New and Comprehensive Duties of Securities Sellers to Investigate, Disclose, and Have an "Adequate Basis" for Representations

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NOTES

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The duties of investigation and disclosure imposed upon securities salesmen have been significantly enlarged by several recent cases generated by the Second Circuit's 1963 decision of *Berko v. SEC*.[1] In a hearing before the Securities and Exchange Commission[2] it was found that Berko was a salesman working out of an acknowledged "boiler room."[3] His employer had provided its salesmen, including Berko, with fraudulent sales brochures,[4] some of which were subsequently distributed by Berko. The action by the Commission against Berko arose out of the sale of a specific security to a customer who had received fraudulent sales brochures and had called Berko to inquire about investment in the stock. In the course of this particular sale, Berko represented that there was a "good possibility" that the market value of the stock would, within a year, increase to fifteen from its sale price of seven. In finding this conduct to be a violation of the antifraud provisions[5] of the securities acts, the Commission had before it evidence that the salesman had himself purchased a large amount of the stock and had sold varying amounts to his relatives as well as to others. In addition, the stock did, in fact, increase in value (albeit not within the predicted time),[6] and there was uncontroverted testimony by the customer that he had understood Berko's prediction of increase in value to be only an opinion.[7] On petition for review, the Court of Appeals for the Second Circuit remanded to the Commission,[8] which affirmed its previous order without further hearing, but with a revised opinion.[9] In this reiterated order

1 316 F.2d 137 (2d ed. 1963).

2 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6462, Feb. 6, 1961, *supplemented*, SEC Securities Exchange Act Release No. 6498, March 16, 1961.

3 The "boiler room" metaphor refers to the cacophony and perspiration produced by numbers of securities salesmen simultaneously delivering high-pressure sales pitches into rows of telephones. Livingston, The American Stockholder 266 (1958). For discussions of boiler-room sales practices, see *Report of Special Study of Securities Markets of the Securities and Exchange Commission*, H.R. Doc. No. 95, 88th Cong., 1st Sess., pt. 1, at 265-68 (1963) [hereinafter cited as *Special Study*]; Note, 72 Yale L.J. 1411 (1963).

4 Berko's employer stipulated for purposes of the hearing that the brochures were false and misleading. Mac Robbins & Co., SEC Securities Exchange Act Release No. 6462, Feb. 6, 1961.

5 Securities Act of 1933 § 17(a), 48 Stat. 84, 15 U.S.C. § 77q(a)(2) (1958); Securities Exchange Act of 1934 § 10(b), 48 Stat. 891, 15 U.S.C. § 78j(b) (1958), and § 15(c)(1), 48 Stat. 895, 15 U.S.C. § 78*o*(c)(1) (1958); Rule 10b-5, 17 C.F.R. § 240.10b-5 (1949); Rule 15cl-2, 17 C.F.R. § 240.15cl-2 (1949).

6 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6462, Feb. 6, 1961. See also Brief for Petitioner, p. 4, Berko v. SEC, 297 F.2d 116 (2d Cir. 1961).

7 Record, p. 139, Mac Robbins & Co., SEC Securities Exchange Act Release No. 6462, Feb. 6, 1961.

8 Berko v. SEC, 297 F.2d 116 (2d Cir. 1961). "Basically . . . [the Commission's] goal should be clarification of the legal duties imposed on salesmen involved in . . . [boiler room] operations . . . ." *Id.* at 119.

9 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6846, July 11, 1962, *aff'd*, Berko v. SEC, 316 F.2d 137 (2d Cir. 1963).

finding Berko a "cause"[10] of revocation of his employer's broker-dealer registration, the Commission emphasized that its findings were not based on any value judgment as to the qualities of the stock involved, and that the customer's understanding as to Berko's representations had no significance insofar as the gravamen of the salesman's offense was concerned.[11] Rather, Berko's breach of duty, in the first instance, consisted of his failure to have an "adequate basis" for his statements as to future increases in the market value of the stock.[12] The court of appeals affirmed this holding and, further, affirmed the Commission's additional holding that a salesman working out of a boiler room is to be held to a higher duty of independent investigation and disclosure than a salesman in a legitimate securities sales operation, and that a boiler-room salesman's conduct is fraudulent if the information he presents to the public to induce sales is misleading.[13] On this latter ground, the Commission, and the court of appeals on review, rejected as a defense the salesman's contention that he was justified in relying on the fraudulent brochures prepared by his employer.[14]

In one sense, it may be said that the *Berko* decision is simply judicial recognition of previously delineated Commission policy. This policy is based on considerations affecting the application of the federal securities acts—in particular the anti-fraud provisions—to the boiler-room sales operation. The federal securities laws are the result of congressional awareness that securities are complex merchandise, and that intelligent investment decisions require evaluation of detailed information concerning the security involved.[15] One of the primary efforts of the Commission to effectuate these laws has been the imposition of a standard of professionalism upon the securities business.[16] This standard frequently has been characterized by the Commission as an implied representation of fair dealing between the broker-dealer, or his salesman, and the customer.[17] Consequently, the anti-fraud provisions have been construed to proscribe a variety of selling prac-

10 Securities Exchange Act of 1934 § 15(b) and § 15A(b)(4), 49 Stat. 1378 (1936) and 52 Stat. 1070 (1938), as amended, 15 U.S.C. § 78*o*(b) (1958) and 15 U.S.C. § 78*o*-3(b)(4) (1958), provide for revocation of a broker or dealer's registration if any person employed by a registered broker-dealer has willfully violated any provision of the securities acts, and § 15A(b)(4) further provides for revocation if an employee previously has been found a "cause" of a revocation. As interpreted by the Commission and the courts, "cause" is a term of art and need not be an immediate or inducing cause. R. H. Johnson & Co., 33 S.E.C. 180, *aff'd sub nom.* R. H. Johnson & Co. v. SEC, 198 F.2d 690 (2d Cir.), *cert. denied*, 344 U.S. 855 (1952).

11 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6846, July 11, 1962.

12 *Ibid.* The Commission found not only that the sales literature was fraudulent, but also that financial information contradicting the misrepresentations in the brochures had been prepared and was readily available.

13 Berko v. SEC, 316 F.2d 137, 142 (2d Cir. 1963).

14 *Ibid.*

15 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6846, July 11, 1962.

16 See generally *Special Study* pt. 1, at 237-40; Comment, 62 MICH. L. REV. 680, 734 (1964).

17 See, *e.g.*, Charles Hughes & Co. v. SEC, 139 F.2d 434 (2d Cir.), *cert. denied*, 321 U.S. 786 (1943); Duker & Duker, 6 S.E.C. 386 (1939).

tices other than misstatement of, or omission to state, a material fact.[18] Common-law concepts of fraud and deceit—requiring proof of false representation of a material fact, *scienter*, and frequently reliance[19]—have been greatly expanded by the Commission.[20] Apparently, the aim is to prohibit as fraudulent conduct any activity which exploits or encourages inequalities of bargaining power or capability. The additional duty thus imposed is couched in terms of an implied standard of fair dealing, but can be generically defined as a duty of disclosure incumbent on the seller whenever failure to disclose information is disadvantageous to a customer's informed and careful consideration of the investment factors applicable to the security involved.

The so-called boiler room, because of the nature of the selling techniques involved, presents a formidable challenge to effective regulation of securities sales practices. Typical boiler-room practices include the distribution of glamorous sales literature, usually describing an unlisted security, followed by high pressure long-distance telephone calls from the salesman reiterating the glowing picture of growth and quick profits presented in the literature. The purpose is immediate sale, and factors which tend to cast doubt on the predicted success of an investment are played down, or often omitted entirely.[21] The Commission itself has characterized the boiler-room operation as "the antithesis of fair dealing."[22] Nevertheless, such selling practices have not yet been held a per se violation of the anti-fraud provisions of the securities acts.[23] As a result, Commission efforts to eradicate boiler-room practices necessarily have been directed to specific conduct which does come within the scope of the anti-fraud provisions.

These attempts to curb sales abuses in the boiler-room context have taken one of two forms. First, outright false statements are expressly proscribed by the anti-fraud provisions[24] and, when provable,[25] are a sufficient basis

18 See Charles Hughes & Co. v. SEC, *supra* note 17; Archer v. SEC, 133 F.2d 795 (8th Cir. 1943). The anti-fraud provisions, *supra* note 5, are broader in coverage than common-law definitions of fraud. Their composite effect, as applicable here, makes unlawful use of the mails or interstate facilities in connection with the offer or sale of any security where there is present a device to defraud, an untrue or misleading statement of a material fact, omission to state such fact so as to be misleading, or any act, practice, or course of conduct which operates or would operate as a fraud or deceit upon a customer.

19 See Derry v. Peek, 14 App. Cas. 337, 374 (1889).

20 For a comparison of securities fraud concepts and common-law deceit, see 3 Loss, SECURITIES REGULATION 1430-44 (2d ed. 1961).

21 See authorities cited in note 30 *supra*.

22 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6846, July 11, 1962. It has even been suggested that "firms which qualify for this ignominious appellation, almost without exception, operate in violation of existing legal and ethical standards." *Special Study* pt. 1, at 265.

23 *But cf.* proposed Rule 15c2-6, SEC Securities Exchange Act Release No. 6885, Aug. 16, 1962. This rule would make it unlawful for a broker or dealer to sell or offer certain equity securities at a price of $10 or less by telephone unless he establishes that the transaction is exempt under the rule.

24 See note 18 *supra*.

25 *Cf.* text accompanying note 3 *infra*.

for Commission action. As a second ground, the Commission has adopted the position that representations made to a prospective customer without an adequate basis are contrary to the basic obligation of fair dealing and therefore also constitute fraud.[26] It is immaterial to such a determination that representations are couched in terms of opinion, rather than fact, so long as the representations are designed to induce purchases.[27] As is suggested by the number of cases in which the Commission has employed the "adequate basis" test as a standard for finding representations to be fraudulent, the test is not a new one.[28] *Berko v. SEC*, however, was the first judicial affirmation of this duty. The duty is based on the fair dealing standard previously mentioned and presumably provides the salesman with a choice of either having reasonable substantiation for oral representations made to the customer or else refraining entirely from predictions concerning the security. It appears that, if the salesman desires to make predictions, he must investigate and compare all available information, and such information must provide an adequate basis for his prediction. On the other hand, failure to investigate is not itself fraudulent conduct under this standard, nor need the salesman disclose the basis for his representation to the customer. It is only in after-the-fact examination of such a representation that the salesman must be able to show his statement concerning the security to have been reasonable in light of all the information reasonably available at the time of sale. Thus, at least ostensibly, investigation in the "adequate basis" obligation of the salesman involves no affirmative duty of investigation.[29]

Neither of the two foregoing methods of control is sufficient protection against the totality of abuse usually present in the boiler-room operation. The essence of boiler-room technique is the presentation of a composite misrepresentation by means of a series of omissions and distortions, none of which is itself clearly fraudulent. Consequently, it is often infeasible, because of the time and expense involved, to prove specific selling violations, and fraudulent conduct may not be provable at all. Moreover, even in situations where there have been fraudulent oral representations, serious problems of proving that a specific salesman perpetrated a particular fraud arise

[26] See, *e.g.*, Alexander Reid & Co., SEC Securities Exchange Act Release No. 6727, Feb. 8, 1962; Barnett & Co., SEC Securities Exchange Act Release No. 6310, July 5, 1960; Best Sec. Inc., SEC Securities Exchange Act Release No. 6282, June 3, 1960; Leonard Burton Corp., SEC Securities Exchange Act Release No. 5978, June 4, 1959.

[27] See cases cited in note 26 *supra*.

[28] Although the test has been frequently used, it is, nevertheless, a fairly recent one, having been apparently first employed to determine the presence of fraudulent conduct in 1959. Leonard Burton Corp., SEC Securities Exchange Act Release No. 5978, June 4, 1959.

[29] The Commission logically could have expanded the duty to have an adequate basis to include a responsibility for the accuracy of any literature the salesman distributes—requiring investigation before sale to avoid violation of the anti-fraud provisions if such literature is false—but it has not done so. The duty appears to be limited to oral representations. Cases cited in note 26 *supra*.

because the transaction has been conducted by long-distance telephone.[30] This mode of selling also impairs initial discovery of violations because there is no tangible evidence of infraction which the Commission might find in a periodic inpection of a firm's records, and because many defrauded customers, unaware that the representation is fraudulent, accept the loss as a risk of speculation or, out of pride, hesitate to complain that they have been duped.[31]

It is in this area of misconduct difficult of proof that the *Berko* decision is most significant. The court not only held that failure to have an adequate basis for representations made to the customer is fraud, but also, independently, that the salesman has an affirmative duty to investigate information presented to the public to induce sales. As a result of his knowledge that he was working in a boiler room, the salesman in *Berko* was put on notice of the potentiality of unethical securities sales practices and therefore had constructive knowledge of the fraudulence of the contents of his employer's sales brochures.[32] Charged with this knowledge, the salesman's continued participation in the boiler-room operation constituted willful violation of the anti-fraud provisions, since he was responsible for allowing customers to rely on the fraudulent brochures.[33] The significance of this holding is twofold. First, a finding of fraud based on failure to investigate imposes a much higher standard than merely requiring restraint from representation if the available facts do not warrant a prediction. Reliance on fraudulent information prepared by others will not exculpate the salesman; an affirmative duty to investigate personally the accuracy of information presented to the investing public is imposed. To avoid fraudulent conduct it is no longer sufficient that the salesman simply refrain from making predictions himself; he must also investigate other information upon which the customer may rely. Although the opinion in *Berko v. SEC* does not make clear the extent of the investigation required, it suggests, as a minimum, the examination of all available information concerning the security.[34] Presumably, the obligation requires either a full disclosure of deficiencies or inaccuracies contained in the sales literature or else the salesman's immediate dissociation of himself from the sales campaign.[35] The public interest in

30 To prove fraud the Commission must not only ascertain what was communicated, but also associate representations made by voice over the long-distance telephone to the salesman and assemble some evidence concerning the issuer in order to make a showing as to the false or misleading character of the representation. Loomis, *Enforcement Problems Under the Federal Securities Laws*, 14 BUS. LAW. 665, 673 (1959).

31 See *Special Study* pt. 1, at 304-08.

32 Berko v. SEC, 316 F.2d 137, 142 (2d Cir. 1963).

33 *Ibid.* The gravamen of the violation thus appears to be the failure of the salesman to disabuse the customer of the misleading information upon which the latter might rely in deciding to purchase.

34 See note 12 *supra*.

35 *Cf.* Cady, Roberts & Co., SEC Securities Exchange Act Release No. 6668, Nov. 8, 1961, where the Commission held that, if disclosure required of a corporate insider would be improper or unrealistic under the circumstances, the alternative must be to forego the transaction.

such regulation surmounts objections that such a duty of investigation, accompanied by commensurate disclosure, amounts to advising a customer not to purchase,[36] or that holding a boiler-room salesman responsible for literature prepared by his employer is tantamount to guilt by association.[37] As the Commission has suggested, there can be no justification for a claim of reliance on literature furnished by an employer who is engaged in a fraudulent sales campaign;[38] the effect of allowing exculpation of the salesman under these circumstances would be to place a premium on indifference to responsibility at the point most directly and intimately affecting the investor. Second, the holding in *Berko* established a duty which may be breached even though a salesman claims reliance on misrepresentations contained in printed matter. Misrepresentation is not an element of the salesman's fraud; therefore, evidence of fraudulent statements, made by the salesman at some indeterminate time in the past over the long distance telephone, need not be produced.

However, as with most definitions of duty established by the Commission,[39] the *ad hoc* nature of the finding of violation raises at least two important and related questions: (1) the extent of investigation required and (2) the situations in which the duty to investigate will be imposed. The first question is one of degree. For example, in the *Berko* case the salesman himself mailed out many of the fraudulent brochures and had ample opportunity to inspect them.[40] Whether the salesman will also be held in violation if his employer disseminates the fraudulent literature is left unanswered. Presumably, the salesman's conduct would be fraudulent in such a situation if the material is reasonably available to the salesman.[41] If so, the question arises as to how much and what type of misrepresentation must appear in the sales literature to make it fraudulent.[42] A policy of *ad hoc* determination, made necessary by the differences in fact situations in which selling malpractice may arise, considerably limits the specificity of any answer which may be given to the question of degree of investigation required. Some indication, however, is present in an answer to the second problem—that of the situations in which the affirmative duty to investigate will be imposed. The court in the *Berko* case predicated the duty of investigation and disclosure upon notice of the potentiality of fraudulent sales

36 *Cf.* Mac Robbins & Co., SEC Securities Exchange Act Release No. 6462, at 7, Feb. 6, 1961.

37 *Cf.* Brief for Petitioner, p. 12, Berko v. SEC, 316 F.2d 137 (2d Cir. 1963).

38 Mac Robbins & Co., SEC Securities Exchange Act Release No. 6846, July 11, 1962.

39 See generally Comment, 62 MICH. L. REV. 680 (1964).

40 See Berko v. SEC, 316 F.2d 137, 142 (2d Cir. 1963).

41 *Cf.* text accompanying note 56 *infra.*

42 The Commission found the brochures distributed by Berko fraudulent because they emphasized that the company was a well-financed, expertly-managed, profit-making enterprise when in fact the financing was questionable, the managers were inexperienced, and the so-called dividends constituted merely a fractionating of shareholder's existing equity interests. Mac Robbins & Co., SEC Securities Exchange Act Release No. 6846, July 11, 1962.

practices imputed to the salesman because of his knowledge that he was involved in a high-pressure sales operation, a situation which, in the past experience of the Commission, had proved a fertile ground for security sales frauds.[43] The court thus specifically limited its decision regarding the obligation of investigation to a boiler-room context[44] and implied that the principle of law applied was even further limited by the Commission findings of fact.[45] However, subsequent to this decision, the obligation of investigation has been applied in holding securities sales practices fraudulent in at least three cases, only two of which involved boiler rooms and boiler-room salesmen.[46]

In the first of these, a civil action for damages,[47] the facts were similar to those of the *Berko* case, although the high-pressure long-distance telephone solicitation, following distribution of sales literature, was instigated by the salesman. The salesman claimed reliance on oral information received from his employer as the basis for false predictions made to the plaintiff customer.[48] No fraudulent sales literature was involved, but, in finding the salesman personally liable in damages for his customer's losses, the court held the salesman to the same duty of investigation imposed in *Berko*.[49] In a second case,[50] a criminal proceeding, the court also cited the *Berko* decision, and held that the salesman's conduct was criminally fraudulent since he should have been aware both that a boiler room was in progress and that the sales literature involved "was suspicious on its face to anyone with the slightest financial knowledge."[51] It is significant in evaluating the scope of the holding in *Berko v. SEC* that in neither of the above

43 See *Special Study* pt. 1, at 265.

44 Berko v. SEC, 316 F.2d 137, 142-43 (2d Cir. 1963).

45 *Id.* at 143 n.6. In administrative actions by the Commission such as that reviewed in the *Berko* case, sanctions are preceded by findings of fact. Of the ten salesmen implicated in the boiler-room operation which gave rise to the *Berko* decision, nine were found to have engaged in fraudulent conduct. The tenth was found factually not to have violated the anti-fraud provisions. *Ibid.* On the other hand, while injunctive actions by the Commission and criminal actions referred to the Attorney General are preceded by an investigation performed by the Commission's staff, there is no finding of fact by the Commission itself. Of course, such actions may result from facts ascertained in a formal hearing. See generally 3 Loss, *op. cit. supra* note 20, at 1894-1918, 1945-2004.

46 *Cf.* Richmond Corp., SEC Securities Act Release No. 4584, Feb. 27, 1960, wherein a duty of independent investigation of the issuer was imposed on a broker-dealer acting as the underwriter.

47 Herring v. Hendison, 218 F. Supp. 419 (S.D.N.Y. 1963).

48 *Id.* at 420.

49 The court stated that "if a salesman working in a 'boiler room' house claims that he relied on literature furnished by an employer who is engaged in a fraudulent sales campaign, that reliance does not excuse him." *Ibid.* The evidence in this case consisted almost entirely of the customer's testimony that the defendant was the salesman to whom he talked. Defendant denied this, but the court found that the testimony had the "ring of truth in it." *Ibid.*

50 United States v. Ross, 321 F.2d 61 (2d Cir.), *cert. denied*, 375 U.S. 894 (1963).

51 *Id.* at 65. Defendant salesman's contention on appeal had been that there was insufficient evidence of violation of § 17(a) of the Securities Act of 1933 because he was warranted in relying on information given him by his employer. *Ibid.*

cases was the decision preceded by a Commission finding of fact, since the Commission is not a party to criminal proceedings or civil actions for damages under the securities acts. Both cases, however, dealt with the conduct of a salesman working out of a boiler room.

The third case, *SEC v. Chamberlain Associates*,[52] involved neither a boiler room nor a salesman as such, but a financial public relations consultant hired to create a market for the stock.[53] The court, ordering an injunction to issue against the defendant, relied on a conclusion of law that his conduct was fraudulent in violation of section 17(a) of the Securities Act. The evidence presented by the Commission in the action consisted, *inter alia*, of a showing that the defendant had distributed a letter containing four false or misleading statements about certain mining stock.[54] The letter was designed as a report to shareholders, and had been distributed as such by defendant's employer. However, defendant had utilized the letter only to provide information for broker-dealers intended as a market for the stock, and he had had no contact with the public. With respect to the defendant's claim that his conduct was not fraudulent because he had simply relied on the representations of others, the court stated that it was by virtue of his representations that the stock would pass to the public, and that defendant therefore "had the duty to investigate further."[55] In light of this decision, it is obvious that the Commission does not intend to limit the affirmative duty of investigation merely to the boiler-room context. A logical extension of the investigation requirement would be its application to situations in which the circumstances of a sale should charge an employee with knowledge that he is engaged in a fraudulent sales campaign, regardless of whether the operation is a boiler room or not. However, the *Chamberlain* case did not rest the finding of fraud upon any such knowledge attributable to the defendant. Rather, his duty was independent of any outside circumstances and arose because "the true facts were *apparently readily available* by mere correspondence with . . . others."[56] The result of this decision is imposition of the duty of affirmative investigation upon all persons in the securities business who are actively involved in sales efforts. Availability of facts contradictory to representations concerning managerial experience and financial status of the company the stock of which is to be sold is, at best, a minimal requirement upon which to rest a duty, since such information is usually in the public domain. And to suggest that the information need only be "apparently" readily available is to diminish further any limitation upon the duty of investigation. Moreover, it would appear that, even if correct information is not "readily available" and the

52 CCH FED. SEC. L. REP. ¶ 91228 (S.D.N.Y. May 16, 1963).

53 *Id.* at 94070.

54 See note 45 *supra*. This evidence was apparently obtained through investigation rather than from a finding by the Commission.

55 SEC v. Chamberlain Associates, CCH FED. SEC. L. REP. ¶ 91228, at 94070 (S.D.N.Y. May 16, 1963).

56 *Ibid.* (Emphasis added.)

information disseminated is false or misleading, distribution still constitutes a fraud, since investigation would disclose that there is no "adequate basis" for the representations.[57]

It cannot be doubted that the nature of the securities business requires some standard of fair dealing and concomitant disclosure by the seller. The broad scope of the anti-fraud provisions and the interpretation of them by the Commission and the courts clearly indicate that some standard of professionalism is viewed as not only desirable, but mandatory. Within this framework, adequate protection of the investing public may well require the high duty imposed in the *Berko* case. However, the opinion leaves undefined not only the degree of investigation required (as well as more limited considerations as to what constitutes an "adequate basis"), but also the scope of the obligation in terms of when it is to arise. Some of the objection to the resulting uncertainty is obviated when the action is initially a proceeding before the Commission, since the Commission must find, even though the conduct is fraudulent, that the sanction to be imposed is in the "public interest."[58] This requirement circumscribes to some degree the harshness of *ad hoc* application of an undefined standard of conduct to securities sales practices. Further protection against arbitrary application of the standard is provided by the nature of Commission proceedings—findings viewed against the broad background of the entire securities industry, with which the Commission is necessarily familiar. On the other hand, no such limitations upon liability exist when the proceeding is a criminal or civil action.[59] Failure to investigate the accuracy of information disseminated to the public is a considerably broader concept of fraud than even previous Commission interpretations of the anti-fraud provisions. It is not subject to the prima facie elements of proof required in a common-law deceit action or a proceeding for criminal fraud. If a breach of the duty of investigation is to give rise to civil liabilities and criminal culpability, as well as Commission sanctions, there should be definitional limitations circumscribing the raising of this duty. While the *Berko* case suggests imputed knowledge of the employer's fraudulent conduct as a limited circumstance giving rise to the duty, the *Chamberlain* holding indicates that the requirement is to encompass far more than imputed knowledge. If the obligation is to arise in all securities sales, it is definite and significant enough to be codified by legislation or regulation. On the other hand, if reliance by the employee upon information obtained from, or distributed by, his employer is fraudu-

57 *But cf.* note 29 *supra* and accompanying text.

58 Under the anti-fraud provisions, *supra* note 5, the Commission is directed to impose a sanction only if it finds such action will be in the public interest. Since no two cases present the same circumstances, it is difficult to generalize as to when the public interest requires imposition of a sanction. However, the requirement does vest in the Commission broad discretion which may be exercised against imposing sanctions if the fraudulent conduct found is such that the violator was not aware of his duty. See 2 Loss, *op. cit. supra* note 20, at 1323-26.

59 See cases cited notes 47, 50 *supra* and accompanying text.

lent conduct in certain circumstances, the variety and subtlety of potential abuses inherent in the sale of securities would make legislation or regulation impractical. It is thus incumbent upon the Commission to provide more definitive guidelines as to when reliance by the salesman is no defense and, conversely, when such reliance is reasonable. At present, the courts and the Commission itself are not imposing upon the duty to investigate the limitations suggested by the *Berko* case itself.

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