No. 11,952 (Dec. 24, 1975), 8 SEC DOCKET 895.

<sup>258</sup> *Bruce William Zimmerman*, Exchange Act Release No. 12,690 (Aug. 5, 1976), 10 SEC DOCKET 175.

<sup>259</sup> *Midland Securities Corp.*, Exchange Act Release No. 13,139 (Jan. 6, 1977), 11 SEC DOCKET 1366; *Jerome H. Shapiro*, Exchange Act Release No. 12,615 (July 12, 1976), 10 SEC DOCKET 10.

realized in connection with the transactions which were the subject of the proceeding were insubstantial<sup>260</sup> and no client appeared to have suffered economic loss;<sup>261</sup> the offender himself suffered substantial financial losses;<sup>262</sup> the drop in the market price of the securities was "unforeseen and unforeseeable;"<sup>263</sup> the offender relied on the advice of counsel<sup>264</sup> or on his firm's investigative activities;<sup>265</sup> the offender willingly let himself be used to further the schemes of others;<sup>266</sup> and the offender fully cooperated with the staff of the SEC in connection with the investigation preceding the administrative proceedings.<sup>267</sup> Certain preventive measures agreed to by the offender which worked to mitigate the sanctions imposed by the SEC included: the addition of a new procedure designed to ensure that future transactions of the same nature will not escape detection,<sup>268</sup> compliance with the undertakings specified in the broker-dealer's offer of settlement,<sup>269</sup> participation in a program of continuing education,<sup>270</sup> and submission to a particular review of the offender's operations.<sup>271</sup> Other corrective actions which have mitigated against sanctions were an investment adviser's promise not to (i) recommend the purchase of a security which it had purchased for its own account within the preceding three months, or (ii) sell any security for its own account if such security was previously recommended for purchase by them unless a sell recommendation also was made to the clients,<sup>272</sup> and a broker-dealer's promise to make restitution or

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<sup>260</sup> Dow Theory Letters, Inc., Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855.

<sup>261</sup> *Id.*; Edward C. Jaegerman, Exchange Act Release No. 12,905 (Oct. 19, 1976), 10 SEC DOCKET 728.

<sup>262</sup> Edward C. Jaegerman, Exchange Act Release No. 12,905 (Oct. 19, 1976), 10 SEC DOCKET 728.

<sup>263</sup> *Id.*

<sup>264</sup> First National Bank, Investment Company Act Release No. 7,859 (June 13, 1973), 1 SEC DOCKET 22, 22; D.F. Bernheimer & Co., 41 S.E.C. 358, 364 n.7 (1963); N. Pinsker & Co., 40 S.E.C. 285, 289 (1960).

<sup>265</sup> Gilbert F. Tuffli, Jr., Exchange Act Release No. 12,534 (June 10, 1976), 9 SEC DOCKET 845.

<sup>266</sup> Joseph Elkind, Exchange Act Release No. 12,485 (May 26, 1976), 9 SEC DOCKET 736.

<sup>267</sup> Dow Theory Letters, Inc., Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855.

<sup>268</sup> Paine, Webber, Jackson & Curtis Inc., Exchange Act Release No. 12,223 (Mar. 17, 1976); Thomson & McKinnon, 35 S.E.C. 451, 459-60 (1953).

<sup>269</sup> Bache & Co., Exchange Act Release No. 11,958 (Dec. 29, 1975), 8 SEC DOCKET 898.

<sup>270</sup> Rudolph, Paltz & Co., Accounting Series Release No. 191 (Mar. 30, 1976), 9 SEC DOCKET 363.

<sup>271</sup> *Id.*

<sup>272</sup> Dow Theory Letters, Inc., Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855.

a bona fide rescission offer.<sup>273</sup>

A person aggrieved by a final order of the SEC under either section 15(b)(4) or 15(b)(6) can appeal to a federal circuit court of appeals.<sup>274</sup> The SEC's findings of fact will be conclusive if supported by substantial evidence.<sup>275</sup> Since the SEC has discretion in ordering what it believes is the proper sanction, a reviewing court will reverse the sanction only if it finds a gross abuse of discretion.<sup>276</sup> A respondent cannot successfully challenge a sanction on the ground that others were less severely disciplined.<sup>277</sup>

### B. *Disciplining Investment Advisers*

In 1975, Congress amended the Investment Advisers Act of 1940 with the result that sections 203(e) and 203(f)<sup>278</sup> now correspond in almost every respect to sections 15(b)(4) and 15(b)(6) of the 1934 Act. The obvious distinction is that the Investment Advisers Act allows the SEC to discipline investment advisers, while the 1934 Act permits the SEC to sanction brokers and dealers. It follows then that the discussion of sections 15(b)(4) and 15(b)(6) applies as well to sections 203(e) and 203(f).<sup>279</sup>

Among the sanctions which have been imposed upon investment advisers are: a bar from association with any investment adviser,<sup>280</sup> revocation of investment adviser registration,<sup>281</sup> and permanent prohibition "from serving or acting as an employee, officer, director, member of an advisory board, investment adviser or depositor of, or principal underwriter for, a registered investment com-

<sup>273</sup> Shearson, Hammill & Co., 42 S.E.C. 811, 852 (1965); A.M. Kidder & Co., 37 S.E.C. 58, 60 (1956); Irving N. Dennis, 34 S.E.C. 338, 341 n.5 (1952); Hammill & Co., 28 S.E.C. 634, 643 (1948); Ver Hulst & Co., 11 S.E.C. 310, 312-13 (1942).

<sup>274</sup> See 15 U.S.C. § 78y(a)(1) (1976).

<sup>275</sup> See *id.* § 78y(a)(4). For cases construing this section, see *Pierce v. SEC*, 239 F.2d 160, 162 (9th Cir. 1956); *Norris & Hirshberg, Inc., v. SEC*, 177 F.2d 228, 230 (D.C. Cir. 1949); *Hughes v. SEC*, 174 F.2d 969, 974-75 (D.C. Cir. 1949).

<sup>276</sup> See *Tager v. SEC*, 344 F.2d 5, 9 (2d Cir. 1965).

<sup>277</sup> See *Dlugash v. SEC*, 373 F.2d 107, 110 (2d Cir. 1967).

<sup>278</sup> 15 U.S.C. §§ 80b-3(e), (f) (1976).

<sup>279</sup> See text accompanying notes 187-277 *supra*.

<sup>280</sup> Joseph P. D'Angelo, Investment Advisers Act Release No. 562 (Dec. 16, 1976), 11 SEC DOCKET 1263; Sereco, S.A., Investment Advisers Act Release No. 546 (Oct. 21, 1976), 10 SEC DOCKET 828; Charles H. Eldredge & Co., Investment Advisers Act Release No. 541 (Oct. 4, 1976), 10 SEC DOCKET 684.

<sup>281</sup> Sereco, S.A., Investment Advisers Act Release No. 546 (Oct. 21, 1976), 10 SEC DOCKET 828; Financial Management Corp., Investment Advisers Act Release No. 545 (Oct. 19, 1976), 10 SEC DOCKET 730; Charles H. Eldredge & Co., Investment Advisers Act Release No. 541 (Oct. 4, 1976), 10 SEC DOCKET 684; C.R. Richmond & Co., Investment Advisers Act Release No. 520 (June 10, 1976), 9 SEC DOCKET 846; Scherl, Egener & Bassuk, Inc., Investment Advisers Act Release No. 501 (Mar. 2, 1976), 9 SEC DOCKET 45.

pany or affiliated person of such investment adviser, depositor, or principal underwriter . . . .<sup>282</sup>

### C. *Disciplining Members of Self-Regulatory Agencies*

Sections 19(h)(2) and 19(h)(3) of the 1934 Act<sup>283</sup> authorize the SEC to discipline members, and persons associated with members, of a national securities exchange of the NASD.<sup>284</sup> In general, section 19(h)(2) permits the SEC, when such action is needed to protect investors or in the public interest, to suspend for up to twelve months or to expel a member from a national securities exchange or from the NASD, if the member is subject to an order under section 15(b)(4) of the 1934 Act,<sup>285</sup> or if the member willfully violated the 1933 Act, the 1934 Act, the Investment Advisers Act of 1940, the Investment Company Act of 1940, or any rule or regulation issued under those statutes.<sup>286</sup> Section 19(h)(3) grants the SEC the same authority over persons associated with a member of a national securities exchange or of the NASD, except that the reference to an order under section 15(b) is to one granted pursuant to subsection (6) rather than subsection (4) of that section.<sup>287</sup> The principles discussed regarding the SEC's power to discipline brokers, dealers, and persons associated with brokers or dealers are applicable here as well.<sup>288</sup> Thus, for example, the meaning of willfully, explored with reference to brokers and dealers, should also govern sanctions under sections 19(h)(2) and 19(h)(3).

### D. *Other SEC Administrative Remedies*

The provisions of the 1933 and 1934 Acts provide several additional avenues for SEC action. Section 19(h)(1) of the 1934 Act permits the Commission, if in the public interest or for the protection of investors, to suspend for up to 12 months, to revoke the registration of, to censure, or to impose limitations on the activities of a national securities exchange or the NASD if the Commission finds that the exchange or the NASD has violated or is unable to

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<sup>282</sup> Financial Management Corp., Investment Advisers Act Release No. 545 (Oct 19, 1976), 10 SEC DOCKET 730, 731.

<sup>283</sup> 15 U.S.C. §§ 78s(h)(2), (3) (1976).

<sup>284</sup> The statute speaks in terms of registered securities associations, but the NASD is presently the only registered securities association.

<sup>285</sup> For a discussion of § 15(b)(4), see text accompanying notes 187-277 *supra*.

<sup>286</sup> 15 U.S.C. 78s(h)(2) (1976).

<sup>287</sup> 15 U.S.C. 78s(h)(3) (1976).

<sup>288</sup> See text accompanying notes 187-277 *supra*.

comply with the 1934 Act or the rules or regulations thereunder.<sup>289</sup> Pursuant to section 12(j) of the 1934 Act,<sup>290</sup> the SEC can deny, suspend the effective date of, suspend for up to 12 months, or revoke the registration<sup>291</sup> of a security if the issuer failed to comply with any provision of the 1934 Act or the rules and regulations thereunder.<sup>292</sup> Section 8(d) of the 1933 Act also permits the Commission to issue a stop order suspending the effectiveness of a misleading registration statement.<sup>293</sup> Additionally, section 12(k) of the 1934 Act authorizes the Commission, in the public interest or for the protection of investors, summarily to suspend trading in a security for a period of up to 10 days;<sup>294</sup> the Supreme Court, however, has prohibited the Commission from tacking 10-day periods.<sup>295</sup> Section 21(a) of the 1934 Act<sup>296</sup> authorizes the Commission to investigate violations of the 1934 Act or the rules thereunder, and to publish a report of its findings. This remedy is seldom used and has been criticized as being ineffective.<sup>297</sup>

Finally, the SEC sometimes invokes Rule 2(e) of its Rules of Practice.<sup>298</sup> Under Rule 2(e), the privilege of practicing before the Commission can, according to the Commission, be temporarily or permanently denied to an attorney, accountant, engineer, or other expert if, *inter alia*, (1) the SEC determines that he willfully violated 10b-5 or another provision of the securities laws, (2) a court enjoined him from violating 10b-5 or another federal securities law in an action brought by the SEC, or (3) the Commission in an administrative proceeding or a court in a judicial proceeding determined that he violated 10b-5 or another federal securities law.<sup>299</sup> The second circuit is presently considering the validity of Rule 2(e).

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<sup>289</sup> 15 U.S.C. § 78s(h)(i) (1976).

<sup>290</sup> *Id.* § 78l(j) (1976).

<sup>291</sup> For a discussion of the registration of securities under § 12 of the Exchange Act, see JACOBS, *supra* note 20, § 3.02[g] & nn.10 & 11.

<sup>292</sup> *See, e.g.*, Western Orbis Co., Exchange Act Release No. 13,610 (June 9, 1977), 12 SEC DOCKET 772.

<sup>293</sup> 15 U.S.C. § 77h(d) (1976).

<sup>294</sup> *Id.* § 77l(k) (1976).

<sup>295</sup> SEC v. Sloan, 436 U.S. 103, 106 (1978).

<sup>296</sup> *Id.* § 78u(a) (1976).

<sup>297</sup> *See Comment, SEC Enforcement of the Rule 10b-5 Duty to Disclose Material Information — Remedies and the Texas Gulf Sulphur Case*, 65 MICH. L. REV. 944, 962 (1967).

<sup>298</sup> 17 C.F.R. § 201.2(e) (1977).

<sup>299</sup> *Id.* An additional ground for temporary or permanent denial of the privilege of practicing before the SEC is that the person has been disqualified by the state which licensed him to practice. *Id.* Cases in which accountants have been permanently disqualified from appearing or practicing before the Commission include E. Veon Scott, Accounting Series Release No. 204 (Jan. 7, 1977), 11 SEC DOCKET 1413; Phillip Shelby Merkatz, Accounting Series Release No. 202 (Nov. 24, 1976), 10 SEC DOCKET 1019. Noteworthy among the cases perma-

## IV. REMEDIES BY CONSENT OF THE PARTIES

Fundamental to the effective functioning of a judicial or administrative system is the ability of the parties to achieve enforcement of the law by agreement, thus eliminating the need for full-term prosecution of every case. Accordingly, the SEC frequently settles with defendants in court actions and respondents in administrative proceedings. To the practitioner, therefore, knowledge of the remedies which are available and have been acquiesced in by the SEC in prior proceedings provides a most useful tool. The settlement in a court case will take the form of a consent decree and, in some cases, a court-approved undertaking.<sup>300</sup>

For example, the SEC may agree to dismiss a court action against a company if the company consents to the entry of a judgment enjoining the company from further violations, and to an undertaking to appoint two directors satisfactory to the SEC. In administrative proceedings the settlement is simply evidenced by the respondent's consent to the imposition of specified sanctions. Thus, a brokerage firm may agree to suspend its operations for a stated period of time.<sup>301</sup>

In addition to greasing the wheels of judicial expedience, termination of a court case or administrative proceeding by consent yields advantages for both the SEC and the defendant-respondent. The SEC has neither the manpower nor the budget to litigate all its cases, and it obtains relief sooner than if the case were fully adjudicated. The defendant-respondent reaps different advantages: litigation expenses are reduced; the disruption of business is reduced; the possibility of harsher penalties is avoided; the SEC's discovery, which might uncover information available for use against the defendant-respondent in private actions arising out of the same conduct, is limited or avoided; and the application of collateral estoppel in subsequent private actions based on findings in the SEC enforcement case is eliminated.<sup>302</sup> Moreover, the defendant-

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nently disqualifying attorneys from appearing or practicing before the Commission is Edward C. Jaegerman, Exchange Act Release No. 13,513 (May 6, 1977), 12 SEC DOCKET 372.

<sup>300</sup> See SEC v. Aminex Resources Corp., Litigation Release No. 8,426 (June 1, 1978), 14 SEC DOCKET 1275 (consent decree); SEC v. Union Planters Corp., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,003 (W.D. Tenn. 1975) (undertaking).

<sup>301</sup> See Bache & Co., Exchange Act Release No. 11,958 (Dec. 29, 1975), 8 SEC DOCKET 898.

<sup>302</sup> In *Parklane Hosiery Co., Inc. v. Shore*, 99 S.Ct. 645 (1979), the Supreme Court held that collateral estoppel may be invoked in a private action to bar the defendant from relitigating issues determined in an SEC enforcement trial, despite the loss of the right to a jury in the SEC action. *Id.* Thus, a defendant is well-advised to avoid a trial in an enforcement action where subsequent private damages actions are likely.



respondent can so consent without making any admissions or denials of the SEC's allegations. If a prospective defendant or respondent negotiates a settlement before the complaint is filed or the administrative proceeding commenced, additional benefits may be realized. Adverse publicity is kept to a minimum since the commencement of the action (or the proceeding) and the settlement are announced at the same time;<sup>303</sup> the SEC's staff will not file an affidavit in court in support of a motion for a preliminary injunction which may set forth troublesome facts; the SEC may be persuaded to drop certain charges<sup>304</sup> and change the language of others; and the offender may be able to negotiate with the SEC not to have certain persons named as defendants.

The remainder of this section explores the remedies to which defendants and respondents have consented. It is important to keep in mind that these remedies are not necessarily available in contested cases or proceedings.<sup>305</sup> Additionally, a court will not grant relief from a remedy to which a party consented merely because the remedy could not have been imposed in a litigated case or proceeding.<sup>306</sup>

#### A. Court Cases

The consent remedies which have been approved by courts vary according to whether the defendant is a corporation or an individual. When the defendant is a corporation, the remedies include monetary payments, special corporate procedures designed to prevent future violations, and replacement in whole or in part of existing management. Monetary payments and limitations on the defendant's activities have been awarded when the defendant is other than a corporation. A temporary restraining order,<sup>307</sup> preliminary injunction<sup>308</sup> or permanent injunction<sup>309</sup> also are available to inhibit

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<sup>303</sup> See, e.g., SEC v. Ranchers Packing Corp., Litigation Release No. 8,240 (Jan. 4, 1978), 13 SEC DOCKET 1330.

<sup>304</sup> See, e.g., SEC v. R.D. Philpot Indus., Inc., Litigation Release No. 8,239 (Dec. 30, 1977), 13 SEC DOCKET 1329.

<sup>305</sup> See notes 2-299 and accompanying text *supra*.

<sup>306</sup> See Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188, 1193 & n.38 (1975).

<sup>307</sup> See, e.g., SEC v. Aminex Resources Corp., Litigation Release No. 8,316 (Mar. 13, 1978), 14 SEC DOCKET 496; Omega Financial Group, Inc., Litigation Release No. 7,687 (Dec. 7, 1976), 11 SEC DOCKET 1157; SEC v. Institutional Sec., Inc., Litigation Release No. 7,601 (Oct. 5, 1976), 10 SEC DOCKET 686; SEC v. First Omaha Sec. Corp., Litigation Release No. 7,576 (Sept. 21, 1976), 10 SEC DOCKET 543.

<sup>308</sup> See, e.g., SEC v. Ginter, Litigation Release No. 7,730 (Jan. 6, 1977), 11 SEC DOCKET 1403; SEC v. J. Tex Petroleum Corp., Litigation Release No. 7,575 (Sept. 21, 1976), 10 SEC

the future conduct of any defendant. Some of these remedies are also available in litigated SEC cases.<sup>310</sup>

### 1. Corporations

Monetary disgorgement of a corporate defendant is the most common form of relief in contested court actions<sup>311</sup> and in those terminated by a consent decree. The distinct advantage of disgorgement by consent is that the corporate defendant is able to negotiate the amount to be disgorged, whereas the court in a contested case will order disgorgement of the entire profits. Disgorgement pursuant to an agreement between the SEC and a corporation may take various forms in court cases. The simplest disgorgement orders have required the payment of a sum of money in restitution,<sup>312</sup> payment to persons who sold shares to the defendant,<sup>313</sup> payment of a specified sum of money to a former limited partner,<sup>314</sup> and payment of all proceeds realized by virtue of defendant's sales to the public.<sup>315</sup> Substitutionary forms of disgorgement have included voiding the conversion of defendant's Class A stock into common stock,<sup>316</sup> void-

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DOCKET 542; SEC v. Reclamation Dist. No. 2090, Litigation Release No. 7,547 (Sept. 2, 1976), 10 SEC DOCKET 401; SEC v. American Petroleum, Inc., Litigation Release No. 7,485 (July 8, 1976), 9 SEC DOCKET 1077; SEC v. Dal-Tex Petroleum Corp., Litigation Release No. 7,260 (Feb. 4, 1976), 8 SEC DOCKET 1227; SEC v. Continental Gold & Silver Corp., Litigation Release No. 7,250 (Jan. 26, 1976), 8 SEC DOCKET 1177.

<sup>309</sup> See, e.g., SEC v. International Postal Sys., Inc., Litigation Release No. 8,373 (Apr. 14, 1978), 14 SEC DOCKET 856; SEC v. Five Star Coal Co., Litigation Release No. 8,319 (Mar. 13, 1978), 14 SEC DOCKET 497; SEC v. Intercontinental Diversified Corp., Litigation Release No. 8,245 (Jan. 6, 1978), 13 SEC DOCKET 1376; SEC v. General Oil, Inc., Litigation Release No. 8,165 (Oct. 21, 1977), 13 SEC DOCKET 502; SEC v. Continental Gold & Silver Corp., Litigation Release No. 7,223 (Dec. 30, 1975), 8 SEC DOCKET 953; SEC v. Empire Properties, Inc., Litigation Release No. 7,219 (Dec. 29, 1975), 8 SEC DOCKET 951; SEC v. Generics Corp., Litigation Release No. 7,218 (Dec. 29, 1975), 8 SEC DOCKET 951; SEC v. Arnold Nelson, Litigation Release No. 7,215 (Dec. 29, 1975), 8 SEC DOCKET 949.

<sup>310</sup> See notes 2-178 and accompanying text *supra*.

<sup>311</sup> See notes 95-129 and accompanying text *supra*.

<sup>312</sup> SEC v. Aminex Resources Corp., Litigation Release No. 8,426 (June 1, 1978), 14 SEC DOCKET 1275 (\$1.24 million); SEC v. Weston Int'l Corp., Litigation Release No. 7,378 (April 29, 1976), 9 SEC DOCKET 537 (\$1 million).

<sup>313</sup> SEC v. Blue Chip Stamps, Litigation Release No. 7,437 (June 9, 1976), 9 SEC DOCKET 867 (\$298,000).

<sup>314</sup> SEC v. Goodman Sec. Corp., Litigation Release No. 7,567 (Sept. 17, 1976), 10 SEC DOCKET 540.

<sup>315</sup> SEC v. Brigadoon Scotch Distribs., Ltd., Litigation Release No. 7,244 (Jan. 19, 1976), 8 SEC DOCKET 1136; *accord*, SEC v. Bank of Credit & Commerce Int'l, S.A., Litigation Release No. 8,336 (Mar. 20, 1978), 14 SEC DOCKET 579; SEC v. Five Star Coal Co., Litigation Release No. 8,319 (Mar. 13, 1978), 14 SEC DOCKET 497; SEC v. First Liberty Corp., Litigation Release No. 8,268 (Jan. 23, 1978), 14 SEC DOCKET 61.

<sup>316</sup> SEC v. PRF Corp., Litigation Release No. 7,408 (May 24, 1976), 9 SEC DOCKET 753.

ing the approval by shareholders of a plan to purchase common stock,<sup>317</sup> and offering rescission rights to those who tendered shares in response to a cash tender offer.<sup>318</sup> Other methods of substantive disgorgement which have been consented to require the defendant to place in an escrow account the proceeds from any future sales of its securities and not to withdraw those proceeds prior to the issuance of stock certificates to the purchasers thereof,<sup>319</sup> to assign a percentage of its cash flow from future land sales in its real estate development to a trustee to be held for the benefit of note purchasers,<sup>320</sup> to phase in a rescission of the franchise purchase price to franchise owners who elect to withdraw,<sup>321</sup> and to modify a trust agreement with one of the limited partners.<sup>322</sup>

In addition to the substantive aspect of disgorgement orders, certain supplemental action is often agreed upon to assure compliance with the decree. Thus, consent decrees have called for the defendant to freeze its assets except for the purpose of complying with the court's restitution order,<sup>323</sup> to freeze the assets in the accounts on deposit with it of certain of the other defendants in the action,<sup>324</sup> to maintain a letter of credit,<sup>325</sup> and to appoint an accountant to render an accounting.<sup>326</sup> Consent orders have also provided for the filing of a report prepared by certified public accountants concerning claims recovered, approved and paid;<sup>327</sup> for the publishing of an appropriate notice of final judgment with written notice

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<sup>317</sup> *Id.*

<sup>318</sup> SEC v. Kodiak Indus., Litigation Release No. 7,622 (Oct. 28, 1976), 10 SEC DOCKET 831; *accord*, SEC v. Washington County Util. Dist., Litigation Release No. 8,410 (May 15, 1978), 14 SEC DOCKET 1155; SEC v. Taylor Realty Enterprises, Inc., Litigation Release No. 8,190 (Nov. 10, 1977), 13 SEC DOCKET 755.

<sup>319</sup> SEC v. Timkin, C.A., Litigation Release No. 7,532 (Aug. 24, 1976), 10 SEC DOCKET 309.

<sup>320</sup> SEC v. Empire Properties, Inc., Litigation Release No. 7,219 (Dec. 29, 1975), 8 SEC DOCKET 951.

<sup>321</sup> SEC v. Futuristic Foods, Inc., Litigation Release No. 7,407 (May 21, 1976), 9 SEC DOCKET 752.

<sup>322</sup> SEC v. Goodman Sec. Corp., Litigation Release No. 7,567 (Sept. 17, 1976), 10 SEC DOCKET 540.

<sup>323</sup> SEC v. Weston Int'l Corp., Litigation Release No. 7,378 (Apr. 29, 1976), 9 SEC DOCKET 537; *see* SEC v. Galaxy Inv. Advisory Serv., Inc., Litigation Release No. 8,264 (Jan. 23, 1978), 14 SEC DOCKET 59.

<sup>324</sup> SEC v. American Inst. Counselors, Inc., Litigation Release No. 7,475 (July 1, 1976), 9 SEC DOCKET 1011.

<sup>325</sup> *Id.*

<sup>326</sup> SEC v. General Financial Servs., Inc., Litigation Release No. 7,503 (July 23, 1976), 10 SEC DOCKET 138; *accord*, SEC v. Potomac Inv. Advisors, Ltd., Litigation Release No. 8,408 (May 10, 1978), 14 SEC DOCKET 1076.

<sup>327</sup> SEC v. Blue Chip Stamps, Litigation Release No. 7,437 (June 9, 1976), 9 SEC DOCKET 867.

to each seller;<sup>328</sup> and for an undertaking by the defendant not to assert any defense or claim based upon any statute of limitations in any action commenced by specified private parties.<sup>329</sup>

Since many 10b-5 violations occur as the result of a lack of concrete guidelines for the conduct of the corporation's activities, consent decrees frequently require a corporation to establish rules, regulations and policies. Defendants have agreed to "adopt, implement and maintain procedures reasonably calculated to prevent the recurrence of the activities alleged" in the complaint,<sup>330</sup> to prepare guidelines for investment and trading policies,<sup>331</sup> to "implement and maintain practices and procedures designed to prevent further violations of Regulation U,"<sup>332</sup> and to "adopt, within 60 days, implement and maintain a Statement of Policies and Procedures with respect to payments to any official or employee of any government unlawful under the laws of the United States or any foreign country."<sup>333</sup> Similarly, defendants have undertaken to educate employees to prevent recurrence of prohibited activity. Thus, a training program for the investment division personnel of a defendant corporation has been established,<sup>334</sup> while other defendants have agreed to circulate accounting policies and requirements<sup>335</sup> and "to insure that their officers and employees become and remain fully educated with respect to the requirements [of certain SEC regulations]."<sup>336</sup>

Courts often issue consent decrees under which a defendant agrees to refrain from engaging in certain activity. Specifically, corporations have been prohibited "from engaging in any business ac-

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<sup>328</sup> *Id.*; cf. SEC v. Unilith Enterprises, Inc., Litigation Release No. 8,265 (Jan. 23, 1978), 14 SEC DOCKET 59; SEC v. Randell, Litigation Release No. 8,251 (Jan. 11, 1978), 13 SEC DOCKET 1379.

<sup>329</sup> SEC v. American Financial Corp., Litigation Release No. 7,545 (Sept. 1, 1976), 10 SEC DOCKET 399.

<sup>330</sup> SEC v. Royal Indus., Inc., Litigation Release No. 7,651 (Nov. 16, 1976), 10 SEC DOCKET 981; SEC v. American Inst. Counselors, Inc., Litigation Release No. 7,475 (July 1, 1976), 9 SEC DOCKET 1011; SEC v. First Mortgage Investors, summarized in [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,274, at 98,394 (S.D. Fla. 1975).

<sup>331</sup> SEC v. Union Planters Corp., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,003, at 97,477 (W.D. Tenn. 1975).

<sup>332</sup> SEC v. Bank of California, Litigation Release No. 7,906 (May 5, 1977), 12 SEC DOCKET 338.

<sup>333</sup> SEC v. United Brands Co., Litigation Release No. 7,251 (Jan. 27, 1976), 8 SEC DOCKET 1177, 1178.

<sup>334</sup> SEC v. Union Planters Corp., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,003, at 97,477 (W.D. Tenn. 1975).

<sup>335</sup> *Id.*

<sup>336</sup> SEC v. United Americas Bank, Litigation Release No. 7,799 (Feb. 28, 1977), 11 SEC DOCKET 1914.

tivities with certain of the entities named" in the complaint;<sup>337</sup> from acquiring certain businesses unless their financial statements are accurate;<sup>338</sup> "from making any agreement, commitment or understanding . . . to make . . . any unlawful material payment of corporate funds or other value, directly or indirectly, to or for the benefit of any official or employee of any entity owned and/or controlled by any foreign government;"<sup>339</sup> and "from using or aiding and abetting the use of corporate funds . . . for unlawful political contributions, or other similar unlawful purposes."<sup>340</sup> Another area in which special corporate procedures have been required is record-keeping. Defendants have been enjoined, by consent, "from making or causing to be made, materially false or fictitious entries on [their] books and records, requiring the maintenance of adequate documents with respect to any unlawful payments to officials or employees of any foreign government and any unlawful political contribution."<sup>341</sup>

Review of certain corporate activity by senior corporate officers, independent professionals or the SEC is another special procedure contained in numerous consent agreements. Thus, courts have mandated annual review of the operations of the corporation's investment department to insure compliance with the applicable law,<sup>342</sup> the appointment of an independent accountant to audit prior years' financial statements,<sup>343</sup> the establishment of a committee of directors to review financial statements and press releases,<sup>344</sup> the appoint-

<sup>337</sup> SEC v. American Inst. Counselors, Inc., Litigation Release No. 7,475 (July 1, 1976), 9 SEC DOCKET 1011.

<sup>338</sup> SEC v. Lum's, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,504, at 95,764 (S.D.N.Y. 1974); *accord*, SEC v. American Financial Corp., Litigation Release No. 7,545 (Sept. 1, 1976), 10 SEC DOCKET 399; SEC v. Levitz Furniture Corp., [1972-1973 Transfer Binder] FED. SEC. L. REP. ¶ 93,510, at 92,481 (D.D.C. 1972).

<sup>339</sup> SEC v. Uniroyal, Inc., Litigation Release No. 7,759 (Jan. 27, 1977), 11 SEC DOCKET 1581, 1582.

<sup>340</sup> *Id.*; SEC v. Firestone Tire & Rubber Co., Litigation Release No. 7,386 (May 10, 1976), 9 SEC DOCKET 664, 664.

<sup>341</sup> SEC v. United Brands Co., Litigation Release No. 7,251 (Jan. 27, 1976), 8 SEC DOCKET 1177; *accord*, SEC v. Uniroyal, Inc., Litigation Release No. 7,759 (Jan. 27, 1977), 11 SEC DOCKET 1581; SEC v. Firestone Tire & Rubber Co., Litigation Release No. 7,443 (June 15, 1976), 9 SEC DOCKET 920; SEC v. General Tire & Rubber Co., Litigation Release No. 7,386 (May 10, 1976), 9 SEC DOCKET 664.

<sup>342</sup> SEC v. Union Planters Corp., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,003, at 97,477 (W.D. Tenn. 1975).

<sup>343</sup> SEC v. Equity Funding Corp., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,917, at 93,675 (C.D. Cal. 1973).

<sup>344</sup> SEC v. Mattel, Inc., *summarized in* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,754, at 96,486 (D.D.C. 1974).

ment of special counsel to review corporate publicity,<sup>345</sup> and the appointment of special counsel to ensure compliance with the consent decree.<sup>346</sup>

Consent decrees and related undertakings in court cases abound with requirements for reports to shareholders, for filing reports with the SEC and for amending or correcting such reports. Settlements have provided for the issuance of an annual report prior to each annual shareholders' meeting containing information in conformity with various provisions of the proxy rules<sup>347</sup> and issuance to shareholders of a summary report of the corporation's operations.<sup>348</sup> Many defendants agree, with respect to filing, to do that which the securities laws already require them to do, while others take on new reporting burdens. In the latter category, defendants have been required to provide periodic financial reports to present and prospective franchisees and to the Commission,<sup>349</sup> and to institute financial reporting requirements.<sup>350</sup> In the former category, defendants have consented to make filings with the Commission which are complete and accurate in all material respects,<sup>351</sup> to file Schedule 13D's with the Commission with respect to any acquisition of five percent or more of any equity security registered with the Commission pursuant to section 12 of the Exchange Act,<sup>352</sup> and "to file . . . Schedule 14D's with respect to any solicitation or recommendation . . . to . . . shareholders to accept or to reject a tender offer or request or invitation for tenders."<sup>353</sup> Other defendants have agreed to amend the relevant quarterly and annual reports filed with the Commission,<sup>354</sup> to amend prior reports which were misleading,<sup>355</sup> to "amend

<sup>345</sup> SEC v. Canadian Javelin Ltd., *summarized in* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,720, at 96,380 (S.D.N.Y. 1974).

<sup>346</sup> SEC v. Holiday Magic, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,526, at 95,818, 819 (N.D. Cal. 1974).

<sup>347</sup> SEC v. Readex Elec. Inc., Litigation Release No. 7,916 (May 11, 1977), 12 SEC DOCKET 418.

<sup>348</sup> *Id.*; *cf.* SEC v. Union Planters Corp., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,003, at 97,478 (W.D. Tenn. 1975); SEC v. Canadian Javelin Ltd., *summarized in* [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,720, at 96,380 (S.D.N.Y. 1974).

<sup>349</sup> SEC v. Futuristic Foods, Inc., Litigation Release No. 7,407 (May 21, 1976), 9 SEC DOCKET 752.

<sup>350</sup> SEC v. Weston Int'l Corp., Litigation Release No. 7,378 (Apr. 29, 1976), 9 SEC DOCKET 537.

<sup>351</sup> SEC v. Equity Funding Corp., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,917, at 93,676 (C.D. Cal. 1973); SEC v. Timkin, C.A., Litigation Release No. 7,532 (Aug. 24, 1976), 10 SEC DOCKET 309.

<sup>352</sup> SEC v. Milgo Elec. Corp., Litigation Release No. 7,771 (Feb. 7, 1977), 11 SEC DOCKET 1110.

<sup>353</sup> *Id.*

<sup>354</sup> SEC v. American Financial Corp., Litigation Release No. 7,545 (Sept. 1, 1976), 10 SEC DOCKET 399.

. . . Schedule 14D's filed with the Commission and to correct its statements to shareholders to assure that such filings and statements are complete and accurate and otherwise comply with the securities laws,"<sup>356</sup> to "amend . . . Schedule 14D filed with the Commission to reflect the institution of the Commission's action, the substance of the allegations in the complaint, and the relief entered by the Court,"<sup>357</sup> and to "correct and amend annual and other periodic reports currently on file with the Commission in accordance with the provisions of the federal securities laws with respect to unlawful payments to officials and employees of foreign governments and unlawful foreign political contributions by [the defendant]."<sup>358</sup>

Miscellaneous special procedures to which corporate defendants have consented include establishing and maintaining an "accounting reserve . . . against payment of any judgment in a legal proceeding brought . . . by reason of the manipulation,"<sup>359</sup> the appointment of a U.S. agent for the purpose of enforcing judgment,<sup>360</sup> appointment of a special counsel to file reports the corporation does not,<sup>361</sup> making certain corrected filings with the Commission and distributing them to shareholders,<sup>362</sup> making certain disclosures if a gambling casino is acquired,<sup>363</sup> and informing the SEC of how the consent decree is being implemented.<sup>364</sup>

The final category of sanctions which may be found in a consent decree or in the related undertaking by a corporation in a court case is the partial or complete replacement of a corporation's manage-

<sup>355</sup> SEC v. Canadian Javelin Ltd., summarized in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,720, at 96,380 (S.D.N.Y. 1974).

<sup>356</sup> SEC v. Royal Indus. Inc., Litigation Release No. 7,651 (Nov. 16, 1976), 10 SEC DOCKET 981.

<sup>357</sup> SEC v. Milgo Elec. Corp., Litigation Release No. 7,771 (Feb. 7, 1977), 11 SEC DOCKET 1110.

<sup>358</sup> SEC v. United Brands Co., Litigation Release No. 7,251 (Jan. 27, 1976), 8 SEC DOCKET 1177.

<sup>359</sup> SEC v. American Financial Corp., Litigation Release No. 7,545 (Sept. 1, 1976), 10 SEC DOCKET 399.

<sup>360</sup> SEC v. OSEC Petroleum, S.A., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,915, at 97,134 (D.D.C. 1974); SEC v. Canadian Javelin Ltd., summarized in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,720, at 96,380 (S.D.N.Y. 1974).

<sup>361</sup> SEC v. Equity Funding Corp. of America, [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,917, at 93,674-75 (C.D. Cal. 1973).

<sup>362</sup> SEC v. Kodiak Indus., Litigation Release No. 7,622 (Oct. 28, 1976), 10 SEC DOCKET 831.

<sup>363</sup> SEC v. Lum's, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,504, at 95,763-64 (S.D.N.Y. 1974).

<sup>364</sup> SEC v. Levitz Furniture Corp., [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,510, at 92,481 (D.D.C. 1972).

ment. The traditional remedies in this category have ranged from simple replacement of a single corporate officer<sup>365</sup> to the appointment of a receiver with wide-ranging powers to control and operate a corporation.<sup>366</sup> In recent years, however, the judiciary and the Commission have, with increasing frequency, fashioned or approved measures which decrease interference with a corporation's management while assuring compliance with the securities law which has been allegedly violated. Thus, remedies now include establishing various corporate committees or positions to oversee activity which is the subject of the underlying allegations, while leaving existing management intact.<sup>367</sup> Such action may integrate impartial personnel into new positions in the corporate hierarchy<sup>368</sup> or simply require the use of an independent source of advice and counselling.<sup>369</sup> A review of particular consent decrees and related undertakings approved by the courts illustrates this trend and demonstrates the variety of solutions acceptable to the SEC and the courts.

The most drastic of the traditional provisions have required the appointment of a receiver,<sup>370</sup> conservator,<sup>371</sup> or special master;<sup>372</sup> the replacement of a temporary receiver by an independent board of trustees and special counsel;<sup>373</sup> a reconstituted board of trustees to include a majority of independent trustees;<sup>374</sup> the appointment of a

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<sup>365</sup> SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>366</sup> SEC v. Key Energy Corp., Litigation Release No. 8,392 (Apr. 27, 1978), 14 SEC DOCKET 960.

<sup>367</sup> See SEC v. United Brands Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420, at 99,141 (D.D.C. 1976); SEC v. Holiday Magic, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,526, at 95,818-19 (N.D. Cal. 1974).

<sup>368</sup> See SEC v. Citizens & S. Realty Investors, Litigation Release No. 8,379 (Apr. 21, 1978), 14 SEC DOCKET 953.

<sup>369</sup> See SEC v. Maninvest Corp., Litigation Release No. 8,393 (May 1, 1978), 14 SEC DOCKET 1028.

<sup>370</sup> SEC v. Key Energy Corp., Litigation Release No. 8,392 (Apr. 27, 1978), 14 SEC DOCKET 960; SEC v. Charles A. Stephens Co., Litigation Release No. 7,968 (June 10, 1977), 12 SEC DOCKET 892; SEC v. Independence Drilling Corp., Litigation Release No. 7,613 (Oct. 20, 1976), 10 SEC DOCKET 774; SEC v. Landahl, Brown & Week Assocs., Litigation Release No. 7,330 (Mar. 25, 1976), 9 SEC DOCKET 294; SEC v. Brigadoon Scotch Distribs., Ltd., Litigation Release No. 7,244 (Jan. 19, 1976), 8 SEC DOCKET 1136; accord, SEC v. Wencke, Litigation Release No. 7,757 (Jan. 25, 1977), 11 SEC DOCKET 1580.

<sup>371</sup> SEC v. Lyons Oil Co., Litigation Release No. 7,645 (Nov. 12, 1976), 10 SEC DOCKET 978.

<sup>372</sup> SEC v. Wencke, Litigation Release No. 7,741 (Jan. 18, 1977), 11 SEC DOCKET 1542.

<sup>373</sup> SEC v. Lincoln Thrift Assoc., Litigation Release No. 7,450 (June 16, 1976), 9 SEC DOCKET 923.

<sup>374</sup> SEC v. Citizens & S. Realty Investors, Litigation Release No. 8,379 (Apr. 21, 1978), 14 SEC DOCKET 953; accord, SEC v. Canadian Javelin Ltd., summarized in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,720, at 96,380 (S.D.N.Y. 1974); see SEC v. Generics Corp., Litigation Release No. 7,224 (Jan. 2, 1976), 8 SEC DOCKET 1004.



new interim board of directors;<sup>375</sup> and the appointment of a new chief executive officer.<sup>376</sup> In fashioning more moderate sanctions, corporate counsels, the SEC and the courts have frequently agreed to the continued existence or establishment of integrated or independent regulatory-like positions such as an audit committee,<sup>377</sup> a management committee with responsibility for the corporation's investment division,<sup>378</sup> a special counsel to attend and call board meetings,<sup>379</sup> a special counsel to decide when the corporation should file a petition in bankruptcy,<sup>380</sup> an independent trustee to implement purchases for all employee stock plans,<sup>381</sup> a special committee of the board to investigate and report on matters contained in the SEC's complaint and other matters,<sup>382</sup> a litigation and claims committee to work with court-appointed special counsel,<sup>383</sup> a special agent to investigate the conversion or purchase of any stock,<sup>384</sup> a special counsel to bring suits,<sup>385</sup> and a committee of directors to

<sup>375</sup> SEC v. Equity Funding Corp., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,917, at 93,675 (C.D. Cal. 1973); see *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1339-40 (2d Cir.), cert. denied, 417 U.S. 932 (1974). Some settlements have called for the appointment of additional directors. See SEC v. First Mortgage Investors, summarized in [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,274, at 93,394 (S.D. Fla. 1975); SEC v. Mattel, Inc., summarized in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,754, at 96,486 (D.D.C. 1974); SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>376</sup> SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>377</sup> See SEC v. National Bank, Litigation Release No. 8,395 (May 3, 1978), 14 SEC DOCKET 1029; SEC v. Manivest Corp., Litigation Release No. 8,393 (May 1, 1978), 14 SEC DOCKET 1028; SEC v. American Elec. Power Co., Litigation Release No. 8,310 (Mar. 3, 1978), 14 SEC DOCKET 416; cf. SEC v. Martin, Litigation Release No. 8,624 (Dec. 21, 1978), 16 SEC DOCKET 582 (engage independent CPA "to conduct an annual limited audit to assess the integrity of investors' interest").

<sup>378</sup> SEC v. Union Planters Corp., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,003, at 97,477-78 (W.D. Tenn. 1975).

<sup>379</sup> SEC v. Holiday Magic, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,526, at 95,819 (N.D. Cal. 1974).

<sup>380</sup> *Id.* at 95,821-22.

<sup>381</sup> SEC v. Westinghouse Elec. Corp., Litigation Release No. 7,214 (Dec. 23, 1975), 8 SEC DOCKET 803.

<sup>382</sup> SEC v. United Brands Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420, at 99,141 (D.D.C. 1976); SEC v. Lockheed Aircraft Corp., Litigation Release No. 7,355 (Apr. 13, 1976), 9 SEC DOCKET 445.

<sup>383</sup> SEC v. Central & S.W. Corp., Litigation Release No. 8,358 (Apr. 3, 1978), 14 SEC DOCKET 690; SEC v. Generics Corp., Litigation Release No. 7,224 (Jan. 2, 1976), 8 SEC DOCKET 1004.

<sup>384</sup> SEC v. PRF Corp., Litigation Release No. 7,408 (May 24, 1976), 9 SEC DOCKET 753; accord, SEC v. United Brands Co., [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,420, at 99,141-42 (D.D.C. 1976).

<sup>385</sup> SEC v. Holiday Magic, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,526, at 95,818-19 (N.D. Cal. 1974); SEC v. Equity Funding Corp., [1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,917, at 93,674-75 (C.D. Cal. 1973).

determine the proper disposition of claims against former directors and officers.<sup>385</sup> Recent consent decrees addressing corporate management have also called for the formation of a new executive committee of the corporation's board of directors,<sup>387</sup> a prohibition on the conversion or purchase of stock unless the matter is submitted to shareholders and a majority approve,<sup>388</sup> a prohibition on the use of external advisers,<sup>389</sup> the voiding of proxies for the shareholders meeting,<sup>390</sup> the voiding of actions taken pursuant to proxies at the shareholders meeting,<sup>391</sup> a moratorium on the declaration of dividends until a judgment is satisfied,<sup>392</sup> a prohibition on expansion of the corporation's business,<sup>393</sup> and the filing of a chapter X bankruptcy reorganization petition.<sup>394</sup>

## 2. Individuals

The second class of remedies available through consent decrees and related undertakings in court cases concerns individuals who have allegedly violated 10b-5. These sanctions can be conveniently divided into disgorgement and limitations on activities. The latter category can be subdivided into those limitations which relate to management or voting and those that do not.

The most common form of disgorgement by consent requires the defendant to relinquish that which he has gained. Thus, defendants have agreed to pay a sum of money into court,<sup>395</sup> to pay a sum of money in restitution,<sup>396</sup> to reimburse and account for all transac-

<sup>385</sup> SEC v. Mattel, Inc., summarized in [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,754, at 96,486 (D.D.C. 1974).

<sup>387</sup> SEC v. First Mortgage Investors, summarized in [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,274, at 98,394 (S.D. Fla. 1975); SEC v. Levitz Furniture Corp., [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,510, at 92,481 (D.D.C. 1972).

<sup>388</sup> SEC v. PRF Corp., Litigation Release No. 7,408 (May 24, 1976), 9 SEC DOCKET 753.

<sup>389</sup> SEC v. First Mortgage Investors, summarized in [1975-1976 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 95,274, at 98,394 (S.D. Fla. 1975).

<sup>390</sup> SEC v. Florida E. Coast Ry., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,418, at 95,428 (D.D.C. 1974).

<sup>391</sup> *Id.*

<sup>392</sup> SEC v. Holiday Magic, Inc., [1973-1974 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,526, at 95,821 (N.D. Cal. 1974).

<sup>393</sup> *Id.*

<sup>394</sup> SEC v. Oil Field Drilling Corp., Litigation Release No. 4,577 (Apr. 1, 1970).

<sup>395</sup> SEC v. Cosmopolitan Investors Funding Co., Litigation Release No. 7,366 (Apr. 23, 1976), 9 SEC DOCKET 533 (\$10,000); SEC v. OSEC Petroleum, S.A., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,915, at 97,133 (D.D.C. 1974); SEC v. Rusco Indus., Inc., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,144, at 91,129 (S.D.N.Y. 1971).

<sup>396</sup> SEC v. Cosmopolitan Investors Funding Co., Litigation Release No. 8,419 (May 24, 1978), 14 SEC DOCKET 1217; SEC v. An-Car Oil Co., Litigation Release No. 7,885 (Apr. 21,

tions in question,<sup>397</sup> to "pay a specified sum of money to former limited partners,"<sup>398</sup> to "disgorge all proceeds realized by virtue of sales to the public of investments,"<sup>399</sup> to disgorge a sum of money and "post collateral satisfactory to the [SEC] to secure their payments,"<sup>400</sup> to pay monies not repaid on the corporation's loan,<sup>401</sup> and to reimburse the corporation for the difference between cost and either sales price or appraised value.<sup>402</sup> In addition to monetary disgorgement, individuals have agreed to rescind purchases of stock,<sup>403</sup> to "forgive certain limited partnership debts,"<sup>404</sup> to "forfeit certain general partnership interests,"<sup>405</sup> and to undertake "to forbear from receiving any assets, properties or monies of [the corporate employer] in any distribution they would be entitled to participate in as security holders or creditors."<sup>406</sup> Finally, it should be noted that consent decrees have sometimes required a defendant to freeze his personal assets, "except for the purpose of complying with the court's restitution order,"<sup>407</sup> or to post collateral to secure agreed upon payments.<sup>408</sup>

Allegations of 10b-5 violations often are lodged against individuals within the corporate hierarchy. The settlements which have been consented to in such cases can be limited or broad. Defendants have agreed not to serve on the board of directors of specified corpo-

1977), 12 SEC DOCKET 73; SEC v. Weston Int'l Corp., Litigation Release No. 7,378 (Apr. 29, 1976), 9 SEC DOCKET 537.

<sup>397</sup> SEC v. Hurwitz, Litigation Release No. 7,451 (June 16, 1976), 9 SEC DOCKET 923.

<sup>398</sup> SEC v. Goodman Sec. Corp., Litigation Release No. 7,567 (Sept. 17, 1976), 10 SEC DOCKET 540.

<sup>399</sup> SEC v. Brigadoon Scotch Distribs., Ltd., Litigation Release No. 7,244 (Jan. 19, 1976), 8 SEC DOCKET 1136; *see* SEC v. Silverberg, Litigation Release No. 8,625 (Dec. 22, 1978), 16 SEC DOCKET 583; SEC v. Manderano, Litigation Release No. 8,342 (Mar. 22, 1978), 14 SEC DOCKET 583; SEC v. Correa, Litigation Release No. 8,267 (Jan. 23, 1978), 14 SEC DOCKET 60.

<sup>400</sup> SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>401</sup> SEC v. Rusco Indus., Inc., [1970-1971 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,144, at 91,129 (S.D.N.Y. 1971).

<sup>402</sup> *Id.* at 91,129-30.

<sup>403</sup> SEC v. Silverberg, Litigation Release No. 8,625 (Dec. 22, 1978), 16 SEC DOCKET 583; SEC v. Baum, Litigation Release No. 8,306 (Feb. 28, 1978), 14 SEC DOCKET 296; SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>404</sup> SEC v. Goodman Sec. Corp., Litigation Release No. 7,567 (Sept. 17, 1976), 10 SEC DOCKET 540.

<sup>405</sup> *Id.*

<sup>406</sup> SEC v. Giant Stores Corp., Litigation Release No. 7,546 (Sept. 2, 1976), 10 SEC DOCKET 400.

<sup>407</sup> SEC v. Weston Int'l Corp., Litigation Release No. 7,378 (Apr. 29, 1976), 9 SEC DOCKET 537.

<sup>408</sup> SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

rations or as a trustee of an employee pension plan,<sup>409</sup> not to hold any position as an officer or director of specified corporations,<sup>410</sup> to be removed as an officer and director,<sup>411</sup> to be removed as a director,<sup>412</sup> and to undertake "not to exercise control or influence over the affairs of [a corporation], except through participation in [court proceedings]."<sup>413</sup> In more egregious circumstances, individual defendants have agreed not to be associated as an officer or director with *any* public company,<sup>414</sup> not to assume "a position as either an officer or director of any public company, except upon a showing satisfactory to the court that measures have been taken to prevent the conduct alleged in the Commission's complaint or conduct of similar object or purport,"<sup>415</sup> and "not to be associated with any corporation whose securities are publicly held as an officer, director, or, with respect to certain financial responsibilities, [as] an executive or like capacity."<sup>416</sup> An individual may also affect the management of a corporation by the manner in which his shareholder voting rights are exercised. Accordingly, individual defendants have agreed not to vote certain securities,<sup>417</sup> not to vote in a proposed merger,<sup>418</sup> not to vote or influence "the voting of any shares of [the corporation] in which he has or had a record or beneficial interest,"<sup>419</sup> not to vote on whether the corporation's stock should be delisted from any national securities exchange,<sup>420</sup> to give an irrevocable proxy to

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<sup>409</sup> Litigation Release No. 7,318 (Mar. 18, 1976).

<sup>410</sup> SEC v. Hurwitz, Litigation Release No. 7,451 (June 16, 1976), 9 SEC DOCKET 923; SEC v. Generics Corp., Litigation Release No. 7,270 (Feb. 10, 1976), 8 SEC DOCKET 1291.

<sup>411</sup> SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>412</sup> *Id.*

<sup>413</sup> SEC v. American Inst. Counselors, Inc., Litigation Release No. 7,508 (Aug. 2, 1976), 10 SEC DOCKET 194.

<sup>414</sup> SEC v. Cosmopolitan Investors Funding Co., Litigation Release No. 8,419 (May 24, 1978), 14 SEC DOCKET 1217; SEC v. Giant Stores Corp., Litigation Release No. 7,546 (Sept. 2, 1976), 10 SEC DOCKET 400; SEC v. Timkin, C.A., Litigation Release No. 7,532 (Aug. 24, 1976), 10 SEC DOCKET 309; SEC v. Nelson, Litigation Release No. 7,347 (Apr. 12, 1976), 9 SEC DOCKET 441.

<sup>415</sup> SEC v. Cosmopolitan Investors Funding Co., Litigation Release No. 7,366 (Apr. 23, 1976), 9 SEC DOCKET 533.

<sup>416</sup> SEC v. Giant Stores Corp., Litigation Release No. 7,546 (Sept. 2, 1976), 10 SEC DOCKET 400.

<sup>417</sup> SEC v. TDA Indus., Inc., Litigation Release No. 7,369 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>418</sup> SEC v. Kodiak Indus., Litigation Release No. 7,622 (Oct. 28, 1976), 10 SEC DOCKET 831.

<sup>419</sup> SEC v. Generics Corp., Litigation Release No. 7,270 (Feb. 10, 1976), 8 SEC DOCKET 1291.

<sup>420</sup> SEC v. OSEC Petroleum, S.A., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,915, at 97,132 (D.D.C. 1974).

someone satisfactory to the SEC,<sup>421</sup> and not to nominate anyone to the corporation's board of directors for 14 months.<sup>422</sup>

Where the individual's conduct has given rise to allegations of 10b-5 fraud unassociated with the operation or control of a corporation, the courts have approved sanctions which include the disclosure of certain future activities, the correction of prior conduct, the prohibition of similar conduct in the future, and the implementation of certain preventive measures. Disclosure measures have required an individual to "report to the Court and the Commission all transactions in the securities of [the defendant corporation],"<sup>423</sup> to "disclose transactions in any securities acquired by him as consideration for services performed as a merger broker, merger consultant or corporate finder for any company whose securities were the subject of a public offering and disclose transactions in any securities acquired by him in any company whose securities are publicly traded or whose securities have been the subject of a public offering,"<sup>424</sup> and to "file a report with the Commission identifying his ownership or control of securities in certain enumerated corporations and their successors."<sup>425</sup>

If the underlying charges relate to inaccuracies in required filings, at least one court has been willing to accept the defendant's assurance of cooperation "in preparing and filing . . . amended or corrected reports."<sup>426</sup> Another court has approved the parties agreement to "implement and maintain certain policies and procedures relating to . . . public relations activities which are reasonably calculated to prevent the recurrence of the matters complained of in [the] action."<sup>427</sup>

The most common and often the most drastic measures limiting an individual's actions involve prohibition. Defendants have been prohibited from pledging or selling shares in a corporation,<sup>428</sup> "from acting as an unregistered broker-dealer,"<sup>429</sup> from rendering

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<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

<sup>423</sup> SEC v. Generics Corp., Litigation Release No. 7,270 (Feb. 10, 1976), 8 SEC DOCKET 1291.

<sup>424</sup> SEC v. Nelson, Litigation Release No. 7,347 (Apr. 12, 1976), 9 SEC DOCKET 441.

<sup>425</sup> *Id.*

<sup>426</sup> SEC v. Hurwitz, Litigation Release No. 7,451 (June 16, 1976), 9 SEC DOCKET 923.

<sup>427</sup> SEC v. Giant Stores Corp., Litigation Release No. 7,546 (Sept. 2, 1976), 10 SEC DOCKET 400.

<sup>428</sup> SEC v. OSEC Petroleum, S.A., [1974-1975 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,915, at 97,132 (D.D.C. 1974).

<sup>429</sup> SEC v. Geo Dynamics Oil & Gas, Inc., Litigation Release No. 7,423 (June 1, 1976), 9 SEC DOCKET 812.

any tax or other advice or recommendation in connection with the offer and sale of tax-oriented securities,<sup>430</sup> from making "any untrue statement of material fact or [omitting] to state a material fact in connection with the purchase or sale of any security which is the subject of a distribution,"<sup>431</sup> from purchasing "any security from a broker-dealer pursuant to an understanding that such security will be repurchased by the broker-dealer,"<sup>432</sup> from "the purchase or sale of any security which is the subject of a distribution (a) where such purchase or sale is made for the purpose of raising, maintaining or depressing the price of such security; (b) where the purchase or sale is made pursuant to a prior agreement or understanding that the purchaser or seller is to be protected against loss or guaranteed a profit in connection with the transaction or (c) is acting at the request or upon the recommendation of [any] person who is a participant in the distribution, except as permitted by Rules 10b-6 and 10b-7 under the Exchange Act,"<sup>433</sup> and from "effecting alone or with any other persons, for the purpose of inducing the purchase or sale of any security by others, a series of transactions in any security, . . . whether listed or not listed on a national securities exchange, which creates actual or apparent active trading in such security, or which raises or depresses the price of such security."<sup>434</sup>

### 3. Special Consent Remedies for Attorneys and Accountants

By reason of their specialized activities, attorneys and accountants accused of 10b-5 violations in a court action or in an administrative proceeding have consented to sanctions peculiar to their status. Note, however, that the more common sanctions are also available.<sup>435</sup>

Provisions to which attorneys have consented include a permanent injunction,<sup>436</sup> permanent disqualification from "appearing or practicing before [the] Commission,"<sup>437</sup> a limited right to practice

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<sup>430</sup> *Id.*

<sup>431</sup> SEC v. Seaboard Corp., Litigation Release No. 7,368 (Apr. 23, 1976), 9 SEC DOCKET 534.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> SEC v. Nelson, Litigation Release No. 7,347 (Apr. 12, 1976), 9 SEC DOCKET 441.

<sup>435</sup> See notes 299-301 and accompanying text *supra*.

<sup>436</sup> SEC v. Capital Planning Assocs., Litigation Release No. 7,572 (Sept. 20, 1976), 10 SEC DOCKET 541; SEC v. Sitomer, Sitomer & Porges, Litigation Release No. 7,418 (June 1, 1976), 9 SEC DOCKET 810; SEC v. Tex-A-Chief, Inc., Litigation Release No. 7,278 (Feb. 10, 1976), 8 SEC DOCKET 1293.

<sup>437</sup> Alvin Lester Sitomer, Exchange Act Release No. 12,501 (June 1, 1976), 9 SEC DOCKET 784; see SEC v. Capitol Planning Assocs., Litigation Release No. 7,572 (Sept. 20, 1976), 10

before the Commission,<sup>438</sup> mandatory disclosure to future clients of past violations or inability to practice before the SEC,<sup>439</sup> and an undertaking not to "hold the position of, or act as an officer or director or otherwise direct the management and policies of any publicly held company or trust."<sup>440</sup> Attorneys have also agreed to be prohibited "from being associated in a proprietary or supervisory capacity with any broker or dealer,"<sup>441</sup> to suspend "from any association with any broker or dealer,"<sup>442</sup> and "not [to] violate the anti-fraud, periodic reporting or proxy provisions of the federal securities laws."<sup>443</sup>

The Commission has obtained the following remedies against consenting accountants: permanent injunction;<sup>444</sup> denial of,<sup>445</sup> resignation from,<sup>446</sup> or suspension from<sup>447</sup> appearing or practicing before the Commission; censure;<sup>448</sup> peer review by other accountants or

SEC DOCKET 541; Francois D.V. de LaBarre, Exchange Act Release No. 12,721 (Aug. 19, 1976), 10 SEC DOCKET 244; SEC v. Hurwitz, Litigation Release No. 7,451 (June 16, 1976), 9 SEC DOCKET 923; Robert H. Jaffe, Esq., Exchange Act Release No. 12,473 (May 24, 1976), 9 SEC DOCKET 716; Morton Schimmel, Esq., Exchange Act Release No. 12,254 (Mar. 25, 1976), 9 SEC DOCKET 262; SEC v. First Mortgage Investors, Litigation Release No. 7,321 (Mar. 1976), 9 SEC DOCKET 290.

<sup>438</sup> SEC v. Nelson, Litigation Release No. 7,215 (Dec. 29, 1975), 8 SEC DOCKET 949.

<sup>439</sup> SEC v. Ezrine, [1972-1973 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,594, at 92,751 (S.D.N.Y. 1972).

<sup>440</sup> SEC v. First Mortgage Investors, Litigation Release No. 7,321 (Mar. 1976), 9 SEC DOCKET 290.

<sup>441</sup> Robert H. Jaffe, Esq., Exchange Act Release No. 12,473 (May 24, 1976), 9 SEC DOCKET 716; see SEC v. Giant Stores Corp., Litigation Release No. 7,546 (Sept. 2, 1976), 10 SEC DOCKET 400.

<sup>442</sup> Robert H. Jaffe, Esq., Exchange Act Release No. 12,473 (May 24, 1976), 9 SEC DOCKET 716.

<sup>443</sup> SEC v. First Mortgage Investors, Litigation Release No. 7,321 (Mar. 1976), 9 SEC DOCKET 290.

<sup>444</sup> SEC v. Capitol Planning Assocs., Litigation Release No. 7,572 (Sept. 20, 1976), 10 SEC DOCKET 541; SEC v. Challenge Homes, Inc., Litigation Release No. 7,344 (Apr. 5, 1976), 9 SEC DOCKET 400; SEC v. Tex-A-Chief, Inc., Litigation Release No. 7,278 (Feb. 10, 1976), 8 SEC DOCKET 1293.

<sup>445</sup> Eugene Testa, Accounting Series Release No. 212 (Apr. 18, 1977), 12 SEC DOCKET 67.

<sup>446</sup> Wilbert S. Fox, Accounting Series Release No. 217 (May 16, 1977), 12 SEC DOCKET 452; John W. Hosford, Accounting Series Release No. 216 (May 16, 1977), 12 SEC DOCKET 451; Phillip J. Wilfson, Accounting Series Release No. 215 (May 9, 1977), 12 SEC DOCKET 376; Bernard C. Zipern, Accounting Series Release No. 208 (Feb. 10, 1977), 11 SEC DOCKET 1113; Paul D. Klinger, Accounting Series Release No. 201 (Nov. 23, 1976), 10 SEC DOCKET 1038; Leigh A. Verley, Accounting Series Release No. 198 (Oct. 8, 1976), 10 SEC DOCKET 715.

<sup>447</sup> George E. Weaver, Accounting Series Release No. 199 (Nov. 17, 1976), 10 SEC DOCKET 977; Rudolph, Palitz & Co., Accounting Series Release No. 191 (Mar. 30, 1976), 9 SEC DOCKET 363.

<sup>448</sup> Rudolph, Palitz & Co., Accounting Series Release No. 191 (Mar. 30, 1976), 9 SEC DOCKET 363.

members of the Commission's staff;<sup>449</sup> participation "in a local firm quality peer review program conducted by the American Institute of Certified Public Accountants;"<sup>450</sup> participation in "a program of continuing professional education consistent with the guidelines recommended by the American Institute of Certified Public Accountants on continuing education for professional members of said association;"<sup>451</sup> and a prohibition on the acquisition of or merger with other accounting firms.<sup>452</sup>

## B. *Administrative Actions*

A substantial portion of the SEC's administrative actions focus on the activities of brokers and dealers and investment advisers. Since brokers and dealers and investment advisers are central to the securities industry and are heavily regulated, special consent remedies have evolved to supplement those which have been previously discussed. Generally, the provisions contained in consent decrees can be categorized as follows: censure; limitations on activities; suspension; bar; revocation; special procedures; and monetary payments. A review of remedies approved by the Commission is facilitated by examining brokers' and dealers' settlements separately from investment advisers' agreements.

### 1. *Brokers and Dealers*

The least severe circumstances have prompted the Commission to approve censure in consent decrees.<sup>453</sup> In acquiescing to more severe limitations on activities, some broker-dealers are "required to obtain written authorization from the compliance director or a branch manager of any broker-dealer with which he may be associated for any securities transactions for accounts in which he main-

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<sup>449</sup> Laventhol Krekstein Horwath & Horwath, Exchange Act Release No. 10,172 (May 23, 1973), 1 SEC DOCKET 11.

<sup>450</sup> Rudolph, Palitz & Co., Accounting Series Release No. 191 (Mar. 30, 1976), 9 SEC DOCKET 363, 365.

<sup>451</sup> *Id.*

<sup>452</sup> Laventhol Krekstein Horwath & Horwath, Exchange Act Release No. 10,172 (May 23, 1973), 1 SEC DOCKET 11.

<sup>453</sup> See E.F. Hutton & Co., Exchange Act Release No. 15,538 (Jan. 30, 1979), 16 SEC DOCKET 873; Goldman, Sachs & Co., Exchange Act Release No. 15,359 (Nov. 28, 1978), 16 SEC DOCKET 281; Michael Batterman, Exchange Act Release No. 12,278 (Mar. 29, 1976), 9 SEC DOCKET 307; Gordon Sec. Ltd., Exchange Act Release No. 12,272 (Mar. 31, 1976), 9 SEC DOCKET 304; Banque de Paris et des Pays-Bas (Suisse) S.A., Exchange Act Release No. 12,192 (Mar. 11, 1976), 9 SEC DOCKET 142; Bache & Co., Exchange Act Release No. 11,958 (Dec. 29, 1975), 8 SEC DOCKET 898; Bache & Co., Exchange Act Release No. 11,957 (Dec. 29, 1975), 8 SEC DOCKET 898.



tains a beneficial interest or for recommendations to more than three customers for the purchase of any security,"<sup>454</sup> and to obtain written authorization from the compliance director or an officer of any broker-dealer with which he may be associated for any recommendations to more than three customers for the purchase of any security.<sup>455</sup>

The bulk of reported remedies limiting a broker-dealer's activities, however, remains in the form of a simple prohibition or restriction on effecting certain transactions. Thus, broker-dealers have agreed to refrain from selling or purchasing, "either as principal for [their] own account or as an agent for others . . . any shares of [stock of a named corporation] in the United States or to or from any United States citizen or resident . . . unless prior thereto that corporation shall have filed and there shall have become effective either a new registration statement relating to said shares or a post-effective amendment to its registration statement;"<sup>456</sup> not to engage in activities with or on behalf of a broker or dealer;<sup>457</sup> to refrain from furnishing to any inter-dealer quotation system any bid or asked quotation with respect to any security as to which it had not furnished any quotation;<sup>458</sup> to limit business to the offer and sale of securities effectively registered with the Commission and securities offered and sold in reliance on an exemption from registration under the Securities Act, provided that there is a written opinion of independent counsel that such exemption is available or has been obtained;<sup>459</sup> to limit activities as a broker-dealer exclusively to the offer and sale at retail or redeemable securities issued by investment companies registered as such with the Commission under the Investment Company Act;<sup>460</sup> to refrain from serving in the capacities

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<sup>454</sup> William Dix, Exchange Act Release No. 12,448 (May 13, 1976), 9 SEC DOCKET 635.

<sup>455</sup> Richard Peress, Exchange Act Release No. 12,476 (May 24, 1976), 9 SEC DOCKET 718; Roger Nieman, Exchange Act Release No. 12,191 (Mar. 11, 1976), 9 SEC DOCKET 142; cf. Merrill Lynch, Pierce, Fenner & Smith, Inc., Exchange Act Release No. 15,421 (Dec. 20, 1978), 16 SEC DOCKET 517, 518 ("prior approval of [a] proposed trade from both the institutional office manager . . . and the executive vice-president of [a named corporation]").

<sup>456</sup> Rosmar Corp., Exchange Act Release No. 12,255 (Mar. 25, 1976), 9 SEC DOCKET 263.

<sup>457</sup> Chartered New England Corp., Exchange Act Release No. 12,497 (June 1, 1976), 9 SEC DOCKET 781.

<sup>458</sup> Wildman, Neal & De Bolt, Inc., Exchange Act Release No. 14,610 (Mar. 27, 1978), 14 SEC DOCKET 607; Colonial Sec., Inc., Exchange Act Release No. 14,287 (Dec. 19, 1977), 13 SEC DOCKET 1166; Singer & Mackie, Inc., Exchange Act Release No. 12,526 (June 9, 1976), 9 SEC DOCKET 833.

<sup>459</sup> Delger Corp., Exchange Act Release No. 13,579 (May 31, 1977), 12 SEC DOCKET 669.

<sup>460</sup> Neil Stephens Inv. Corp., Exchange Act Release No. 13,494 (May 2, 1977), 12 SEC DOCKET 293.

specified in Section 9(b) of the Investment Company Act;<sup>461</sup> to limit activities to acting as a supervised employee in a non-supervisory capacity while associated with a broker-dealer, investment adviser, investment company, or municipal securities dealer;<sup>462</sup> to refrain from tendering securities on behalf of another person in response to a tender offer;<sup>463</sup> to refrain from engaging in any business as or acting as a underwriter of any public offerings registered with the Commission pursuant to the Securities Act or exempt from such registration pursuant to Regulations A or B thereunder;<sup>464</sup> and to refrain from soliciting the retail purchase and/or recommending the retail purchase of any security not admitted to trading on a national securities exchange, except a syndicate issue of which his present employer is a member of the underwriting or seller group.<sup>465</sup>

With regard to municipal securities, broker-dealers have consented not to act, directly or indirectly, as an underwriter or participant in any underwriting,<sup>466</sup> to clear all transactions in which they act as either a broker or a dealer through a financial institution whose deposits are insured by the FDIC,<sup>467</sup> and to restrict all transactions in which they act as either a broker or dealer to such securities as have a minimum rating of "baa" or better, except for a limited number of transactions involving the sale of nonrated securities to financial institutions located in the same geographic area as the issuer of such securities.<sup>468</sup> In one rather protective consent order, the respondent was prohibited from effecting transactions for any investment company managed by a named company or for any

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<sup>461</sup> First State Financial, Inc., Exchange Act Release No. 15,463 (Jan. 8, 1979), 16 SEC DOCKET 690; Gerald H. Cahill, Exchange Act Release No. 12,277 (Mar. 29, 1976), 9 SEC DOCKET 306; Howard F. Bovers, Exchange Act Release No. 12,008 (Jan. 13, 1976), 8 SEC DOCKET 1021; Moe Fischer, Exchange Act Release No. 12,001 (Jan. 12, 1976), 8 SEC DOCKET 1016. Section 9(b) of the Investment Company Act, 15 U.S.C. § 80a-9(b) (1976), states that an individual who violates the section may not serve or act "as an employee, officer, director, member of an advisory board, investment advisor or depositor of, or principal underwriter for, a registered investment company or affiliated persons of such investment advisor, depositor, or principal underwriter."

<sup>462</sup> Frank J. Duffy, Exchange Act Release No. 13,374 (Mar. 14, 1977), 11 SEC DOCKET 2003; Omega Financial Group, Inc., Exchange Act Release No. 13,284 (Feb. 22, 1977), 11 SEC DOCKET 1809.

<sup>463</sup> Gordon Sec. Ltd., Exchange Act Release No. 12,272 (Mar. 31, 1976), 9 SEC DOCKET 304.

<sup>464</sup> Rosmar Corp., Exchange Act Release No. 12,255 (Mar. 25, 1976), 9 SEC DOCKET 264; see Elmer I. Paull, Exchange Act Release No. 14,425 (Jan. 30, 1978), 14 SEC DOCKET 68.

<sup>465</sup> Roger Nieman, Exchange Act Release No. 12,191 (Mar. 11, 1976), 9 SEC DOCKET 142.

<sup>466</sup> Gulf Inv. Bankers, Inc., Exchange Act Release No. 13,460 (Apr. 22, 1977), 12 SEC DOCKET 83.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.*

other registered investment company, in securities of issuers which are speculative and unseasoned unless the transactions are first specifically approved by a committee composed of two nonaffiliated directors and one affiliated director of the investment companies after they have been furnished with a written recommendation detailing the risks involved and reasons for such investments.<sup>469</sup>

The options activity of brokers and dealers has prompted charges which have resulted in agreements to avoid arranging for the matching on the floor of any exchange of any stock transactions generated by the purchase or sale of conventional options,<sup>470</sup> to refrain from participating in that portion of his employer's business relating to conventional options,<sup>471</sup> to avoid selling conventional options on a given security in a given week in excess of an amount covering 1,000 shares without acquiring such excess conventional options from a third party within one business day of such sale,<sup>472</sup> and to refrain from "buying or selling conventional option contracts not traded on an option exchange . . . on any given security in any given month in an amount that is greater than the lesser of an amount of conventional options covering 15% of the total volume traded in that security for the previous calendar month or an amount of conventional options covering 10,000 shares of that security."<sup>473</sup>

The activities of brokers and dealers also have been limited by suspension from certain activity such as sales,<sup>474</sup> retail operations,<sup>475</sup> market making,<sup>476</sup> trading or otherwise dealing in securities in the over-the-counter market,<sup>477</sup> furnishing to any inter-dealer quotation

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<sup>469</sup> Robert E. Anton, Exchange Act Release No. 12,424 (May 11, 1976), 9 SEC DOCKET 619.

<sup>470</sup> Michael Batterman, Exchange Act Release No. 12,278 (Mar. 29, 1976), 9 SEC DOCKET 307.

<sup>471</sup> *Id.*; see E.F. Hutton & Co., Exchange Act Release No. 15,538 (Jan. 30, 1979), 16 SEC DOCKET 873; Bache Halsey Stuart Shields, Inc., Exchange Act Release No. 14,723 (May 1, 1978), 14 SEC DOCKET 977.

<sup>472</sup> Michael Batterman, Exchange Act Release No. 12,278 (Mar. 29, 1976), 9 SEC DOCKET 307.

<sup>473</sup> *Id.*

<sup>474</sup> ISI Sales Corp., Exchange Act Release No. 12,541 (June 14, 1976), 9 SEC DOCKET 877; cf. Bateman Eichler, Hill Richards, Inc., Exchange Act Release No. 14,579 (Mar. 20, 1978), 14 SEC DOCKET 520 (suspension from block trading).

<sup>475</sup> Bache & Co., Exchange Act Release No. 11,958 (Dec. 29, 1975), 8 SEC DOCKET 898 (suspend if complies with undertaking).

<sup>476</sup> Colonial Sec., Inc., Exchange Act Release No. 14,287 (Dec. 19, 1977), 13 SEC DOCKET 1166; Olde & Co., Exchange Act Release No. 11,952 (Dec. 24, 1975), 8 SEC DOCKET 895.

<sup>477</sup> Edward Elliot Kessler, Exchange Act Release No. 12,417 (May 10, 1976), 9 SEC DOCKET 617.

system any bid or asked quotation or appearing in name only,<sup>478</sup> trading on the American Stock Exchange of the respondent's home office and branch office,<sup>479</sup> trading of industrial development revenue bonds,<sup>480</sup> and underwriting activities.<sup>481</sup> The respondent and the SEC often choose to suspend broker-dealer registration.<sup>482</sup> This suspension, however, is frequently accompanied by exceptions which allow the respondent to engage in certain transactions during the suspension period which include, *inter alia*, liquidating transactions to comply with the net capital rule,<sup>483</sup> executing unsolicited brokerage transactions for existing customers,<sup>484</sup> continuing to submit quotations to *The National Daily Quotation Service*,<sup>485</sup> and participating in principal transactions as a market maker with respect to such securities as have been approved by the Commission's staff.<sup>486</sup> One settlement has even provided for the respondent to withdraw its registration as a broker-dealer after the period of suspension has expired.<sup>487</sup>

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<sup>478</sup> Wildman, Neal & De Bolt, Inc., Exchange Act Release No. 14,610 (Mar. 27, 1978), 14 SEC DOCKET 607; Colonial Sec., Inc., Exchange Act Release No. 14,287 (Dec. 19, 1977), 13 SEC DOCKET 1166; Brooks-Hamburger Sec., Co., Exchange Act Release No. 12,695 (Aug. 6, 1976), 10 SEC DOCKET 214.

<sup>479</sup> Alex Brown & Sons, Exchange Act Release No. 12,339 (Apr. 13, 1976), 9 SEC DOCKET 409; see Albert Fried & Co., Exchange Act Release No. 15,293 (Nov. 3, 1978), 16 SEC DOCKET 100.

<sup>480</sup> Bache Halsey Stuart, Inc., Exchange Act Release No. 12,847 (Oct. 1, 1976), 10 SEC DOCKET 652.

<sup>481</sup> First State Financial, Inc., Exchange Act Release No. 15,463 (Jan. 18, 1979), 16 SEC DOCKET 690; Elmer I. Paull, Exchange Act Release No. 14,425 (Jan. 30, 1978), 14 SEC DOCKET 68; Bond, Richman & Co., Exchange Act Release No. 12,445 (May 13, 1976), 9 SEC DOCKET 633.

<sup>482</sup> See Royal W. Carson & Co., Exchange Act Release No. 14,670 (Apr. 17, 1978), 14 SEC DOCKET 815; Gulf Inv. Bankers, Inc., Exchange Act Release No. 14,557 (Mar. 13, 1978), 14 SEC DOCKET 425; Delger Corp., Exchange Act Release No. 13,579 (May 31, 1977), 12 SEC DOCKET 669; Charles Stuart & Co., Exchange Act Release No. 12,884 (Oct. 12, 1976), 10 SEC DOCKET 696; OPI Investments, Inc., Exchange Act Release No. 12,639 (July 19, 1976), 10 SEC DOCKET 1140; David Cannarsa, Exchange Act Release No. 12,234 (Mar. 19, 1976), 9 SEC DOCKET 246.

<sup>483</sup> Omega Financial Group, Inc., Exchange Act Release No. 13,284 (Feb. 22, 1977), 11 SEC DOCKET 1809; Kroeze, McLarty & Duddleston, Exchange Act Release No. 12,108 (Feb. 17, 1976), 8 SEC DOCKET 1297.

<sup>484</sup> E.F. Hutton & Co., Exchange Act Release No. 15,538 (Jan. 30, 1979), 16 SEC DOCKET 873; Burke, Lawton & Co., Exchange Act Release No. 14,759 (May 15, 1978), 14 SEC DOCKET 1094; Hulme, Applegate & Humphrey, Inc., Exchange Act Release No. 12,782 (Sept. 9, 1976), 10 SEC DOCKET 415 (retail customers).

<sup>485</sup> J.L. Schiffman & Co., Exchange Act Release No. 12,204 (Mar. 15, 1976).

<sup>486</sup> *Id.*

<sup>487</sup> Kurtz & Co., Exchange Act Release No. 13,520 (May 9, 1977), 12 SEC DOCKET 375; Bramwell, Chandler, Johnson & Co., Exchange Act Release No. 12,499 (June 1, 1976), 9 SEC DOCKET 783; Stearns & Co., Exchange Act Release No. 12,405 (May 3, 1976), 9 SEC DOCKET 550.

In addition to suspension, brokers and dealers have been suspended from association with other brokers or dealers,<sup>488</sup> investment advisors,<sup>489</sup> and municipal securities dealers.<sup>490</sup> This form of suspension will sometimes provide that after the period of suspension the respondent may associate with the broker or dealer in a non-supervisory capacity upon a showing to the Commission of adequate supervision.<sup>491</sup> Some settlements have permitted a broker-dealer to become reassociated upon a showing that he has completed 10 hours of appropriate educational training concerning the duties and responsibilities of persons associated with brokers or dealers under

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<sup>488</sup> *E.g.*, First State Financial, Inc., Exchange Act Release No. 15,463 (Jan. 8, 1979), 16 SEC DOCKET 690; Richard C. Flick, Exchange Act Release No. 14,629 (Apr. 3, 1978), 14 SEC DOCKET 653; Flow of Capital Sec., Inc., Exchange Act Release No. 14,472 (Feb. 15, 1978), 14 SEC DOCKET 178; Neil Stephens Inv. Corp., Exchange Act Release No. 13,494 (May 2, 1977), 12 SEC DOCKET 293; Ross Pascall, Exchange Act Release No. 13,305 (Feb. 28, 1977), 11 SEC DOCKET 1876; Todd & Co., Exchange Act Release No. 13,285 (Feb. 22, 1977), 11 SEC DOCKET 1811; E.L. Aaron & Co., Exchange Act Release No. 13,015 (Nov. 29, 1976), 11 SEC DOCKET 1058; Cösse' Int'l Sec., Inc., Exchange Act Release No. 12,943 (Nov. 2, 1976), 10 SEC DOCKET 846; Brooks-Hamburger Sec., Co., Exchange Act Release No. 12,695 (Aug. 6, 1976), 10 SEC DOCKET 214; OPI Invs., Inc., Exchange Act Release No. 12,639 (July 19, 1976), 10 SEC DOCKET 1140; Richard Peress, Exchange Act Release No. 12,476 (May 24, 1976), 9 SEC DOCKET 718; Gerald Hodes, Exchange Act Release No. 12,310 (Apr. 5, 1976), 9 SEC DOCKET 373; Chartered New England Corp., Exchange Act Release No. 12,105 (Feb. 13, 1976), 8 SEC DOCKET 1296; Church Sec., Inc., Exchange Act Release No. 12,057 (Jan. 28, 1976), 8 SEC DOCKET 1164; Howard F. Bovers, Exchange Act Release No. 12,008 (Jan. 13, 1976), 8 SEC DOCKET 1021; *cf.* Rosmar Corp., Exchange Act Release No. 12,255 (Mar. 25, 1976), 9 SEC DOCKET 263 (may continue association with co-defendant broker-dealer only).

Some settlements have permitted the respondent to become associated with a broker-dealer only in a non-supervisory capacity. *E.g.*, Hulme, Applegate & Humphrey, Inc., Exchange Act Release No. 12,782 (Sept. 9, 1976), 10 SEC DOCKET 415; Leonard Bros., Exchange Act Release No. 12,294 (Mar. 31, 1976), 9 SEC DOCKET 325; Roger Nieman, Exchange Act Release No. 12,191 (Mar. 11, 1976), 9 SEC DOCKET 142.

<sup>489</sup> First State Financial, Inc., Exchange Act Release No. 15,463 (Jan. 8, 1979), 16 SEC DOCKET 690; Frank S. Moran, Exchange Act Release No. 14,555 (Mar. 13, 1978), 14 SEC DOCKET 424; Financial Serv. Corp. of America, Exchange Act Release No. 12,002 (Jan. 12, 1976), 8 SEC DOCKET 1017; *see* Lambert Hirsheimer, Exchange Act Release No. 12,589 (July 1, 1976), 9 SEC DOCKET 989 (with exceptions); Robert E. Anton, Exchange Act Release No. 12,424 (May 11, 1976), 9 SEC DOCKET 619.

<sup>490</sup> C.D. Pulis & Co., Exchange Act Release No. 14,470 (Feb. 14, 1978), 14 SEC DOCKET 177; Kurtz & Co., Exchange Act Release No. 13,520 (May 9, 1977), 12 SEC DOCKET 375; Frank J. Duffy, Exchange Act Release No. 13,374 (Mar. 14, 1977), 11 SEC DOCKET 2003; Omega Financial Group, Inc., Exchange Act Release No. 13,284 (Feb. 22, 1977), 11 SEC DOCKET 1809; Howard Dulman, Exchange Act Release No. 11,961 (Dec. 30, 1975), 8 SEC DOCKET 900; *see* Bernard Terrance Tierney, Exchange Act Release No. 13,464 (Apr. 25, 1977), 12 SEC DOCKET 183.

<sup>491</sup> Thornwell Inv. Management, Inc., Exchange Act Release No. 15,285 (Oct. 31, 1978), 16 SEC DOCKET 6; Frank Gordon Putnam, Exchange Act Release No. 14, 812 (May 30, 1978), 14 SEC DOCKET 1230; Chartered New England Corp., Exchange Act Release No. 12,376 (Apr. 26, 1976), 9 SEC DOCKET 492.

the anti-fraud provisions of the federal securities laws,<sup>492</sup> or that he has successfully completed the examination required by the NASD for principals of broker-dealers.<sup>493</sup> In the latter instance the agreement permitted the respondent to reassociate as a principal.<sup>494</sup> The Commission also has permitted respondents, during the period of suspension, to execute unsolicited liquidating transactions for existing clients and to execute other unsolicited transactions, provided, however, that they not receive any compensation for any transactions effected during the suspension period.<sup>495</sup> Other cases have allowed a broker-dealer to continue in his present supervised capacity provided that he not communicate in any manner with any customers of his employer.<sup>496</sup> In one case, the respondent was suspended from engaging in any business as a securities broker or dealer in the United States or engaging in any transaction or transactions which, if made, would require registration with the SEC as a broker-dealer.<sup>497</sup>

The permanent forms of discipline are a bar on association and revocation of registration. Thus, broker-dealers have been barred from association with any broker, dealer,<sup>498</sup> investment adviser,<sup>499</sup> or

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<sup>492</sup> Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc., Exchange Act Release No. 13,012 (Nov. 26, 1976), 11 SEC DOCKET 1055.

<sup>493</sup> Flow of Capital Sec., Inc., Exchange Act Release No. 14,472 (Feb. 15, 1978), 14 SEC DOCKET 178, *amended*, Exchange Act Release No. 14,724 (May 1, 1978), 14 SEC DOCKET 978; Omega Financial Group, Inc., Exchange Act Release No. 13,284 (Feb. 22, 1977), 11 SEC DOCKET 1809.

<sup>494</sup> Omega Financial Group, Inc., Exchange Act Release No. 13,284 (Feb. 22, 1977), 11 SEC DOCKET 1809.

<sup>495</sup> E.F. Hutton & Co., Exchange Act Release No. 15,538 (Jan. 30, 1979), 16 SEC DOCKET 873; Burke, Lawton & Co., Exchange Act Release No. 14,759 (May 15, 1978), 14 SEC DOCKET 1094; John H. Weber, Exchange Act Release No. 12,868 (Oct. 5, 1976), 10 SEC DOCKET 662.

<sup>496</sup> Bernard Terrance Tierney, Exchange Act Release No. 13,464 (Apr. 25, 1977), 12 SEC DOCKET 183.

<sup>497</sup> Rosmar Corp., Ltd., Exchange Act Release No. 12,255 (Mar. 25, 1976), 9 SEC DOCKET 263.

<sup>498</sup> Donald H. Skaufel, Inc., Exchange Act Release No. 15,549 (Feb. 5, 1979), 16 SEC DOCKET 1031; Thornwell Inv. Management, Inc., Exchange Act Release No. 15,285 (Oct. 31, 1978), 16 SEC DOCKET 6; IES Management Group, Inc., Exchange Act Release No. 14,560 (Mar. 15, 1978), 14 SEC DOCKET 428; Nicholas Chiola, Exchange Act Release No. 13,463 (Apr. 25, 1977), 12 SEC DOCKET 183; Glade M. Knight, Exchange Act Release No. 13,087 (Dec. 21, 1976), 11 SEC DOCKET 1227; R. Wayne Everett & Assocs., Exchange Act Release No. 12,792 (Sept. 13, 1976), 10 SEC DOCKET 459; Hibbard & O'Connor Sec. Church Fin./Dev. Group Inc., Exchange Act Release No. 12,180 (Mar. 9, 1976), 9 SEC DOCKET 131; Thornton D. Morris & Co., Exchange Act Release No. 12,169 (Mar. 5, 1976), 9 SEC DOCKET 125.

<sup>499</sup> First State Financial, Inc., Exchange Act Release No. 15,463 (Jan. 8, 1979), 16 SEC DOCKET 690; Willis E. Burnside & Co., Exchange Act Release No. 14,556 (Mar. 13, 1978), 14 SEC DOCKET 424; Charles E. Bach, Exchange Act Release No. 14,401 (Jan. 23, 1978), 14 SEC

municipal securities dealer.<sup>500</sup> Some bar settlements permit association in other than a supervisory or proprietary capacity.<sup>501</sup> One consent order barred the respondent from employment by or with any

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DOCKET 5; E.L. Aaron & Co., Exchange Act Release No. 13,015 (Nov. 29, 1976), 11 SEC DOCKET 1058; Bernard Zipern, Exchange Act Release No. 12,679 (Aug. 2, 1976), 10 SEC DOCKET 167; James T. Bakos, Exchange Act Release No. 12,545 (June 15, 1976), 9 SEC DOCKET 879; Arnold Gerstein, Exchange Act Release No. 12,527 (June 9, 1976), 9 SEC DOCKET 833; Alex Brown & Sons, Exchange Act Release No. 12,339 (Apr. 13, 1976), 9 SEC DOCKET 409; Gerald H. Cahill, Exchange Act Release No. 12,277 (Mar. 29, 1976), 9 SEC DOCKET 306; Rosmar Corp., Exchange Act Release No. 12,255 (Mar. 25, 1976), 9 SEC DOCKET 263; Howard F. Bovers, Exchange Act Release No. 12,008 (Jan. 13, 1976), 8 SEC DOCKET 1021; Evelyn Harris, Exchange Act Release No. 12,007 (Jan. 13, 1976), 8 SEC DOCKET 1021; Stephen Smith, Exchange Act Release No. 11,971 (Jan. 2, 1976), 8 SEC DOCKET 972.

<sup>500</sup> Willis E. Burnside & Co., Exchange Act Release No. 14,556 (Mar. 13, 1978), 14 SEC DOCKET 424; Windsor Planning Corp., Exchange Act Release No. 13,306 (Feb. 28, 1977), 11 SEC DOCKET 1876; Irving Levine, Exchange Act Release No. 12,665 (July 28, 1976), 10 SEC DOCKET 107; Harvey J. Ost, Exchange Act Release No. 12,575 (June 25, 1976), 9 SEC DOCKET 984; Edward Hayton, Exchange Act Release No. 12,185 (Mar. 9, 1976), 9 SEC DOCKET 139; Sidney Bertram Weinberg, Exchange Act Release No. 12,126 (Feb. 24, 1976), 9 SEC DOCKET 3. Association with any NASD member also has been barred. David D. Esco, Exchange Act Release No. 14,716 (Apr. 28, 1978), 14 SEC DOCKET 963; Steven C. Pruette, Exchange Act Release No. 14,359 (Jan. 9, 1978), 13 SEC DOCKET 1345.

<sup>501</sup> Numerous settlements have prohibited association in a supervisory or proprietary capacity. *E.g.*, Donald R. Huffman, Exchange Act Release No. 15,481 (Jan. 8, 1979), 16 SEC DOCKET 697; Shaughnessy & Co., Exchange Act Release No. 14,791 (May 23, 1978), 14 SEC DOCKET 1167; Richard C. Flick, Exchange Act Release No. 14,629 (Apr. 3, 1978), 14 SEC DOCKET 653; Kurtz & Co., Exchange Act Release No. 13,520 (May 9, 1977), 12 SEC DOCKET 375; Kenneth J. Welker, Exchange Act Release No. 13,233 (Feb. 2, 1977), 11 SEC DOCKET 1631; James T. Bakos, Exchange Act Release No. 12,545 (June 15, 1976), 9 SEC DOCKET 879; Branwell, Chandler, Johnson & Co., Exchange Act Release No. 12,499 (June 1, 1976), 9 SEC DOCKET 783; William Dix, Exchange Act Release No. 12,448 (May 13, 1976), 9 SEC DOCKET 635; Stearns & Co., Exchange Act Release No. 12,405 (May 3, 1976), 9 SEC DOCKET 550; Roger Nieman, Exchange Act Release No. 12,191 (Mar. 11, 1976), 9 SEC DOCKET 142; Barry J. Margulis, Exchange Act Release No. 11,976 (Jan. 5, 1976), 8 SEC DOCKET 974; John E. Pedderson, Exchange Act Release No. 11,954 (Dec. 29, 1975), 8 SEC DOCKET 896; *accord*, I\* Sec., Inc., Exchange Act Release No. 14,829 (June 5, 1978), 14 SEC DOCKET 1304. Other settlements have barred association other than as a supervised employee in a nonsupervisory capacity. *E.g.*, Robert Richard Rawlings, Exchange Act Release No. 13,543 (May 16, 1977), 12 SEC DOCKET 430; J. Kent Kinniburgh, Exchange Act Release No. 13,372 (Mar. 14, 1977), 11 SEC DOCKET 2002; Sheldon Fidler, Exchange Act Release No. 13,286 (Feb. 22, 1977), 11 SEC DOCKET 1811; Allison-James, Inc., Exchange Act Release No., 13,257 (Feb. 14, 1977), 11 SEC DOCKET 1720; E.L. Aaron & Co., Exchange Act Release No. 13,015 (Nov. 29, 1976), 11 SEC DOCKET 1058; Gerald J. Vanderzon, Exchange Act Release No. 12,983 (Nov. 16, 1976), 10 SEC DOCKET 958; Philip Richman, Exchange Act Release No. 12,864 (Oct. 5, 1976), 10 SEC DOCKET 660; Mitchell B. Walker, Exchange Act Release No. 12,867 (Oct. 5, 1976), 10 SEC DOCKET 661; Chartered New England Corp., Exchange Act Release No. 12,376 (Apr. 26, 1976), 9 SEC DOCKET 492; Gerald Hodes, Exchange Act Release No. 12,310 (Apr. 5, 1976), 9 SEC DOCKET 373; Edward Stansfield, Exchange Act Release No. 12,128 (Feb. 23, 1976), 9 SEC DOCKET 4; Chartered New England Corp., Exchange Act Release No. 12,105 (Feb. 13, 1976), 8 SEC DOCKET 1296; Church Sec., Inc., Exchange Act Release No. 12,057 (Jan. 28, 1976), 8 SEC DOCKET 1164; Financial Serv. Corp. of America, Exchange Act Release No. 12,002 (Jan. 12, 1976), 8 SEC DOCKET 1017; *accord*, Stephenson, Leydecker & Co., Exchange Act Release No. 12,475 (May 24, 1976), 9 SEC DOCKET 717.

broker-dealer, except his present employer, "unless such broker-dealer is either a member of the New York Stock Exchange or the American Stock Exchange or a member of the NASD and/or any predecessor thereof has been a member of the NASD for three years and the principals of such member of the NASD have combined experience as principals of no less than five years,"<sup>502</sup> while another permitted association only with SEC approval.<sup>503</sup> The Commission has also allowed a respondent to make application for reassociation with an investment adviser in order to enable him to render advice as an offeree representative as defined in Rule 146 under the 1933 Act.<sup>504</sup>

Revocation of a broker-dealer's registration<sup>505</sup> is another possibility. Subject to limited exceptions, when this remedy is utilized the revocation is usually total.<sup>506</sup> One order required the respondent to commence withdrawal proceedings with respect to its registration as a broker-dealer or undertake to implement additional supervisory procedures to prevent a recurrence of the violative activities and employ a competent back office supervisor and manager.<sup>507</sup> Included

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<sup>502</sup> Edmond L. Brown, Exchange Act Release No. 12,208 (March 15, 1976).

<sup>503</sup> Dewey, Johnson & George, Inc., Exchange Act Release No. 12,268 (March 25, 1976), 9 SEC DOCKET 268.

<sup>504</sup> Melvin Spielman, Exchange Act Release No. 12,727 (Aug. 23, 1976), 10 SEC DOCKET 268; cf. Victor Tostado, Exchange Act Release No. 15,357 (Nov. 27, 1978), 16 SEC DOCKET 280 (may reapply after 42 months for a non-supervisory position); Bache Halsey Stuart Shields, Inc., Exchange Act Release No. 14,722 (May 1, 1978), 14 SEC DOCKET 976 (may reapply after 2 years for a non-supervisory position); Frank S. Groseclose, Exchange Act Release No. 14,479 (Feb. 16, 1978), 14 SEC DOCKET 188 (may reapply after 1 year for a non-supervisory position and may reapply after 2 years for a supervisory position); Peter E. Aaron, Exchange Act Release No. 14,399 (Jan. 23, 1978), 14 SEC DOCKET 5 (may reapply after 21 months for any position).

<sup>505</sup> Donald H. Skaufel, Inc., Exchange Act Release No. 15,549 (Feb. 5, 1979), 16 SEC DOCKET 1031; Nassar & Co., Exchange Act Release No. 15,347 (Nov. 22, 1978), 16 SEC DOCKET 228; Thornwell Inv. Management, Inc., Exchange Act Release No. 15,285 (Oct. 31, 1978), 16 SEC DOCKET 6; Ronald M. Gottfried, Exchange Act Release No. 14,426 (Jan. 30, 1978), 14 SEC DOCKET 69; Investors Sec. Corp., Exchange Act Release No. 12,238 (Mar. 22, 1976), 9 SEC DOCKET 248; First Midwest Inv. Corp., Exchange Act Release No. 12,179 (Mar. 8, 1976), 9 SEC DOCKET 130; Thornton D. Morris & Co., Exchange Act Release No. 12,169 (Mar. 5, 1976), 9 SEC DOCKET 125; Merit Investors Corp., Exchange Act Release No. 12,085 (Feb. 9, 1976), 8 SEC DOCKET 1240; Church Sec., Inc., Exchange Act Release No. 12,057 (Jan. 28, 1976), 8 SEC DOCKET 1164; Charles Plohn & Co., Exchange Act Release No. 12,033 (Jan. 22, 1976), 8 SEC DOCKET 1099; Parallel Sec., Inc., Exchange Act Release No. 12,013 (Jan. 13, 1976), 8 SEC DOCKET 1024; Financial Serv. Corp. of America, Exchange Act Release No. 12002 (Jan. 12, 1976), 8 SEC DOCKET 1017.

<sup>506</sup> Howard Lawrence & Co., Exchange Act Release No. 12,573 (June 24, 1976), 9 SEC DOCKET 956.

<sup>507</sup> Hulme, Applegate & Humphrey, Inc., Exchange Act Release No. 12,782 (Sept. 9, 1976), 10 SEC DOCKET 415; see Flow of Capital Sec., Inc., Exchange Act Release No. 14,472 (Feb. 15, 1978), 14 SEC DOCKET 178; C.D. Pulis & Co., Exchange Act Release No. 14,470 (Feb. 14, 1978), 14 SEC DOCKET 177.



within the category of revocation are orders which deny or delay broker-dealer registration until certain conditions are fulfilled.<sup>508</sup> Similarly, the SEC has conditioned a respondent's ability to apply for membership in the NASD upon prior consent of the Commission.<sup>509</sup>

Numerous Commission-approved consent orders require that special procedures be adopted to prevent recurrence of the alleged 10b-5 violation and to inform customers and regulatory agencies of certain activities. The emphasis, therefore, is on remedial measures. Accordingly, broker-dealers have agreed to "institute and maintain procedures reasonably to be expected to prevent and detect, insofar as practicable, the reoccurrence" of alleged violations,<sup>510</sup> to "implement a compliance program establishing a procedure whereby any over-the-counter securities shall not be recommended and/or purchased on behalf of any retail customers without the prior approval of a committee of three partners of the security to be recommended,"<sup>511</sup> to implement procedures designed to ensure full disclosure of costs, risks and alternatives to customers in certain specified transactions,<sup>512</sup> to adopt certain operating procedures and implement a compliance and inspection program relating to the trading of securities and the maintenance of books and records at the firm,<sup>513</sup> and to institute specific written procedures designed to prevent violations of Rule 10b-4.<sup>514</sup> Orders also have contained requirements to attend a course covering the NASD and SEC rules and regulations governing brokers and dealers,<sup>515</sup> to inform present and future customers of the existence and nature of the subject proceedings, sanctions and prior injunctions,<sup>516</sup> to file monthly fin-

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<sup>508</sup> See *OPI Inv., Inc.*, Exchange Act Release No. 12,639 (July 19, 1976), 10 SEC DOCKET 1140; *SMW Sec., Inc.*, Exchange Act Release No. 12,375 (Apr. 26, 1976), 9 SEC DOCKET 492; *John H. Clifton*, Exchange Act Release No. 12,094 (Feb. 9, 1976), 8 SEC DOCKET 1245.

<sup>509</sup> *Rosmar Corp.*, Exchange Act Release No. 12,255 (Mar. 25, 1976), 9 SEC DOCKET 263.

<sup>510</sup> *Albert Fried & Co.*, Exchange Act Release No. 15,293 (Nov. 13, 1978), 16 SEC DOCKET 100; *Bache Halsey Stuart Shields Inc.*, Exchange Act Release No. 14,723 (May 1, 1978), 14 SEC DOCKET 977; *Thomson & McKinnon, Auchincloss, Kohlmeyer, Inc.*, Exchange Act Release No. 13,012 (Nov. 26, 1976), 11 SEC DOCKET 1055; *Paine, Webber, Jackson & Curtis Inc.*, Exchange Act Release No. 12,223 (Mar. 17, 1976).

<sup>511</sup> *Dr. Kan Chi Mui*, Exchange Act Release No. 15,381 (Dec. 4, 1978), 16 SEC DOCKET 346; *Bell & Beckwith*, Exchange Act Release No. 12,447 (May 13, 1976), 9 SEC DOCKET 634.

<sup>512</sup> *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, Exchange Act Release No. 15,421 (Dec. 20, 1978), 16 SEC DOCKET 517; *ISI Sales Corp.*, Exchange Act Release No. 12,541 (June 14, 1976), 9 SEC DOCKET 877.

<sup>513</sup> *Charles Stuart & Co.*, Exchange Act Release No. 12,884 (Oct. 12, 1976), 10 SEC DOCKET 696.

<sup>514</sup> *Gordon Sec., Ltd.*, Exchange Act Release No. 12,272 (Mar. 31, 1976), 9 SEC DOCKET 304.

ancial statements as required by Rule 17a-11 of the 1934 Act on Form X-17A-5,<sup>517</sup> and to advise the SEC of the employment of any person who has been enjoined from further securities violations and thereafter implement suitable supervisory procedures for such person, which procedures shall have been found to be non-objectionable by the SEC prior to the employment of any such person.<sup>518</sup> Finally, broker-dealers have agreed to create and keep current all books and records required by the Exchange Act and rules thereunder,<sup>519</sup> to appoint an independent director,<sup>520</sup> to retain special counsel,<sup>521</sup> and to retain independent, duly licensed auditors who have had previous experience in the examination of the financial statements of broker-dealers.<sup>522</sup>

The final category of sanctions involving broker-dealers is monetary awards. Monetary provisions have called for the respondent to pay a specified sum of money,<sup>523</sup> to pay "all compensation for services performed during suspension,"<sup>524</sup> to establish a "fund consisting of certain revenues to be derived,"<sup>525</sup> "to pay all compensation, including salaries, commissions, and bonuses, earned and to be paid and payable to him" from a certain investment company,<sup>526</sup> to disgorge the gross commission and foreign exchange gain which

<sup>515</sup> Robert Byron Stanat, Exchange Act Release No. 12,908 (Oct. 19, 1976), 10 SEC DOCKET 729; Nolan Twibell, Exchange Act Release No. 12,907 (Oct. 19, 1976), 10 SEC DOCKET 729.

<sup>516</sup> Gulf Inv. Bankers, Inc., Exchange Act Release No. 13,460 (Apr. 22, 1977), 12 SEC DOCKET 83.

<sup>517</sup> *Id.*; see David Cannarsa, Exchange Act Release No. 12,234 (Mar. 19, 1976), 9 SEC DOCKET 246.

<sup>518</sup> Delger Corp., Exchange Act Release No. 13,579 (May 31, 1977), 12 SEC DOCKET 669.

<sup>519</sup> David Cannarsa, Exchange Act Release No. 12,234 (Mar. 19, 1976), 9 SEC DOCKET 246.

<sup>520</sup> SEC v. Inventive Indus., Inc., Litigation Release No. 7,959 (June 7, 1977), 12 SEC DOCKET 803.

<sup>521</sup> Chartered New England Corp., Exchange Act Release No. 12,497 (June 1, 1976), 9 SEC DOCKET 781.

<sup>522</sup> David Cannarsa, Exchange Act Release No. 12,234 (Mar. 19, 1976), 9 SEC DOCKET 246.

<sup>523</sup> Bateman Eichler, Hill Richards, Inc., Exchange Act Release No. 14,579 (Mar. 20, 1978), 14 SEC DOCKET 520; Gulf Inv. Bankers, Inc., Exchange Act Release No. 14,557 (Mar. 13, 1978), 14 SEC DOCKET 425; Lambert Hirsheimer, Exchange Act Release No. 12,589 (July 1, 1976), 9 SEC DOCKET 989; Robert E. Anton, Exchange Act Release No. 12,424 (May 11, 1976), 9 SEC DOCKET 619.

<sup>524</sup> Lambert Hirsheimer, Exchange Act Release No. 12,589 (July 1, 1976), 9 SEC DOCKET 989.

<sup>525</sup> Michael Batterman, Exchange Act Release No. 12,278 (Mar. 29, 1976), 9 SEC DOCKET 307; see Albert Fried & Co., Exchange Act Release No. 15,293 (Nov. 3, 1978), 16 SEC DOCKET 100.

<sup>526</sup> Robert E. Anton, Exchange Act Release No. 12,424 (May 11, 1976), 9 SEC DOCKET 619.

he received,<sup>527</sup> to pay persons who purchased bonds one-half their loss,<sup>528</sup> and to increase net capital as defined by Rule 15c3-1 under the Exchange Act.<sup>529</sup>

## 2. Investment Advisers

The remedies approved by the Commission where the respondent is an investment adviser parallel those imposed upon broker-dealers. Censure,<sup>530</sup> of course, is the least stringent. An investment adviser's activities have been limited in various ways, including a moratorium on solicitation of new clients,<sup>531</sup> a prohibition on managing and supervising securities accounts for clients,<sup>532</sup> and a prohibition on engaging in any transaction as an investment adviser with any person or entity which at the time of the transaction is a customer of respondent's affiliated broker-dealer.<sup>533</sup> Furthermore, investment advisers have consented to suspension from association with any investment adviser<sup>534</sup> or broker-dealer.<sup>535</sup> Some settle-

<sup>527</sup> Gordon Sec., Ltd., Exchange Act Release No. 12,272 (Mar. 31, 1976), 9 SEC DOCKET 304.

<sup>528</sup> Bache Halsey Stuart, Inc., Exchange Act Release No. 12,847 (Oct. 1, 1976), 10 SEC DOCKET 652.

<sup>529</sup> Gulf Inv. Bankers, Inc., Exchange Act Release No. 13,460 (Apr. 22, 1977), 12 SEC DOCKET 83.

<sup>530</sup> A. Feldesman & Assocs., Investment Advisers Act Release No. 653 (Dec. 5, 1978), 16 SEC DOCKET 416; Independent Investor Publications, Inc., Investment Advisers Act Release No. 630 (May 15, 1978), 14 SEC DOCKET 1154; Consolidated Business Servs., Inc., Investment Advisers Act Release No. 587 (May 19, 1977), 12 SEC DOCKET 449; Dow Theory Letters, Inc., Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855; Capital Consultants, Inc., Investment Advisers Act Release No. 556 (Dec. 1, 1976), 11 SEC DOCKET 1107; Collett & Co., Exchange Act Release No. 12,784 (Sept. 9, 1976), 10 SEC DOCKET 417; Donelan, Phelps & Co., Investment Advisers Act Release No. 530 (Aug. 23, 1976), 10 SEC DOCKET 206; R.D.P. Investments, Ltd., Investment Advisers Act Release No. 509 (Apr. 12, 1976), 9 SEC DOCKET 440.

<sup>531</sup> Dow Theory Letters, Inc., Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855.

<sup>532</sup> R.D.P. Investments, Ltd., Investment Advisers Act Release No. 509 (Apr. 12, 1976), 9 SEC DOCKET 440.

<sup>533</sup> Donelan, Phelps & Co., Investment Advisers Act Release No. 530 (Aug. 23, 1976), 10 SEC DOCKET 266.

<sup>534</sup> First State Financial, Inc., Investment Advisers Act Release No. 655 (Jan. 8, 1979), 16 SEC DOCKET 690; Consolidated Business Servs., Inc., Investment Advisers Act Release No. 587 (May 19, 1977), 12 SEC DOCKET 449; Sanders Inv. Advisory Corp., Investment Advisers Act Release No. 537 (Sept. 14, 1976), 10 SEC DOCKET 496; Ronald L. Damask, Investment Advisers Act Release No. 531 (Aug. 30, 1976), 10 SEC DOCKET 393; R.D.P. Invs., Ltd., Investment Advisers Act Release No. 509 (Apr. 12, 1976), 9 SEC DOCKET 440.

<sup>535</sup> Donald R. Huffman, Investment Advisers Act Release No. 657 (Jan. 8, 1979), 16 SEC DOCKET 697; Robert Antolini, Investment Advisers Act Release No. 656 (Jan. 8, 1979), 16 SEC DOCKET 696; Bernard G. Greer, Investment Advisers Act Release No. 510 (Apr. 12, 1976), 9 SEC DOCKET 441.

ments, however, permit association as a non-supervisory employee under supervision deemed adequate by the SEC.<sup>536</sup> Other settlements provide that the suspension be without any form of compensation or accrual of compensation attributable to the period of suspension.<sup>537</sup>

Investment advisers have been barred from association with any broker, dealer, or investment adviser,<sup>538</sup> from having any financial interest or any position as partner, director, or officer in any broker, dealer, or investment adviser which manages or supervises securities accounts for clients,<sup>539</sup> and from "serving or acting as an employee, officer, director, member of an advisory board, investment adviser, or depositor of, or principal underwriter for, a registered investment company or affiliated person of such investment adviser, depositor, or principal underwriter."<sup>540</sup> These provisions, however, sometimes permit continued association as an adequately supervised employee in a non-supervisory or non-proprietary capacity.<sup>541</sup> Moreover, investment adviser registration has been revoked<sup>542</sup>

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<sup>536</sup> American Gen. Capital Management, Inc., Investment Advisers Act Release No. 616 (Feb. 23, 1978), 14 SEC DOCKET 240; Cumulo Management, Inc., Investment Advisers Act Release No. 569 (Feb. 7, 1977), 11 SEC DOCKET 1109.

<sup>537</sup> Capital Consultants, Inc., Investment Advisers Act Release No. 556 (Dec. 1, 1976), 11 SEC DOCKET 1107.

<sup>538</sup> Kay Harrison, Investment Advisers Act Release No. 547 (Oct. 26, 1976), 10 SEC DOCKET 784; Jerry L. Dover, Investment Advisers Act Release No. 519 (June 9, 1976), 9 SEC DOCKET 865; see Financial Profiles, Inc., Investment Advisers Act Release No. 586 (May 10, 1977), 12 SEC DOCKET 377; Bruce Keller Financial Advisers, Inc., Investment Advisers Act Release No. 568 (Feb. 3, 1977), 11 SEC DOCKET 1661; F.C. Berckefeldt & Co., Investment Advisers Act Release No. 540 (Oct. 4, 1976), 10 SEC DOCKET 683; John C. Schick, Exchange Act Release No. 12,783 (Sept. 9, 1976), 10 SEC DOCKET 416; H. William Alexander, Investment Advisers Act Release No. 521 (June 17, 1976), 9 SEC DOCKET 915. In some cases, the defendant was barred from associating only with investment advisers. Luis Delacruz, Investment Advisers Act Release No. 552 (Nov. 16, 1976), 10 SEC DOCKET 973; J.L. Mead & Co., Investment Advisers Act Release No. 512 (May 10, 1976), 9 SEC DOCKET 660; Bowen & Bowen & Assocs., Investment Advisers Act Release No. 502 (Mar. 9, 1976), 9 SEC DOCKET 172.

<sup>539</sup> First State Financial, Inc., Investment Act Release No. 655 (Jan. 8, 1979), 16 SEC DOCKET 690; R.D.P. Inv., Ltd., Investment Advisers Act Release No. 509 (Apr. 12, 1976), 9 SEC DOCKET 440.

<sup>540</sup> Luis Delacruz, Investment Advisers Act Release No. 552 (Nov. 16, 1976), 10 SEC DOCKET 973; Kay Harrison, Investment Advisers Act Release No. 547 (Oct. 26, 1976), 10 SEC DOCKET 784.

<sup>541</sup> Sanders Inv. Advisory Corp., Investment Advisers Act Release No. 537 (Sept. 14, 1976), 10 SEC DOCKET 495.

<sup>542</sup> Cardinal Management Co., Investment Advisers Act Release No. 628 (May 1, 1978), 14 SEC DOCKET 1027; F.C. Berckefeldt & Co., Investment Advisers Act Release No. 540 (Oct. 4, 1976), 10 SEC DOCKET 683; Sanders Inv. Advisory Corp., Investment Advisers Act Release No. 537 (Sept. 14, 1976), 10 SEC DOCKET 495; H. William Alexander, Investment Advisers Act Release No. 521 (June 17, 1976), 9 SEC DOCKET 915; J.L. Mead & Co., Investment Advisers Act Release No. 512 (May 10, 1976), 9 SEC DOCKET 660; Bowen & Bowen & Assocs., Investment Advisers Act Release No. 502 (Mar. 9, 1976), 9 SEC DOCKET 172.

or denied<sup>543</sup> pursuant to SEC approved settlements.

As with broker-dealers, investment advisers often consent to remedial measures which focus on preventing future violations and informing customers and the SEC of certain activity. Thus, a consenting respondent agreed to furnish in advance to the SEC "the names of any accounts, other than his own or that of his spouse, in which security transactions are effected and in which he has any direct or indirect beneficial interest;"<sup>544</sup> conduct his personal investment activities pursuant to a special policy should he become associated with any investment adviser registered with the Commission in the capacity of an "advisory representative";<sup>545</sup> mail a true copy of the SEC's order to each of its current clients and each of its former clients;<sup>546</sup> file an affidavit with the Commission certifying that the order has been compiled with;<sup>547</sup> and submit to the SEC a report setting forth the information as required by paragraph (a)(12) of Rule 204-2 under the Investment Advisers Act and like information for fiduciary accounts to which respondent is a registered or unregistered investment adviser.<sup>548</sup> To compensate injured investors, the SEC has prompted investment advisers to contribute a specified sum of money "to be applied as a credit against respondent's clients' accounts,"<sup>549</sup> to resolve respondent's "disputes with clients or former clients arising out of the allegations contained in [the order],"<sup>550</sup> and to make pro rata refunds to clients for whom it presently manages securities accounts of the fees received for managing these accounts and submit an affidavit to the SEC's staff that shall attest that these refunds have been made.<sup>551</sup>

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<sup>543</sup> Jerry L. Dover, Investment Advisers Act Release No. 519 (June 9, 1976), 9 SEC DOCKET 865.

<sup>544</sup> Richard C. Goldstein, Investment Advisers Act Release No. 583 (Apr. 26, 1977), 12 SEC DOCKET 269; *see* Dow Theory Letters, Inc., Investment Advisers Act Release No. 571 (Feb. 22, 1977), 11 SEC DOCKET 1855.

<sup>545</sup> Richard C. Goldstein, Investment Advisers Act Release No. 583 (Apr. 26, 1977), 12 SEC DOCKET 269.

<sup>546</sup> Capital Consultants, Inc., Investment Advisers Act Release No. 556 (Dec. 1, 1976), 11 SEC DOCKET 1107.

<sup>547</sup> *Id.*

<sup>548</sup> Richard C. Goldstein, Investment Advisers Act Release No. 583 (Apr. 26, 1977), 12 SEC DOCKET 269.

<sup>549</sup> Consolidated Business Servs., Inc., Investment Advisers Act Release No. 587 (May 19, 1977), 12 SEC DOCKET 449; *see* Capital Consultants, Inc., Investment Advisers Act Release No. 556 (Dec. 1, 1976), 11 SEC DOCKET 1107.

<sup>550</sup> Capital Consultants, Inc., Investment Advisers Act Release No. 556 (Dec. 1, 1976), 11 SEC DOCKET 1107.

<sup>551</sup> *Id.*

## V. CONCLUSION

To the attorney representing persons accused of a violation of Rule 10b-5 a working knowledge of the vast range of available remedies is most valuable. Accordingly, the practitioner must be able to inform his client of the difference in potential exposure between full term litigation and settlement. Indeed, in advising a client faced with a 10b-5 charge, it may be more important to consider the possible sanctions rather than whether the SEC will be able to establish liability under the securities laws. In response to the practitioner's need, this Article has attempted to set forth a broad and, at the same time, detailed description of the available remedies.