

1990

Johnson-Bowles Company Inc., and Marlen V. Johnson v. The Division of Securities and the Utah Department of Commerce, State of Utah : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO.

900558CA

IN THE UTAH COURT OF APPEALS

JOHNSON-BOWLES COMPANY, INC.,
a Utah corporation, and MARLEN
V. JOHNSON,

Petitioners,

v.

The DIVISION OF SECURITIES
and the UTAH DEPARTMENT OF
COMMERCE, STATE OF UTAH,

Respondents.

RESPONDENTS' ADDENDUM

Case # 900558-CA

Rule 29 Priority # 15

Consolidated appeal from Final Agency Actions by the
Division of Securities, Department of Commerce, State of Utah
Case # SD-89-46BD and Case # SD-89-47AG

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JOHNSON-BOWLES COMPANY, INC.,
a Utah corporation, and MARLEN
V. JOHNSON,

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The DIVISION OF SECURITIES
and the UTAH DEPARTMENT OF
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Dismissal of prior derivative action by stockholder for failure to post bond-for cost did not operate as an adjudication on merits and did not make dismissal res judicata to subsequent derivative action by another stockholder against the same defendants. *Saylor v. Lindsley*, C.A.N.Y. 1968, 391 F.2d 965 on remand 302 F.Supp. 1174.

The defense of res judicata and estoppel are available, under proper circumstances, to a defendant against a claim brought under this chapter. *Moran v. Paine, Webber, Jackson and Curtis, Inc.* Pa.1967, 279 F.Supp. 573, affirmed 389 F.2d 242.

Doctrine of res judicata did not preclude customer of stock brokerage firm from bringing suit in federal court upon claims under this chapter, even though claim was presented to state court, together with alleged violations of Securities Act of 1933, section 77a et seq. of this title, and common law actions of fraud and deceit. *Id.*

Although verdict for defendants in state action for breach of contract and common-law fraud would not be res judicata as to federal action based on this chapter and upon the same factual complex, it would foreclose relitigation in federal action of many issues, common to both, on basis of collateral estoppel. *Gallo v. Mayer*, 1966, 270 N.Y.S.2d 295, 50 Misc.2d 385, affirmed 272 N.Y.S.2d 1007, 26 A.D.2d 773.

Verdict for defendants in federal action on this chapter based on finding that defendants used no manipulative or deceptive device would be res judicata of common law fraud action brought in state court and based on same factual complex. *Id.*

Where United States district court assumed jurisdiction and issued ruling, not appealed to higher federal court, striking claim for relief based on alleged false proxy statements, the ruling was final and res judicata, and the point thus could not be subsequently reargued or collaterally attacked in state court. *Webster v. Steinberg*, 1968, 442 P.2d 894, 41 Nev. 426.

44 Review

In reviewing dismissal of complaint for lack of jurisdiction under this chapter, court is limited to observing whether the complaint is drawn to seek recovery under this chapter and, if so, determining whether, as a matter of law, the federal claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or is wholly inauth-

278, rehearing denied 521 F.2d 815, certiorari denied 96 S.Ct. 786, 423 U.S. 1055 48 L.Ed.2d 644.

Denial of offeror's motion for summary judgment in action to require offeror to divest itself of stock in target corporation and to refrain from voting the stock which it acquired as result of stock tender offer was not appealable. *Electronic Specialty Co. v. International Controls Corp.*, C.A.N.Y.1969, 409 F.2d 937.

Appeals would be dismissed in suit by common shareholders of railway for relief under this chapter where no final judgment in the case had yet been entered by district court. *Quirk v. Norfolk & W. Ry. Co.*, C.A.N.Y.1966, 367 F.2d 864.

Question of whether judicial review is apposite is not answered merely by the label which agency may place on its own communication but rather by a functional appraisal of consequences of action which plaintiffs may reasonably expect, and court must evaluate both fitness of issues for judicial decision and hardship to parties of withholding court decision. *Koss v. Securities and Exchange Commission of U. S.*, D.C.N.Y.1973, 364 F.Supp. 1321.

165. Remand

Where court of appeals was unable to discern from record whether order of dismissal appealed from was based upon lack of personal jurisdiction, lack of subject-matter jurisdiction, or both, case was remanded with directions that district judge specify ground or grounds of his order. *Hilgeman v. National Ins. Co. of America*, C.A.Ala.1971, 444 F.2d 446, rehearing denied 564 F.2d 416.

Customer's complaint against brokerage firm, which alleged common law fraud and breach of fiduciary obligations in regard to certain stock transactions, which did not seek damages and which did not specifically invoke provisions of this chapter did not state cause of action arising under this chapter in which federal court would have exclusive jurisdiction, and thus customer was entitled to remand of case to state court even though complaint did incorporate by reference an action which had been filed by Commission against brokerage firm involving stock which customer had purchased. *Goldstein v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, D.C.Ill.1976, 416 F.Supp. 796.

166. Reversal

Order, which dismissed counts based on Illinois and Delaware common law after it was found that there was no federal causes of action, would, after it was de-

er analysis of issue of pendent jurisdiction, though district court has stated that such counts pertained to matters which could not properly be injected into a federal controversy. *Burns v. Paddock* C.A.Ill.1974, 503 F.2d 18.

Trial court's failure to allow full cross-examination of coincidtee, who had entered plea of guilty, concerning his attempts to obtain favorable ruling by Commission on his desire to sell publicly registered common stock of corporation, which prevented defense from adequately showing coincidtee's motive to falsify in

hope of gaining government favor constituted reversible error in prosecution for conspiracy to violate this chapter, perjury, subornation and obstruction of justice. *U. S. v. Wolfson*, C.A.N.Y.1970, 437 F.2d 862.

Trial court committed reversible error by waiting until end of trial, more than two weeks after removing issue of fraud from case, to instruct jury to disregard four weeks of proof directed to stock fraud and to deliberate solely on issues of perjury, subornation and obstruction of justice. *Id.*

§ 78bb

Effect on existing law

Addition of rights and remedies; recovery of actual damages; State securities commissions

(a) The rights and remedies provided by this chapter shall be in addition to any and all other rights and remedies that may exist at law or in equity; but no person permitted to maintain a suit for damages under the provisions of this chapter shall recover, through satisfaction of judgment in one or more actions, a total amount in excess of his actual damages on account of the act complained of. Nothing in this chapter shall affect the jurisdiction of the securities commission (or any agency or officer performing like functions) of any State over any security or any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

Modification of disciplinary procedures

(b) Nothing in this chapter shall be construed to modify existing law with regard to the binding effect (1) on any member of or participant in any self-regulatory organization of any action taken by the authorities of such organization to settle disputes between its members or participants, (2) on any municipal securities dealer or municipal securities broker of any action taken pursuant to a procedure established by the Municipal Securities Rulemaking Board to settle disputes between municipal securities dealers and municipal securities brokers, or (3) of any action described in paragraph (1) or (2) on any person who has agreed to be bound thereby.

Continuing validity of disciplinary sanctions

(c) The stay, setting aside, or modification pursuant to section 78a(e) of this title of any disciplinary sanction imposed by a self-regulatory organization or a member thereof, person associated with a member, or participant therein, shall not affect the validity or force of any action taken as a result of such sanction by the self-regulatory organization prior to such stay, setting aside, or modification: *Provided*, That such action is not inconsistent with the provisions of this chapter.

ive begins or terminates employment with an investment adviser, the investment adviser shall promptly notify the division. 1990

1-4. Registration procedure.

1) (a) A broker-dealer, agent, investment adviser, or investment adviser representative must obtain an initial or renewal registration by filing with the division or its designee an application together with a consent to service of process under Subsection 61-1-26(7).

(b) The application shall contain whatever information the division by rule requires concerning such matters as:

(i) the applicant's form and place of organization;

(ii) the applicant's proposed method of doing business;

(iii) the qualifications and business history of the applicant; in the case of a broker-dealer or investment adviser, the qualifications and business history of any partner, officer, or director, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser;

(iv) any injunction or administrative order or conviction of a misdemeanor involving a security or any aspect of the securities business and any conviction of a felony;

(v) the applicant's financial condition and history.

(c) The division may, by rule or order, require an applicant for initial registration to publish an announcement of the application in one or more specified newspapers published in this state.

(d) Every registration of broker-dealers, agents, investment advisers, and investment adviser representatives shall expire on December 31 of each year.

(e) If no denial order is in effect and no proceeding is pending under Section 61-1-6, registration becomes effective at noon of the 30th day after an application is filed. The division may by rule or order specify an earlier effective date and may by order defer the effective date until noon of the 30th day after the filing of any amendment. Registration of a broker-dealer automatically constitutes registration of any agent who is a partner, officer, director, or a person occupying a similar status or performing similar functions. Registration of an investment adviser automatically constitutes registration of any investment adviser representative who is a partner, officer, director, or a person occupying a similar status or performing similar functions.

2) Every applicant for initial or renewal registration shall pay a reasonable filing fee as determined by rule or order of the division. If the registration or renewal is not granted or the application is withdrawn, the division shall retain the fee.

3) A registered broker-dealer or investment adviser may file an application for registration of a successor for the unexpired portion of the year. There shall be no filing fee.

4) The division may by rule require a minimum filing fee for registered broker-dealers and establish minimum financial requirements for investment advisers, which may include different requirements for investment advisers who maintain custody of funds or securities or who have discretionary

authority over same and those investment advisers who do not.

(5) The division may by rule require registered broker-dealers and investment advisers who have custody of or discretionary authority over client funds or securities to post surety bonds and may by rule determine the conditions and the amounts of the bonds. Any appropriate deposit of cash or securities may be accepted in lieu of any bond so required. No bond may be required of any registrant whose net capital, or in the case of an investment adviser whose minimum financial requirements, which may be defined by rule, exceeds \$30,000. Every bond shall provide for suit thereon by any person who has a cause of action under Section 61-1-22 and, if the division by rule or order requires, by any person who has a cause of action not arising under this chapter. Every bond shall provide that no suit may be maintained to enforce any liability on the bond unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first. 1990

61-1-5. Postregistration provisions.

(1) Every registered broker-dealer and investment adviser shall make and keep such accounts, correspondence, memoranda, papers, books, and other records as the division by rule prescribes. All records so required shall be preserved for three years unless the division by rule prescribes otherwise for particular types of records.

(2) Every registered broker-dealer shall, within 24 hours after demand, furnish to any customer or principal for whom the broker-dealer has executed any order for the purchase or sale of any securities, either for immediate or future delivery, a written statement showing the time when, the place where, and the price at which the securities were bought and sold. With respect to investment advisers, the division may require that certain information be furnished or disseminated as necessary or appropriate in the public interest or for the protection of investors and advisory clients. To the extent determined by the director in his discretion, information furnished to clients or prospective clients of an investment adviser pursuant to the Investment Advisers Act of 1940 and the rules thereunder may be used in whole or partial satisfaction of this requirement.

(3) Every registered broker-dealer and investment adviser shall file financial reports as the division by rule prescribes.

(4) If the information contained in any document filed with the division is or becomes inaccurate or incomplete in any material respect, the registrant shall promptly file a correcting amendment unless notification of the correction has been given under Subsection 61-1-3(2).

(5) All the records referred to in Subsection (1) are subject at any time or from time to time to reasonable periodic, special, or other examinations by representatives of the division, within or without this state, as the division deems necessary or appropriate in the public interest or for the protection of investors. For the purpose of avoiding unnecessary duplication of examination, the division, insofar as it deems practicable in administering this subsection, may cooperate with the securities administrators of other states, the Securities and Exchange Commission, and national securities exchanges or national securities associa-

tions registered under the Securities Exchange Act of 1934. 1990

61-1-6. Denial, suspension, revocation, cancellation, or withdrawal of registration.

(1) Upon approval by a majority of the Securities Advisory Board, the director, by means of adjudicative proceedings conducted in accordance with Chapter 48b, Title 63, the Administrative Procedures Act, may issue an order denying, suspending, or revoking any registration, barring or censuring any registrant or any officer, director, partner, or person occupying a similar status or performing similar functions for a registrant from employment with a registered broker-dealer or investment adviser, or restricting or limiting a registrant as to any function or activity of the business for which registration is required in this state, and may impose a fine if the director finds that it is in the public interest and if he finds any of the following with respect to the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or director, or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser, that such person:

(a) has filed an application for registration that, as of its effective date or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement that was, in light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act;

(c) was convicted, within the past ten years, of any misdemeanor involving a security or any aspect of the securities business, or any felony;

(d) is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the securities business;

(e) is the subject of an order of the director or any predecessor denying, suspending, or revoking registration as a broker-dealer, agent, investment adviser, or investment adviser representative;

(f) is the subject of:

(i) an adjudication or determination, within the past five years by a securities or commodities agency or administrator of another state, Canadian province or territory, or a court of competent jurisdiction that the person has willfully violated the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or the securities or commodities law of any other state; or

(ii) an order entered within the past five years by the securities administrator of any state or Canadian province or territory or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, agent, investment adviser, or investment adviser representative or the substantial equivalent of those terms or is the subject of an order of the Securities and Exchange Commission suspending or expelling him from a national securities exchange or

national securities association registered under the Securities Exchange Act of 1934, or is the subject of a United States post office fraud order; except that

(iii) the division may not commence agency action to revoke or suspend any registration under Subsection (f) more than one year from the date of the order relied on, and the director may not enter an order under Subsection (f) on the basis of an order under another state's law unless that order was based on facts that would currently constitute a ground for an agency action under this section;

(g) has engaged in dishonest or unethical practices in the securities business;

(h) is insolvent, either in the sense that liabilities exceed assets or in the sense that obligations cannot be met as they mature, except that the director may not enter an order against a broker-dealer or investment adviser under this subsection without a finding of insolvency as to the broker-dealer or investment adviser;

(i) is not qualified on the basis of the lack of training, experience, and knowledge of the securities business, except as otherwise provided in Subsection (3);

(j) has failed reasonably to supervise his agents or employees if he is a broker-dealer, or his investment adviser representatives or employees if he is an investment adviser; or

(k) has failed to pay the proper filing fee within 30 days after being notified by the division of a deficiency.

(2) The division may enter a denial order under Subsection (1)(j) or (k), but shall vacate the order when the deficiency has been corrected.

(3) The division may not institute a suspension or revocation proceeding on the basis of a fact or transaction known to it when registration became effective unless the proceeding is instituted within the next 120 days.

(4) The following provisions govern the application of Subsection 61-1-6(1)(i):

(a) The director may not enter an order against a broker-dealer on the basis of the lack of qualification of any person other than:

(i) the broker-dealer himself if he is an individual; or

(ii) an agent of the broker-dealer.

(b) The director may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than:

(i) the investment adviser himself if he is an individual; or

(ii) an investment adviser representative.

(c) The director may not enter an order solely on the basis of lack of experience if the applicant or registrant is qualified by training or knowledge.

(d) The director shall consider that an agent who will work under the supervision of a registered broker-dealer need not have the same qualifications as a broker-dealer and that an investment adviser representative who will work under the supervision of a registered investment adviser need not have the same qualifications as an investment adviser.

(e) The director shall consider that an investment adviser is not necessarily qualified solely on the basis of experience as a broker-dealer or agent. When he finds that an applicant for registra-

tration as a broker-dealer is not qualified as an investment adviser, he may condition the applicant's registration as a broker-dealer upon his not transacting business in this state as an investment adviser.

(f) The division may by rule provide for examinations, which may be written or oral or both, to be taken by any class of or all applicants. The division may by rule or order waive the examination requirement as to a person or class of persons if the division determines that the examination is not necessary for the protection of investors.

(5) If the director finds that any registrant or applicant for registration is no longer in existence, has ceased to do business as a broker-dealer, agent, investment adviser, or investment adviser representative, or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian, or cannot be located after reasonable search, the division may summarily cancel or deny the registration or application according to the procedures and requirements of Chapter 46b, Title 63, the Utah Administrative Procedures Act.

(6) (a) Withdrawal from registration as a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective 30 days after receipt of an application to withdraw or within such shorter period of time as the director may determine, unless:

(i) a revocation or suspension proceeding is pending when the application is filed;

(ii) a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days after the application is filed; or

(iii) additional information is requested by the division regarding the withdrawal application.

(b) If a proceeding described in Subsection (6)(a) is pending or instituted, the director shall designate by order when and under what conditions the withdrawal becomes effective. If additional information is requested, withdrawal is effective 30 days after the additional information is filed.

(c) (i) If no proceeding is pending or instituted, and withdrawal automatically becomes effective, the director may initiate a revocation or suspension proceeding under Subsection 61-1-6(1)(b) within one year after withdrawal became effective.

(ii) The director shall enter any order under Subsection (1)(b) as of the last date on which registration was effective. 1999

61-1-7. Registration before sale.

It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14. 1999

61-1-8. Registration by notification.

(1) The following securities may be registered by notification, whether or not they are also eligible for registration by coordination under Section 61-1-9:

(a) any security whose issuer and any predecessors have been in continuous operation for at least five years if there has been no default during the current fiscal year or within the three preceding fiscal years in the payment of principal, interest, or dividends on any security of the

issuer, or any predecessor, with a fixed maturity or a fixed interest or dividend provision, and the issuer and any predecessors during the past three fiscal years have had average net earnings, determined in accordance with generally accepted accounting practices, (i) which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed and equal to at least 5% of the amount of such outstanding securities, as measured by the maximum offering price or the market price on a day, selected by the registrant, within 30 days before the date of filing the registration statement, whichever is higher, or book value on a day, selected by the registrant, within 90 days of the date of filing the registration statement to the extent that there is neither a readily determinable market price nor a cash offering price, or (ii) which, if the issuer and any predecessors have not had any security of the type specified in Subsection (1)(a)(i) outstanding for three full fiscal years, equal to at least 5% of the amount, as measured in Subsection (1)(a)(i), of all securities which will be outstanding if all the securities being offered or proposed to be offered, whether or not they are proposed to be registered or offered in this state, are issued;

(b) any security, other than a certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, registered for nonissuer distribution if any security of the same class has ever been registered under this chapter or a predecessor act, or the security being registered was originally issued pursuant to an exemption under this chapter or a predecessor act.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Subsection 61-1-26(6):

(a) a statement demonstrating eligibility for registration by notification;

(b) with respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state or foreign jurisdiction and the date of its organization; and the general character and location of its business;

(c) with respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of the filing of the registration statement; and a statement of his reasons for making the offering;

(d) a description of the security being registered;

(e) the information and documents specified in clauses (b), (i), and (j) of Subsection 61-1-10(3) and

(f) in the case of any registration under Subsection 61-1-8(1)(b) which does not also satisfy the conditions of Subsection 61-1-8(1)(a): a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; and a summary of earnings for each of the two fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance

sheet, or for the period of the issuer's and any predecessor's existence if less than two years.

(3) If no stop order is in effect and no proceeding is pending under Section 61-1-12, a registration statement under this section automatically becomes effective at three o'clock mountain standard time in the afternoon of the second full business day after the filing of the registration statement or the last amendment, or at such earlier time as the division determines. 1997

61-1-9. Registration by coordination.

(1) Any security for which a registration statement or a notification under Regulation A or any successor to Regulation A has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Subsection 61-1-26(6):

(a) one copy of the disclosure statement together with all its amendments filed under the Securities Act of 1933;

(b) if the division by rule or otherwise requires, a copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered and a specimen or copy of the security;

(c) if the division requests, any other information, or copies of any other documents, filed under the Securities Act of 1933; and

(d) an undertaking to forward all future amendments to the disclosure statement promptly and in any event not later than the first business day after the day they are forwarded to or filed with the Securities and Exchange Commission, whichever first occurs.

(3) A registration statement under this section automatically becomes effective at the moment the disclosure statement becomes effective if all the following conditions are satisfied: (a) no stop order is in effect and no proceeding is pending under Section 61-1-12; (b) the disclosure statement has been on file with the division for at least ten days; and (c) a statement of the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions has been on file for two full business days or such shorter period as the division permits by rule or otherwise and the offering is made within those limitations. The registrant shall promptly notify the division by telephone or telegram of the date and time when the disclosure statement became effective and the content of the price amendment, if any, and shall promptly file a post-effective amendment containing the information and documents in the price amendment. "Price amendment" means the final federal amendment which includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price. Upon failure to receive the required notification and post-effective amendment with respect to the price amendment, the division may enter a stop order, without notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until com-

pliance with this subsection, if it promptly notifies the registrant by telephone or telegram and promptly confirms by letter or telegram when it notifies by telephone of the issuance of the order. If the registrant proves compliance with the requirements of this subsection as to notice and post-effective amendment, the stop order is void as of the time of its entry. The division may by rule or otherwise waive either or both of the conditions specified in Subsections (3)(b) and (3)(c) of this section. If the disclosure statement becomes effective before all the conditions in this subsection are satisfied and they are not waived, the disclosure statement automatically becomes effective as soon as all the conditions are satisfied. If the registrant advises the division of the date when the disclosure statement is expected to become effective, the division shall promptly advise the registrant by telephone or telegram, at the registrant's expense, whether all the conditions are satisfied and whether it then contemplates the institution of proceedings under Section 61-1-12, but this advice by the division does not preclude the institution of such a proceeding at any time.

(4) The division may by rule or order permit registration by coordination of any security for which a notification or similar document has been filed under the Securities Act of 1933 in connection with the same offering. 1999

61-1-10. Registration by qualification.

(1) Application may be made to register any security by qualification.

(2) A registration statement under this section shall contain the following information and be accompanied by the following documents in addition to the information specified in Subsection 61-1-11(3) and the consent to service of process required by Subsection 61-1-26(6):

(a) with respect to the issuer and any significant subsidiary: its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(b) with respect to every director and officer of the issuer or person occupying a similar status or performing similar functions: his name, address, and principal occupation for the past five years; the amount of securities of the issuer held by him as of a specified date within 30 days of the filing of the registration statement; the amount of the securities covered by the registration statement to which he has indicated his intention to subscribe; and a description of any material interest in any material transaction with the issuer or any significant subsidiary affected within the past three years or proposed to be affected;

(c) with respect to persons covered by clause (b): the remuneration paid during the past 12 months and estimated to be paid during the next 12 months, directly or indirectly, by the issuer, together with all predecessors, parents, subsidiaries, and affiliates, to all those persons in the aggregate;

(d) with respect to any person owning of record, or beneficially if known, 10% or more of the outstanding shares of any class of equity security of the issuer: the information specified in clause (b) other than his occupation;

(e) with respect to every promoter if the issuer was organized within the past three years: the information specified in clause (b), any amount paid to him within that period or intended to be paid to him, and the consideration for any such payment;

(f) with respect to any person on whose behalf any part of the offering is to be made in a nonissuer distribution: his name and address; the amount of securities of the issuer held by him as of the date of filing of the registration statement; a description of any material interest in any material transaction with the issuer or any significant subsidiary effected within the past three years or proposed to be effected; and a statement of his reasons for making the offering;

(g) the capitalization and long-term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, goodwill, or anything else, for which the issuer or any subsidiary has issued any of its securities within the past two years or is obligated to issue any of its securities;

(h) the kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation therefrom at which any proportion of the offering is to be made to any person or class of persons other than the underwriters, with a specification of any such person or class; the basis upon which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering, or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of every underwriter and every recipient of a finder's fee; a copy of any underwriting or selling-group agreement under which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined, and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(i) the estimated cash proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of any such funds; and, if any part of the proceeds is to be used to acquire any property, including goodwill, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons who have received commissions in connection with the acquisition, and the amounts of any such commissions and any other expense in connection with the acquisition, including the cost of borrowing money to finance the acquisition;

(j) a description of any stock options or other security options outstanding, or to be created in connection with the offering, together with the amount of any such option held or to be held by every person required to be named in clause (b), (d), (e), (f), or (h) and by any person who holds or will hold 10% or more in the aggregate of any such options;

(k) the dates of, parties to, and general effect concisely stated of, every management or other material contract made or to be made otherwise than in the ordinary course of business if it is to be performed in whole or in part at or after the filing of the registration statement or was made within the past two years, together with a copy of every such contract; and a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets, including any such litigation or proceeding known to be contemplated by governmental authorities;

(l) a copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering;

(m) a specimen copy of the security being registered; a copy of the issuer's articles of incorporation, and bylaws, if any, or their substantial equivalents, as currently in effect; and a copy of any indenture or other instrument covering the security to be registered;

(n) a signed or conformed copy of an opinion of counsel as to the legality of the security being registered, with an English translation if it is in a foreign language, which shall state whether the security when sold will be legally issued, fully paid, and nonassessable, and if a debt security, a binding obligation of the issuer;

(o) the written consent of any accountant, engineer, appraiser, or other person whose profession gives authority to a statement made by him, if that person is named as having prepared or certified a report or valuation, other than a public and official document or statement, which is used in connection with the registration statement;

(p) a balance sheet of the issuer as of a date within four months prior to the filing of the registration statement; a profit and loss statement and analysis of surplus for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the last fiscal year and the date of the balance sheet, or for the period of the issuer's and any predecessors' existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of any business, the same financial statements which would be required if that business were the registrant; and

(q) such additional information or verification of any statement as the division requires by rule or order.

(3) A registration statement under this section becomes effective when the division so orders.

(4) As a condition of registration under this section, a prospectus containing the information, but not containing copies of contracts or agreements specified in clauses (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), and (p) of Subsection 61-1-10(2), shall be sent or given to each person to whom an offer is made before or concurrently with: (a) the first written offer made to him, otherwise than by means of a public advertisement,

ment, by or for the account of the issuer or any other person on whose behalf the offering is being made, or by any underwriter or broker-dealer who is offering part of an unsold allotment or subscription taken by him as a participant in the distribution; (b) the confirmation of any sale made by or for the account of any such person; (c) payment pursuant to any such sale; or (d) delivery of the security pursuant to any such sale, whichever first occurs.

1983

61-1-11. Provisions applicable to registration generally.

(1) A registration statement may be filed by the issuer, any other person on whose behalf the offering is to be made, or a registered broker-dealer.

(2) Every person filing a registration statement shall pay a filing fee as determined by division rule.

(3) Every registration statement shall specify:

(a) the amount of securities to be offered in this state;

(b) the states in which a registration statement or similar document in connection with the offering has been or is to be filed; and

(c) any adverse order, judgment, or decree entered in connection with the offering by the regulatory authorities in each state or by any court or the Securities and Exchange Commission.

(4) Any document filed under this chapter or a predecessor act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the document is currently accurate.

(5) The division may by rule or otherwise permit the omission of any item of information or document from any registration statement.

(6) In the case of a nonissuer distribution, information may not be required under Section 61-1-10 or Subsection 61-1-11(9) unless it is known to the person filing the registration statement or to the persons on whose behalf the distribution is to be made, or can be furnished by them without unreasonable effort or expense.

(7) The division may by rule or order require as a condition of registration by qualification or coordination:

(a) that any security issued within the past three years or to be issued to a promoter for a consideration substantially different from the public offering price, or to any person for a consideration other than cash, be deposited in escrow; and

(b) that the proceeds from the sale of the registered security be impounded until the issuer receives a specified amount from the sale of the security either in this state or elsewhere. The division may by rule or order determine the conditions of any escrow or impounding required by this subsection, but it may not reject a depository solely because of location in another state.

(8) Every registration statement is effective for one year from its effective date. All outstanding securities of the same class as a registered security are considered to be registered for the purpose of any nonissuer transaction:

(a) so long as the registration statement is effective; and

(b) between the 30th day after the entry of any stop order suspending or revoking the effectiveness of the registration statement under Section 61-1-12, if the registration statement did not relate in whole or in part to a nonissuer distribution, and one year from the effective date of the

registration statement. A registration statement may not be withdrawn for one year from its effective date if any securities of the same class are outstanding. A registration statement may be withdrawn otherwise only in the discretion of the division.

(9) So long as a registration statement is effective and the offering is not completely sold, the division may by rule or order require the person who filed the registration statement to file reports, not more often than quarterly, to keep reasonably current the information contained in the registration statement and to disclose the progress of the offering.

(10) A registration statement may be amended after its effective date so as to increase the securities specified to be offered and sold, if the public offering price and underwriters' discounts and commissions are not changed from the respective amounts of which the division was informed. The amendment becomes effective when the division so orders. Every person filing such an amendment shall pay a registration fee as determined by rule or order of the division with respect to the additional securities proposed to be offered. The amendment relates back to the date of the sale of the additional security being registered, provided that within six months of the date of such sale the amendment is filed and the additional registration fee is paid.

1990

61-1-12. Denial, suspension, and revocation of registration.

(1) Upon approval by a majority of the Securities Advisory Board, the director, by means of adjudicative proceedings conducted in accordance with Chapter 46b, Title 63, the Administrative Procedures Act, may issue a stop order that denies effectiveness to, or suspends or revokes the effectiveness of, any securities registration statement and may impose a fine if he finds that the order is in the public interest and that:

(a) the registration statement, as of its effective date or as of any earlier date in the case of an order denying effectiveness, or any amendment under Subsection 61-1-11(10) as of its effective date, or any report under Subsection 61-1-11(9), is incomplete in any material respect, or contains any statement that was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) any provision of this chapter, or any rule, order, or condition lawfully imposed under this chapter, has been willfully violated, in connection with the offering, by:

(i) the person filing the registration statement;

(ii) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or

(iii) any underwriter;

(c) the security registered or sought to be registered is the subject of an administrative stop order or similar order, or a permanent or temporary injunction of any court of competent jurisdiction entered under any other federal or state act applicable to the offering; except that the division may not commence agency action against

an effective registration statement under this subsection more than one year from the date of the order or injunction relied on, and it may not enter an order under this subsection on the basis of an order or injunction entered under the securities act of any other state unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section;

(d) the issuer's enterprise or method of business includes or would include activities that are illegal where performed;

(e) the offering has worked or tended to work a fraud upon purchasers or would so operate;

(f) the offering has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options;

(g) when a security is sought to be registered by notification, it is not eligible for such registration;

(h) when a security is sought to be registered by coordination, there has been a failure to comply with the undertaking required by Subsection 61-1-9(2)(d); or

(i) the applicant or registrant has failed to pay the proper filing fee.

(2) The director may enter an order under this section but may vacate the order if he finds that the conditions that prompted its entry have changed or that it is otherwise in the public interest to do so.

(3) The director may not issue a stop order against an effective registration statement on the basis of a fact or transaction known to the division when the registration statement became effective unless the proceeding is instituted within the next 120 days.

(4) No person may be considered to have violated Section 61-1-7 or 61-1-15 by reason of any order or sale effected after the entry of an order under this section if that person proves by a preponderance of the evidence that he did not know, and in the exercise of reasonable care could not have known, of the order.

1990

61-1-13. Definitions.

As used in this chapter:

(1) "Affiliate" means a person that, directly or indirectly, through one or more intermediaries, controls or is controlled by, or is under common control with a person specified.

(2) "Agent" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect purchases or sales of securities. "Agent" does not include an individual who represents an issuer, who receives no commission or other remuneration, directly or indirectly, for effecting or attempting to effect purchases or sales of securities in this state, and who:

(a) effects transactions in securities exempted by Subsection 61-1-14(1)(a), (b), (c), (i), or (j);

(b) effects transactions exempted by Subsection 61-1-14(2); or

(c) effects transactions with existing employees, partners, officers, or directors of the issuer.

A partner, officer, or director of a broker-dealer or issuer, or a person occupying a similar status or performing similar functions, is an agent only if he otherwise comes within this definition.

(3) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include:

(a) an agent;

(b) an issuer;

(c) a bank, savings institution, or trust company;

(d) a person who has no place of business in this state if:

(i) he effects transactions in this state exclusively with or through:

(A) the issuers of the securities involved in the transactions;

(B) other broker-dealers; or

(C) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees; or

(ii) during any period of 12 consecutive months he does not direct more than 15 offers to sell or buy into this state in any manner to persons other than those specified in Subsection (3)(d)(i), whether or not the offeror or any of the offerees is then present in this state;

(e) a general partner who organizes and effects transactions in securities of three or fewer limited partnerships, of which he is the general partner, in any period of 12 consecutive months;

(f) a person whose participation in transactions in securities is confined to those transactions made by or through a broker-dealer registered in this state;

(g) a person who is a real estate broker licensed in this state and who effects transactions in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed or trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit; or

(h) other persons as the division, by rule or order, may designate, consistent with the public interest and protection of investors, as not within the intent of this subsection.

(4) "Buy" or "purchase" means every contract for purchase of, contract to buy, or acquisition of a security or interest in a security for value.

(5) "Director" means the director of the Division of Securities charged with the administration and enforcement of this chapter.

(6) "Division" means the Division of Securities established by Section 61-1-18.

(7) "Executive director" means the executive director of the Department of Commerce.

(8) "Fraud," "deceit," and "defraud" are limited to their common-law meanings.

(9) "Guaranteed" means guaranteed as to payment of principal or interest as to debt securities or dividends as to equity securities.

(10) (a) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or

through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities.

(b) "Investment adviser" does not include:

(i) a bank, savings institution, or trust company;

(ii) a lawyer, accountant, engineer, or teacher whose performance of these services is solely incidental to the practice of his profession;

(iii) a broker-dealer or its agent whose performance of these services is solely incidental to the conduct of his business as a broker-dealer and who receives no special compensation for them;

(iv) a publisher of any bona fide newspaper, news column, news letter, news magazine, or business or financial publication or service, of general, regular, and paid circulation, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client;

(v) a person whose advice, analyses, or reports relate only to securities exempted by Subsection 61-1-14(1)(a);

(vi) an investment adviser representative;

(vii) such other persons not within the intent of this subsection as the division may by rule or order designate.

(11) "Investment adviser representative" means any partner, officer, director of, or a person occupying a similar status or performing similar functions, or other individual employed by or associated with an investment adviser, except clerical or ministerial personnel, who:

(a) makes any recommendations or otherwise renders advice regarding securities directly to advisory clients;

(b) manages accounts or portfolios of clients;

(c) determines which recommendation or advice regarding securities should be given if that person is a member of the investment adviser's investment committee that determines general investment advice to be given to clients or, if the investment adviser has no investment committee, the person determines general client advice (if there are more than five such persons, only the supervisors of such persons are considered to be investment adviser representatives);

(d) solicits, offers, or negotiates for the sale of or sells investment advisory services unless that person is a broker-dealer licensed in this state or a licensed agent of a broker-dealer and the person would not be an investment adviser representative except for the performance of the activities described in this subsection; or

(e) immediately supervises employees who perform any of the foregoing.

(12) (a) "Issuer" means any person who issues or proposes to issue any security or has outstanding a security that it has issued.

(b) With respect to a preorganization certificate or subscription, "issuer" means the promoter or the promoters of the person to be organized.

(c) With respect to:

(i) interests in trusts, including but not limited to collateral trust certificates, voting trust certificates and certificates of deposit for securities; or

(ii) shares in an investment company without a board of directors, "issuer" means the person or persons performing the acts and assuming duties of a depositor or manager under the provisions of the trust or other agreement or instrument under which the security is issued.

(d) With respect to an equipment trust certificate, a conditional sales contract, or similar securities serving the same purpose, "issuer" means the person by whom the equipment or property is to be used.

(e) With respect to interests in partnerships, general or limited, "issuer" means the partnership itself and not the general partner or partners.

(f) With respect to certificates of interest or participation in oil, gas, or mining titles or leases or in payment out of production under the titles or leases, "issuer" means the owner of the title or lease or right of production, whether whole or fractional, who creates fractional interests therein for the purpose of sale.

(13) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(14) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a joint venture, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(15) "Promoter" means any person who, acting alone or in concert with one or more persons, takes initiative in founding or organizing the business or enterprise of a person.

(16) (a) "Sale" or "sell" includes every contract for sale of, contract to sell, or disposition of, a security or interest in a security for value.

(b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(c) The following are examples of the definitions in Subsections (a) and (b):

(i) any security given or delivered with or as a bonus on account of any purchase of a security or any other thing, is part of the subject of the purchase, and has been offered and sold for value;

(ii) a purported gift of assessable stock is an offer or sale as is each assessment levied on the stock;

(iii) an offer or sale of a security that is convertible into, or entitles its holder to acquire or subscribe to another security of the same or another issuer is an offer or sale of that security, and also an offer of the other security, whether the right to convert or acquire is exercisable immediately or in the future;

(iv) any conversion or exchange of one security for another shall constitute an offer or sale of the security received in a conversion or exchange, and the offer to buy or the purchase of the security converted or exchanged;

(v) securities distributed as a dividend wherein the person receiving the dividend surrenders the right, or the alternative right, to receive a cash or property dividend is an offer or sale;

(vi) a dividend of a security of another issuer is an offer or sale; or

(vii) the issuance of a security under a merger, consolidation, reorganization, recapitalization, reclassification, or acquisition of assets shall constitute the offer or sale of the security issued as well as the offer to buy or the purchase of any security surrendered in connection therewith, unless the sole purpose of the transaction is to change the issuer's domicile.

(d) The terms defined in Subsections 16(a) and (b) do not include:

(i) a good faith gift;

(ii) a transfer by death;

(iii) a transfer by termination of a trust or of a beneficial interest in a trust;

(iv) a security dividend not within Subsection 16(c)(v) or (vi);

(v) a securities split or reverse split; or

(vi) any act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests, or partly in such exchange and partly for cash.

(17) "Securities Act of 1933," "Securities Exchange Act of 1934," "Public Utility Holding Company Act of 1935," and "Investment Company Act of 1940" mean the federal statutes of those names as amended before or after the effective date of this chapter.

(18) "Security" means any:

(a) note;

(b) stock;

(c) treasury stock;

(d) bond;

(e) debenture;

(f) evidence of indebtedness;

(g) certificate of interest or participation in any profit-sharing agreement;

(h) collateral-trust certificate;

(i) preorganization certificate or subscription;

(j) transferable share;

(k) investment contract;

(l) burial certificate or burial contract;

(m) voting-trust certificate;

(n) certificate of deposit for a security;

(o) certificate of interest of participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease;

(p) contract or option on a contract for the future delivery of any commodity offered or sold to the public and not regulated by the Commodity Futures Trading Commission, provided that such contract or option shall

not be subject to the provision of Section 61-1-7 if sold or purchased on the floor of a bona fide exchange or board of trade and offered and sold to the public by a broker-dealer or agent registered under this chapter; or

(q) in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay money in a lump sum or periodically for life or some other specified period.

(19) "State" means any state, territory, or possession of the United States, the District of Columbia, and Puerto Rico.

61-1-14. Exemptions.

(1) The following securities are exempted from Sections 61-1-7 and 61-1-15:

(a) any security, including a revenue obligation, issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing, or any certificate of deposit for any of the foregoing;

(b) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing, or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(c) any security issued by and representing an interest in or a debt of, or guaranteed by, any bank organized under the laws of the United States, or any bank, savings institution, or trust company supervised under the laws of any state;

(d) any security issued by and representing an interest in or a debt of, or guaranteed by, any federal savings and loan association, or any building and loan or similar association organized under the laws of any state and authorized to do business in this state;

(e) any security issued or guaranteed by any federal credit union or any credit union, industrial loan association, or similar association organized and supervised under the laws of this state;

(f) any security issued or guaranteed by any railroad, other common carrier, public utility, holding company which is subject to the jurisdiction of the interstate commerce commission, registered holding company under the Public Utility Holding Company Act of 1935 or a subsidiary of such a company within the meaning of that act, or any security regulated in respect to its rates or in its issuance by a governmental authority of the United States, any state, Canada, or any Canadian province;

(g) any security listed on the National Association of Securities Dealers Automated Quotations System, the New York Stock Exchange, the American Stock Exchange, or on any other stock exchange or medium approved by the director except that the director may at any time suspend or revoke this exemption for any particular security

exchange, medium, security, or securities under Subsection 61-1-14(4); any other security of the same issuer which is of senior or substantially equal rank to any security so listed and approved by the director, any security called for by subscription rights or warrants so listed or approved, or any warrant or right to purchase or subscribe to any of the foregoing;

(h) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes, or as a chamber of commerce or trade or professional association; and any security issued by a corporation organized under Chapter 1, Title 3 and any security issued by a corporation to which the provisions of such chapter are made applicable by compliance with the requirements of Section 3-1-21;

(i) any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which evidences an obligation to pay cash within nine months of the date of issuance, exclusive of days of grace, or any renewal, guarantee, or guarantee of renewal of the paper which is likewise limited;

(j) any investment contract issued in connection with an employees' stock purchase, savings, pension, profit-sharing, or similar benefit plan;

(k) a security issued by an issuer registered as an open-end management investment company or unit investment trust under Section 8 of the Investment Company Act of 1940, if:

(i) (A) the issuer is advised by an investment adviser that is a depository institution exempt from registration under the Investment Advisers Act of 1940 or that is currently registered as an investment adviser, and has been registered, or is affiliated with an adviser that has been registered, as an investment adviser under the Investment Advisers Act of 1940 for at least three years next preceding an offer or sale of a security claimed to be exempt under this subsection; and

(B) the adviser has acted, or is affiliated with an investment adviser that has acted as investment adviser to one or more registered investment companies or unit investment trusts for at least three years next preceding an offer or sale of a security claimed to be exempt under this subsection; or

(ii) the issuer has a sponsor that has at all times throughout the three years before an offer or sale of a security claimed to be exempt under this subsection sponsored one or more registered investment companies or unit investment trusts the aggregate total assets of which have exceeded \$100,000,000;

(iii) in addition to Subsection (i) or (ii), the division has received prior to any sale exempted herein:

(A) a notice of intention to sell which has been executed by the issuer which sets forth the name and address of the issuer and the title of the securities to be offered in this state; and

(B) a filing fee as determined by division rule;

(iv) in the event any offer or sale of a security of an open-end management investment company is to be made more than 12 months after the date on which the notice and fee under Subsection (iii) is received by the director, another notice and payment of the applicable fee shall be required.

(v) For the purpose of this subsection, an investment adviser is affiliated with another investment adviser if it controls, is controlled by, or is under common control with the other investment adviser.

(1) any security as to which the director, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(2) The following transactions are exempted from Sections 61-1-7 and 61-1-15:

(a) any isolated transaction, whether effected through a broker-dealer or not;

(b) any nonissuer transaction in an outstanding security.

(i) Such a security must be listed in a recognized securities manual such as Moody's and Standard & Poor's securities manuals where the listing contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations; or

(ii) the security must have a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the three preceding fiscal years, or during the existence of the issuer and any predecessors if less than three years, in the payment of principal, interest, or dividends on the security.

(iii) The director may by rule or order approve certain manuals as recognized within the meaning of this subsection;

(c) any nonissuer transaction effected by or through a registered broker-dealer pursuant to an unsolicited order or offer to buy;

(d) any transaction between the issuer or other person on whose behalf the offering is made and an underwriter, or among underwriters;

(e) any transaction in a bond or other evidence of indebtedness secured by a real or chattel mortgage or deed of trust, or by an agreement for the sale of real estate or chattels, if the entire mortgage, deed of trust, or agreement, together with all the bonds or other evidences of indebtedness secured thereby, is offered and sold as a unit;

(f) any transaction by an executor, administrator, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(g) any transaction executed by a bona fide pledgee without any purpose of evading this chapter;

(h) any offer or sale to a bank, savings institution, trust company, insurance company, investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust, or other financial institution or institutional buyer, or to a broker-dealer, whether the purchaser is acting for itself or in some fiduciary capacity;

(i) any offer or sale of a preorganization certificate or subscription if:

- (i) no commission or other remuneration is paid or given directly or indirectly for soliciting any prospective subscriber,
 - (ii) the number of subscribers acquiring any legal or beneficial interest therein does not exceed ten, and
 - (iii) there is no general advertising or solicitation in connection with the offer or sale
- (j) (i) any transaction pursuant to an offer by an issuer of its securities to its existing securities holders, if no commission or other remuneration, other than a standby commission is paid or given directly or indirectly for soliciting any security holders in this state, if the transaction constitutes
- (A) the conversion of convertible securities,
 - (B) the exercise of nontransferable rights or warrants,
 - (C) the exercise of transferable rights or warrants if the rights or warrants are exercisable not more than 90 days after their issuance, or
 - (D) the purchase of securities under a preemptive right, and
- (ii) the exemption created by Subsection (2)(j)(i) is not available for an offer or sale of securities to existing securities holders who have acquired their securities from the issuer in a transaction in violation of Section 61-1-7,
- (k) any offer, but not a sale, of a security for which registration statements have been filed under both this chapter and the Securities Act of 1933 if no stop order or refusal order is in effect and no public proceeding or examination looking toward such an order is pending,
- (l) a distribution of securities as a dividend if the person distributing the dividend is the issuer of the securities distributed,
- (m) any nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer or issuer files with the division, and the broker-dealer maintains in his records, and makes reasonably available upon request to any person expressing an interest in a proposed transaction in the security with the broker-dealer information prescribed by the division under its rules,
- (n) any transactions not involving a public offering,
- (o) any offer or sale of "condominium units" or "time period units" as those terms are defined in the Condominium Ownership Act, whether or not to be sold by installment contract, if the provisions of the Condominium Ownership Act, or if the units are located in another state, the condominium act of that state, the Utah Uniform Land Sales Practices Act, and the Utah Uniform Consumer Credit Code are complied with,
- (p) any transaction or series of transactions involving a merger, consolidation, reorganization, recapitalization, reclassification, or sale of assets, if the consideration for which, in whole or in part, is the issuance of securities of a person or persons, and if
- (i) the transaction or series of transactions is incident to a vote of the securities holders of each person involved or by written consent or resolution of some or all of the securities holders of each person involved,

(ii) the vote, consent, or resolution is given under a provision in

(A) the applicable corporate statute or other controlling statute,

(B) the controlling articles of incorporation, trust indenture, deed of trust, or partnership agreement, or

(C) the controlling agreement among securities holders,

(iii) (A) one person involved in the transaction is required to file proxy or informational materials under Section 14(a) or (c) of the Securities Exchange Act of 1934 or Section 20 of the Investment Company Act of 1940 and has so filed,

(B) one person involved in the transaction is an insurance company which is exempt from filing under Section 12(g)(2)(G) of the Securities Exchange Act of 1934, and has filed proxy or informational materials with the appropriate regulatory agency or official of its domiciliary state, or

(C) all persons involved in the transaction are exempt from filing under Section 12(g)(1) of the Securities Exchange Act of 1934, and file with the division such proxy or informational material as the division requires by rule,

(iv) the proxy or informational material is filed with the division and distributed to all securities holders entitled to vote in the transaction or series of transactions at least ten business days prior to any necessary vote by the securities holders or action on any necessary consent or resolution, and

(v) the division does not, by order, deny or revoke the exemption within ten business days after filing of the proxy or informational materials,

(q) any transaction pursuant to an offer to sell securities of an issuer

(i) This subsection applies if

(A) the transaction is part of an issue in which there are not more than 15 purchasers in this state, other than those designated in Subsection (1)(h), during any 12 consecutive months,

(B) no general solicitation or general advertising is used in connection with the offer to sell or sale of the securities,

(C) no commission or other similar compensation is given, directly or indirectly, to a person other than a broker-dealer or agent licensed under this chapter, for soliciting a prospective purchaser in this state, and

(D) the seller reasonably believes that all the purchasers in this state are purchasing for investment

(ii) The director by rule or order as to a security or transaction, or a type of security or transaction, may withdraw or further condition this exemption or waive one or more of the conditions in this subsection, and

(r) any transaction as to which the division, by rule or order, finds that registration is not necessary or appropriate for the protection of investors,

(3) Every person filing an exemption notice or application shall pay a filing fee as determined by rule or order of the division

(4) Upon approval by a majority of the Securities Advisory Board, the director may by means of an adjudicative proceeding as conducted in accordance with Chapter 46b, Title 63, the Administrative Procedures Act, deny or revoke any exemption specified in Subsection (1)(g), (1)(h), or (1)(j) or in Subsection (2) with respect to

(a) a specific security, transaction, or series of transactions, or

(b) any person or issuer, any affiliate or successor to a person or issuer, or any entity subsequently organized by or on behalf of a person or issuer generally if he finds that the order is in the public interest and that

(i) the application for or notice of exemption filed with the division is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact,

(ii) any provision of this chapter, or any rule, order, or condition lawfully imposed under this chapter has been willfully violated in connection with the offering or exemption by

(A) the person filing any application for or notice of exemption,

(B) the issuer, any partner, officer, or director of the issuer, any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling or controlled by the issuer, but only if the person filing the application for or notice of exemption is directly or indirectly controlled by or acting for the issuer, or

(C) any underwriter,

(iii) the security for which the exemption is sought is the subject of an administrative stop order or similar order, or a permanent or temporary injunction or any court of competent jurisdiction entered under any other federal or state act applicable to the offering or exemption, the division may not institute a proceeding against an effective exemption under this subsection more than one year from the date of the order or injunction relied on, and it may not enter an order under this subsection on the basis of an order or injunction entered under any other state act unless that order or injunction was based on facts that would currently constitute a ground for a stop order under this section,

(iv) the issuer's enterprise or method of business includes or would include activities that are illegal where performed,

(v) the offering has worked, has tended to work, or would operate to work a fraud upon purchasers,

(vi) the offering has been or was made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation, or promoters' profits or participation, or unreasonable amounts or kinds of options,

(vii) an exemption is sought for a security or transaction which is not eligible for the exemption, and

(viii) the proper filing fee, if any, has not been paid

(5) No order under Subsection (4) may operate retroactively. No person may be considered to have vio-

lated Section 61-1-7 or 61-1-15 by reason of any offer or sale effected after the entry of an order under this subsection if he sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the order

1990

61-1-14.5. Burden of proving exemption.

In any proceeding under this chapter, civil, criminal, administrative, or judicial, the burden of proving an exemption under Section 61-1-14 or an exception from a definition under Section 61-1-13 is upon the person claiming the exemption or exception

1993

61-1-15. Filing of sales literature.

The division may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, unless the security or transaction is exempted by Section 61-1-14

1993

61-1-16. False statements unlawful.

It is unlawful for any person to make or cause to be made, in any document filed with the division or in any proceeding under this chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect

1993

61-1-17. No finding by division on merits — Contrary representation unlawful.

(1) Neither the fact that an application for registration or a registration statement has been filed nor the fact that a person or security is effectively registered constitutes a finding by the division that any document filed under this chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the division has passed in any way upon the merits or qualifications of, or recommended or given approval to, any person, security, or transaction

(2) It is unlawful to make, or cause to be made, to any prospective purchaser, customer, or client any representation inconsistent with Subsection (1)

1993

61-1-18. Division of Securities established — Director — Appointment — Functions.

(1) There is established within the Department of Commerce a Division of Securities. The division shall be under the direction and control of a director, appointed by the executive director with the governor's approval. The director shall be responsible for the administration and enforcement of this chapter. The director shall hold office at the pleasure of the governor

(2) The director, with the approval of the executive director, may employ such staff as necessary to discharge the duties of the division at salaries to be fixed by the director according to standards established by the Department of Administrative Services

1990

61-1-18.1. Technical experts and specialists — Employment — Contracts.

The director may employ or contract with technical experts and specialists including but not limited to certified public accountants, appraisers, engineers, and tax accountants to conduct or participate in any examination, audit, investigation or proceeding

1993

61-1-18.2. Budget — Annual report.

The director shall annually prepare and submit to the executive director

- (1) a budget for the expenses of the division for the administration and enforcement of this chapter for the next fiscal year; and
- (2) a report outlining the division's work for the preceding fiscal year. 1983

1-1-18.3. Information obtained by division — Use for personal benefit prohibited — Disclosure.

It is unlawful for any of the division's employees or any member of the Securities Advisory Board to use or personal benefit any non-public information which is filed with or obtained by the division. No provision of this chapter authorizes the division or any of its officers or employees to disclose any such information except among themselves or when necessary or appropriate in a proceeding or investigation under this chapter. No provision of this chapter either creates or derogates from any privilege which exists at common law or otherwise when documentary or other evidence is sought under subpoena directed to the division or any of its employees. 1983

1-1-18.4. Fees collected by division.

The Division of Securities shall establish, charge, and collect fees pursuant to Subsection 63-38-3(2), except when it can be demonstrated that the fee amount should be based on factors other than cost, for the following:

- (1) the fair and reasonable cost of any examination, audit, or investigation authorized or required by this chapter or other state law;
- (2) certificate of serving and mailing process served upon the division in any action or proceeding commenced or prosecuted in this state against any person who has appointed the division its agent as provided in Subsection 61-1-28(7);
- (3) copies and authentication of all papers, publications, data, and other records available to the public or issued under the division's authority. 1989

1-1-18.5. Securities Advisory Board established — Appointment — Duties — Qualifications — Terms — Vacancies — Meetings — Conflicts of interest — Compensation.

- (1) There is hereby established a Securities Advisory Board. Members of the board shall be appointed by the governor with the advice and consent of the senate. The board shall have the following duties:
 - (a) formulate and make recommendations to the director regarding policy and budgetary matters;
 - (b) submit recommendations regarding registration requirements and division rules;
 - (c) formulate and make recommendations to the director regarding the establishment of reasonable fees; and
 - (d) generally act in an advisory capacity to the director with respect to the exercise of his duties, powers, and responsibilities.
- (2) The Securities Advisory Board shall be composed of five members, two from the securities brokerage community who have at least five years prior experience in securities matters, one from the securities section of the Utah Bar Association, one officer or director of a corporation not subject to the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, and one from the public at large who has no active participation in the securities business. The term of the public member first ap-

pointed shall expire July 1, 1987, the term of the broker and one attorney first appointed shall expire July 1, 1986, and the term of the other broker and the officer or director first appointed shall expire July 1, 1985. The terms of the board members thereafter shall run three years with no member serving more than two consecutive terms.

(3) Any vacancy in the membership of the board occurring other than by expiration of the term shall be filled in the same manner as the original appointment, but for the unexpired term only. All members shall serve until their respective successors are appointed and qualified.

(4) The board shall meet at least quarterly on a regular date to be fixed by the board and at such other times at the call of the director or any two members of the board. Four members shall constitute a quorum for the transaction of business. Actions of the board shall require a vote of a majority of those present.

(5) Each member of the board shall, by sworn and written statement filed with the Department of Commerce and the lieutenant governor, disclose any position of employment or ownership interest that the member has with respect to any entity or business subject to the jurisdiction of the division. This statement shall be filed upon appointment and must be appropriately amended whenever significant changes occur in matters covered by the statement.

(6) The members of the board shall receive no salary but shall be paid a per diem allowance, as provided by law, for each day actually spent in the performance of their duties, and travel expenses as established by the Division of Finance. 1989

61-1-18.6. Procedures — Adjudicative proceedings.

The Division of Securities shall comply with the procedures and requirements of Chapter 46b, Title 63, in its adjudicative proceedings. 1987

61-1-18.7. Securities investor education and training.

(1) All money received by the state by reason of civil penalties ordered and administrative fines collected pursuant to this chapter shall be deposited in the General Fund as a securities investor education and training restricted account to provide revenue for educating the public and the securities industry as provided in this section.

(2) The restricted account may include any fines collected by the division after July 1, 1989, pursuant to voluntary settlements or administrative orders, and these may be set aside for investor education and training.

(3) Money deposited or accumulated in the restricted account shall be used in a manner consistent with the duties of the division under this chapter and only for any or all of the following and the expense of providing them:

- (a) education and training of Utah residents in matters concerning securities laws and investment decisions, by publications or presentations;
- (b) education of registrants and licensees under this chapter, by:
 - (i) publication of this chapter and rules and policy statements and opinion letters of the division; and
 - (ii) sponsorship of seminars or meetings to educate registrants and licensees as to the requirements of this chapter; and
- (c) investigation and litigation. 1989

61-1-19. Investigations authorized.

(1) (a) The division in its discretion may make any public or private investigations within or without this state as it considers necessary to determine whether any person has violated, is violating, or is about to violate any provision of this chapter or any rule or order hereunder.

(b) To aid in the enforcement of this chapter or in the prescribing of rules and forms hereunder, the division may require or permit any person to file a statement in writing, under oath or otherwise as to all the facts and circumstances concerning the matter to be investigated.

(c) The division may publish information concerning any violation of this chapter or the violation of any rule or order hereunder.

(2) For the purpose of any investigation or proceeding under this chapter, the division or any employee designated by it may:

- (a) administer oaths and affirmations;
- (b) subpoena witnesses and compel their attendance;
- (c) take evidence; and
- (d) require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records relevant or material to the investigation. 1989

61-1-20. Enforcement.

Whenever it appears to the director that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of this chapter or any rule or order under this chapter, in addition to any specific powers granted in this chapter:

- (1) (a) the director may issue an order directing the person to appear before the division and show cause why an order should not be issued directing the person to cease and desist from engaging in the act or practice, or doing any act in furtherance of the activity;
- (b) the order to show cause shall state the reasons for the order and the date of the hearing;
- (c) the director shall promptly serve a copy of the order to show cause upon each person named in the order;
- (d) the director shall hold a hearing on the order to show cause no sooner than ten business days after the order is issued;
- (e) after a hearing, the director may issue an order to cease and desist from engaging in any act or practice constituting a violation of this chapter or any rule or order under this chapter. The order shall be accompanied by written findings of fact and conclusions of law;
- (f) the director may impose a fine; and
- (g) the director may bar or suspend that person from associating with a licensed broker-dealer or investment adviser in this state.
- (2) (a) Bring an action in the appropriate district court of this state or the appropriate court of another state to enjoin the acts or practices and to enforce compliance with this chapter or any rule or order under this chapter;
- (b) upon a proper showing in an action brought under this section, the court may:
 - (i) issue a permanent or temporary, prohibitory or mandatory injunction;

- (ii) issue a restraining order or writ of mandamus;
- (iii) enter a declaratory judgment;
- (iv) appoint a receiver or conservator for the defendant or the defendant's assets;
- (v) order disgorgement;
- (vi) order rescission;
- (vii) impose a fine of not more than \$500 for each violation of the act; and
- (viii) enter any other relief the court considers just; and
- (c) the court may not require the division to post a bond in an action brought under this subsection. 1989

61-1-21. Penalties for violations — Limitation of prosecutions.

Any person who willfully violates any provision of this chapter except Section 61-1-16, or who willfully violates any rule or order under this chapter, or who willfully violates Section 61-1-16 knowing the statement made to be false or misleading in any material respect, shall upon conviction be fined not more than \$10,000 or imprisoned not more than five years, or both. No person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order. No indictment or information may be returned or complaint filed under this chapter more than five years after the alleged violation. 1989

61-1-21.5. Legal counsel — Prosecutions.

- (1) The attorney general shall advise and represent the division and its staff in all civil matters, administrative or judicial, requiring legal counsel or services in the exercise or defense of the division's power or the performance of its duties.
- (2) In the prosecution of all criminal actions under this chapter, the attorney general, or county attorney of the appropriate jurisdiction, shall provide all legal services for the division and its staff. The division may refer such evidence as is available concerning violations of this chapter to the attorney general or the appropriate county attorney for criminal prosecution. 1989

61-1-22. Sales and purchases in violation — Remedies — Limitation of actions.

(1) Any person who offers or sells a security in violation of Subsection 61-1-3(1), Section 61-1-7, Subsection 61-1-17(2), any rule or order under Section 61-1-15 which requires the affirmative approval of sales literature before it is used, any condition imposed under Subsection 61-1-10(4) or 61-1-11(7), or offers, sells, or purchases a security in violation of Subsection 61-1-12 is liable to the person selling the security to or buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at 12% per year from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security, upon the tender of the security or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at 12% per year from the date of disposition.

(2) The court in a suit brought under Subsection (1) may award an amount equal to three times the consideration paid for the security, together with interest, costs, and attorney's fees, less any amounts,

as specified in Subsection (1) upon a showing that he violated was reckless or intentional.

(3) A person who offers or sells a security in violation of Subsection 61-1-1(2) is not liable under Subsection (1) if the purchaser knew of the untruth or omission, or the seller did not know and in the exercise of reasonable care could not have known of the untrue statement or misleading omission.

(4) Every person who directly or indirectly controls a seller or buyer liable under Subsection (1), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such a seller or buyer who materially aids in the sale or purchase, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller or purchaser, unless the nonseller or nonpurchaser who is so liable sustains the burden of proof that he did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(5) Any tender specified in this section may be made at any time before entry of judgment.

(6) Every cause of action under this section survives the death of any person who might have been a plaintiff or defendant.

(7) No action shall be maintained to enforce any liability under this section unless brought before the expiration of four years after the act or transaction constituting the violation or the expiration of two years after the discovery by the plaintiff of the facts constituting the violation, whichever expires first. No person may sue under this section: (a) if the buyer or seller received a written offer, before suit and at a time when he owned the security, to refund the consideration paid together with interest at 12% per year from the date of payment, less the amount of any amount received on the security, and he failed to accept the offer within 30 days of its receipt; or (b) if the buyer or seller received such an offer before suit and at a time when he did not own the security, unless he accepted the offer in writing within 30 days of its receipt.

(8) No person who has made or engaged in the performance of any contract in violation of this chapter any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making performance was in violation, may base any suit on such contract.

(9) Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with this chapter or any rule or order hereunder is void.

(10) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist at law or in equity, but this chapter does not create any cause of action not specified in this section or Subsection 61-1-4(5).

61-23. Review of orders.

Any person aggrieved by a final order of the director determining all of the issues of an adjudicative proceeding may obtain review of the order by the executive director in accordance with Chapter 46b, Title the Administrative Procedures Act.

61-24. Rules, forms, and orders of division.

(1) (a) The division may make, amend, and rescind rules, forms, and orders when necessary to carry out the provisions of this chapter.

(b) For the purpose of rules and forms, the division may classify securities, persons, and matters within its jurisdiction, and prescribe different requirements for different classes.

(2) (a) The division may not make, amend, or rescind any rule, form, or order unless it finds that the action is in the public interest, for the protection of investors, and consistent with the purposes of this chapter.

(b) In prescribing rules and forms, the division may cooperate with the securities administrators of the other states and the Securities and Exchange Commission to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

(3) (a) The division may by rule or order prescribe:

- (i) the form and content of financial statements required under this chapter;
- (ii) the circumstances under which consolidated financial statements shall be filed; and
- (iii) whether or not any required financial statements shall be certified by independent public accountants.

(b) All financial statements shall be prepared in accordance with generally accepted accounting practices.

(4) All rules and forms of the division shall be published.

(5) No provision of this chapter imposing any liability applies to any act done or omitted in good faith in conformity with any rule, form, or order of the division, notwithstanding that the rule, form, or order may later be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.

(6) The division may by rule classify specific acts as unlawful within the meaning of Sections 61-1-1 and 61-1-2 if it finds that the acts could operate as a fraud or part of a device, scheme, or artifice to defraud any person, and that the rule is not inconsistent with this chapter.

61-25. Record of registrations.

(1) A document is filed when it is received by the division.

(2) The division shall keep a register of all applications for registration and registration statements which are or have ever been effective under this chapter and all denial, suspension, or revocation orders which may have been entered under this chapter. The register shall be open for public inspection.

(3) The information contained in or filed with any registration statement, application, or report may be made available to the public under such rules as the division prescribes.

(4) Upon request and at such reasonable charges as it prescribes, the division shall furnish to any person photostatic or other copies, certified under seal if requested, of any entry in the register or any document which is a matter of public record. In any proceeding or prosecution under this chapter, any copy so certified is prima facie evidence of the contents of the entry or document certified.

(5) The division in its discretion may honor requests from interested persons for interpretative opinions.

61-1-26. Scope of the act — Service of process.

(1) Section 61-1-1, Subsection 61-1-3(2), Sections 61-1-7, 61-1-17, and 61-1-22 apply to persons who sell or offer to sell when:

- (a) an offer to sell is made in this state; or
- (b) an offer to buy is made and accepted in this state.

(2) Section 61-1-1, Subsection 61-1-3(2), and Section 61-1-17 apply to persons who buy or offer to buy when:

- (a) an offer to buy is made in this state; or
- (b) an offer to sell is made and accepted in this state.

(3) For the purposes of this section, an offer to sell or to buy is made in this state whether or not either party is then present in this state, when the offer:

- (a) originates from this state; or
- (b) is directed by the offeror to this state and received at the place to which it is directed, or at any post office in this state in the case of a mailed offer.

(4) For the purposes of this section, an offer to sell or to buy is accepted in this state when acceptance:

- (a) is communicated to the offeror in this state; and
- (b) has not previously been communicated to the offeror, orally or in writing, outside this state, and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror in this state reasonably believing the offeror to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(5) An offer to sell or to buy is not made in this state when:

- (a) the publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds of its circulation outside this state during the past 12 months; or
- (b) a radio or television program originating outside this state is received in this state.

(6) Section 61-1-2 and Subsection 61-1-3(3), as well as Section 61-1-17 so far as investment advisers are concerned, apply when any act instrumental in effecting prohibited conduct is done in this state, whether or not either party is then present in this state.

(7) Every application for registration under this chapter and every issuer which proposes to offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the division, in such form as it by rule prescribes, an irrevocable consent appointing the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor, executor, or administrator which arises under this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration need not file another. Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the

defendant or respondent at his last address on file with the division, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(8) When any person, including any nonresident of this state, engages in conduct prohibited or made actionable by this chapter or any rule or order hereunder, and he has not filed a consent to service of process under Subsection (7) and personal jurisdiction over him cannot otherwise be obtained in this state, that conduct shall be considered equivalent to his appointment of the division or the director to be his attorney to receive service of any lawful process in any noncriminal suit, action, or proceeding against him or his successor executor or administrator which grows out of that conduct and which is brought under this chapter or any rule or order hereunder, with the same force and validity as if served on him personally. Service may be made by leaving a copy of the process in the office of the division, but it is not effective unless the plaintiff, who may be the division in a suit, action, or proceeding instituted by it, sends notice of the service and a copy of the process by registered mail to the defendant or respondent at his last known address or takes other steps which are reasonably calculated to give actual notice, and the plaintiff's affidavit of compliance with this subsection is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

(9) When process is served under this section, the court, or the director shall order such continuance as may be necessary to afford the defendant or respondent reasonable opportunity to defend.

61-1-27. Construction of chapter.

This chapter may be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

61-1-28. Citation of chapter.

This chapter may be cited as the Utah Uniform Securities Act.

61-1-29. Savings clause.

If any provision of this chapter or its application to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application.

61-1-30. Prior law repealed — Savings clause.

(1) The Securities Act, Chapter 1, Title 61, Utah Code Annotated 1953, as amended by Chapter 129, Laws of Utah 1957, is hereby repealed except as saved in this section.

(2) Prior law exclusively governs all suits, actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before the effective date of this chapter, except that no civil suit or action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and in any event within two years after the effective date of this chapter.

(3) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect so long as they would have remained in effect if this chapter had not been passed. They are

- (ii) any action taken by an agency in response to committee recommendations; and
- (iii) any recommendations by the committee for legislation. 1989

46a-11.5. Legislative reauthorization of agency rules — Extension of rules by governor.

- 1) All grants of rulemaking power from the Legislature to a state agency in any statute are made subject to the provisions of this section.
- 2) (a) Except as provided in Subsection (b), every agency rule that is in effect on January 1 of any calendar year expires on May 1 of that year unless it has been reauthorized by the Legislature during its annual general session.
- (b) Notwithstanding the provisions of Subsection 1(a), an agency's rules do not expire if:
 - (i) the rule is explicitly mandated by a federal law or regulation; or
 - (ii) a provision of Utah's constitution vests the agency with specific constitutional authority to regulate.
- 3) (a) Prior to January 1 of each year, the Administrative Rules Review Committee shall have omnibus legislation prepared for consideration by the Legislature during its annual general session.
- (b) The omnibus legislation shall be substantially in the following form: "All rules of Utah state agencies are reauthorized except for the following:"
- (c) Before sending the legislation to the governor for his action, the Administrative Rules Review Committee shall send a letter to the governor and to the agency explaining specifically why the committee believes any rule should not be reauthorized.
- 4) The Legislature's reauthorization of a rule by elation does not constitute legislative approval of rule, nor is it admissible in any proceeding as notice of legislative intent.
- 5) (a) If an agency believes that a rule that has not been reauthorized by the Legislature or that will be allowed to expire should continue in full force and effect and is a rule within their authorized rulemaking power, the agency may seek the governor's declaration extending the rule beyond the expiration date.
- (b) In seeking the extension, the agency shall submit a petition to the governor that affirmatively states:
 - (i) that the rule is necessary; and
 - (ii) a citation to the source of its authority to make the rule.
- (c) (i) If the governor finds that the necessity does exist, and that the agency has the authority to make the rule, he may declare the rule to be extended by publishing that declaration in the Administrative Rules Bulletin on or before April 15 of that year.
- (ii) The declaration shall set forth the rule to be extended, the reasons the extension is necessary, and a citation to the source of the agency's authority to make the rule.
- (d) If the omnibus bill required by Subsection (3) fails to pass both houses of the Legislature, the governor may declare all rules to be extended by publishing a single declaration in the Administrative Rules Bulletin on or before April 15 without meeting requirements of Subsections (b) and (c). 1989

63-46a-12. Interested parties.

- (1) An interested person may petition an agency requesting the making, amendment, or repeal of a rule.
- (2) The division shall prescribe by rule the form for petitions and the procedure for their submission, consideration, and disposition.
- (3) A statement shall accompany the proposed rule, or amendment or repeal of a rule, demonstrating that the proposed action is within the jurisdiction of the agency and appropriate to the powers of the agency.
- (4) Within 30 days after submission of a petition, the agency shall either deny the petition in a writing stating its reasons for the denial, or initiate rulemaking proceedings in accordance with Section 63-46a-4. 1987

63-46a-12.1. Judicial challenge to administrative rules.

- (1) (a) Any person aggrieved by a rule may obtain judicial review of the rule by filing a complaint with the county clerk in the district court where the person resides or in the district court in Salt Lake County.
- (b) Any person aggrieved by an agency's failure to comply with Section 63-46a-3 may obtain judicial review of the agency's failure to comply by filing a complaint with the clerk of the district court where the person resides or in the district court in Salt Lake County.
- (2) (a) Except as provided in Subsection (b), a person seeking judicial review under this section shall exhaust his administrative remedies by complying with the requirements of Section 63-46a-12 before filing the complaint.
- (b) When seeking judicial review of a rule, the person need not exhaust his administrative remedies if:
 - (i) less than six months has passed since the date that the rule became effective and the person had submitted verbal or written comments on the rule to the agency during the public comment period;
 - (ii) a statute granting rulemaking authority expressly exempts rules made under authority of that statute from compliance with Section 63-46a-12; or
 - (iii) compliance with Section 63-46a-12 would cause the person irreparable harm.
- (3) (a) Besides the information required by the Utah Rules of Civil Procedure, a complaint filed under this section shall contain:
 - (i) the name and mailing address of the plaintiff;
 - (ii) the name and mailing address of the defendant agency;
 - (iii) the name and mailing address of any other party joined in the action as a defendant;
 - (iv) a copy of the rule or proposed rule, if any;
 - (v) an allegation that he has either exhausted the administrative remedies by complying with Section 63-46a-12 or met the requirements for waiver of exhaustion of administrative remedies established by Subsection (2)(b);
 - (vi) the relief sought; and
 - (vii) factual and legal allegations supporting the relief sought.

- (b) (i) The plaintiff shall serve a summons and a copy of the complaint as required by the Utah Rules of Civil Procedure.
- (ii) The defendants shall file a responsive pleading as required by the Utah Rules of Civil Procedure.
- (iii) The agency shall file the administrative record of the rule, if any, with its responsive pleading.
- (4) The district court may grant relief to the petitioner by:
 - (a) declaring the rule invalid, if the court finds that:
 - (i) the rule violates constitutional or statutory law or the agency does not have legal authority to make the rule;
 - (ii) the rule is not supported by substantial evidence when viewed in light of the whole administrative record; or
 - (iii) the agency did not follow proper rule-making procedure;
 - (b) declaring the rule nonapplicable to the petitioner;
 - (c) remanding the matter to the agency for compliance with proper rulemaking procedures or further fact-finding;
 - (d) ordering the agency to comply with Section 63-46a-3;
 - (e) issuing a judicial stay or injunction to enjoin the agency from illegal action or action that would cause irreparable harm to the petitioner; or
 - (f) any combination of Subsections (a) through (e).
- (5) If the plaintiff meets the requirements of Subsection (2)(b) the district court may review and act on a complaint under this section whether or not the plaintiff has requested the agency review under Section 63-46a-12. 1990

63-46a-13. Repealed. 1990

63-46a-14. Time for contesting a rule.

A proceeding to contest any rule on the ground of noncompliance with the procedural requirements of this chapter shall commence within two years of the effective date of the rule. 1988

63-46a-15. Repealed. 1988

63-46a-16. Utah Administrative Code as official compilation of rules.

The code shall be received in all the courts, and by all the judges, public officers, commissions, and departments of the state government as evidence of the administrative law of the state of Utah and as an authorized compilation of the administrative law of Utah. 1987

CHAPTER 46b

ADMINISTRATIVE PROCEDURES ACT

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63-46b-1. Scope and applicability of chapter.

(1) Except as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of this chapter by explicit reference to this chapter, the provisions of this chapter apply to every agency of the state of Utah and govern:

- (a) all state agency actions that determine the legal rights, duties, privileges, immunities, or other legal interests of one or more identifiable persons, including all agency actions to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license; and
- (b) judicial review of all such actions.

(2) The provisions of this chapter do not govern:

- (a) the procedures for promulgation of agency rules, or the judicial review of those procedures or rules;
- (b) the issuance of any notice of a deficiency in the payment of a tax, the decision to waive penalties or interest on taxes, the imposition of, and penalties or interest on, taxes, or the issuance of any tax assessment, except that the provisions of this chapter govern any agency action commenced by a taxpayer or by another person authorized by law to contest the validity or correctness of those actions;
- (c) state agency actions relating to extradition, to the granting of pardons or parole, commutations or terminations of sentences, or to the rescission, termination, or revocation of parole or probation, to actions and decisions of the Psychiatric Security Review Board relating to discharge, conditional release, or retention of persons under its jurisdiction, to the discipline of, resolution of grievances of, supervision of, confinement of, or the treatment of, inmates or residents of any correctional facility, the Utah State Hospital, the Utah State Training School, or persons in the custody or jurisdiction of the Division of Mental Health, or persons on probation or parole, or judicial review of those actions;
- (d) state agency actions to evaluate, discipline, employ, transfer, reassign, or promote students

or teachers in any school or educational institution, or judicial review of those actions;

(e) applications for employment and internal personnel actions within an agency concerning its own employees, or judicial review of those actions;

(f) the issuance of any citation or assessment under Chapter 9, Title 35, the Occupational Safety and Health Act, except that the provisions of this chapter govern any agency action commenced by the employer or other person authorized by law to contest the validity or correctness of such a citation or assessment;

(g) state agency actions relating to management of state funds, and contracts for the purchase or sale of products, real property, supplies, goods, or services by or for the state, or by or for an agency of the state, except as provided in such contracts, or judicial review of those actions;

(h) state agency actions under Article 3, Chapter 1, Title 7, and Chapters 2, 8a, and 19, Title 7, and Chapter 30, Title 63 or judicial review of those actions;

(i) the initial determination of any person's eligibility for unemployment benefits, the initial determination of any person's eligibility for benefits under Chapters 1 and 2, Title 35, or the initial determination of a person's unemployment tax liability;

(j) state agency actions relating to the distribution or award of monetary grants to or between governmental units, or for research, development, or the arts, or judicial review of those actions;

(k) the issuance of any notice of violation or order under Chapter 8, 11, 12, 13, or 14, Title 26, except that the provisions of this chapter govern any agency action commenced by any person authorized by law to contest the validity or correctness of any such notice or order;

(l) state agency actions, to the extent required by federal statute or regulation to be conducted according to federal procedures;

(m) the initial determination of any person's eligibility for government or public assistance benefits, or the right of any person to obtain documents or information from an agency; and

(n) state agency actions relating to hunting or fishing licenses, or licenses for use of state recreational facilities.

(3) The provisions of this chapter do not affect any legal remedies otherwise available to:

(a) compel an agency to take action; or

(b) challenge an agency's rule.

(4) This chapter does not preclude an agency, prior to the beginning of an adjudicative proceeding, or the presiding officer during an adjudicative proceeding from:

(a) requesting or ordering conferences with parties and interested persons to:

(i) encourage settlement;

(ii) clarify the issues;

(iii) simplify the evidence;

(iv) facilitate discovery; or

(v) expedite the proceedings; or

(b) granting a timely motion to dismiss or for summary judgment if the requirements of Rule 12(b) or Rule 56, respectively, of the Utah Rules of Civil Procedure are met by the moving party, except to the extent that the requirements of those rules are modified by this chapter.

(5) (a) Declaratory proceedings authorized by Section 63-46b-21 are not governed by this chapter, except as explicitly provided in that section.

(b) Judicial review of declaratory proceedings authorized by Section 63-46b-21 are governed by this chapter.

(6) This chapter does not preclude an agency from enacting rules affecting or governing adjudicative proceedings or from following any of those rules, if the rules are enacted according to the procedures outlined in Chapter 46a, Title 63, the Utah Administrative Rulemaking Act, and if the rules conform to the requirements of this chapter.

(7) If the attorney general issues a written determination that any provision of this chapter would result in the denial of funds or services to an agency of the state from the federal government, the applicability of those provisions to that agency shall be suspended to the extent necessary to prevent the denial. The attorney general shall report the suspension to the Legislature at its next session.

(8) Nothing in this chapter may be interpreted to provide an independent basis for jurisdiction to review final agency action.

(9) Nothing in this chapter may be interpreted to restrict a presiding officer, for good cause shown, from lengthening or shortening any time period prescribed in this chapter, except those time periods established for judicial review.

63-46b-2. Definitions.

(1) As used in this chapter:

(a) "Adjudicative proceeding" means an agency action or proceeding described in Section 63-46b-1.

(b) "Agency" means a board, commission, department, division, officer, council, office, committee, bureau, or other administrative unit of this state, including the agency head, agency employees, or other persons acting on behalf of or under the authority of the agency head, but does not mean the Legislature, the courts, the governor, any political subdivision of the state, or any administrative unit of a political subdivision of the state.

(c) "Agency head" means an individual or body of individuals in whom the ultimate legal authority of the agency is vested by statute.

(d) "Declaratory proceeding" means a proceeding authorized and governed by Section 63-46b-21.

(e) "License" means a franchise, permit, certification, approval, registration, charter, or similar form of authorization required by statute.

(f) "Party" means the agency or other person commencing an adjudicative proceeding, all respondents, all persons permitted by the presiding officer to intervene in the proceeding, and all persons authorized by statute or agency rule to participate as parties in an adjudicative proceeding.

(g) "Person" means an individual, group of individuals, partnership, corporation, association, political subdivision or its units, governmental subdivision or its units, public or private organization or entity of any character, or another agency.

(h) (i) "Presiding officer" means an agency head, or an individual or body of individuals designated by the agency head, by the agency's rules, or by statute to conduct an adjudicative proceeding.

(ii) If fairness to the parties is not compromised, an agency may substitute one presiding officer for another during any proceeding.

(iii) A person who acts as a presiding officer at one phase of a proceeding need not continue as presiding officer through all phases of a proceeding.

(i) "Respondent" means a person against whom an adjudicative proceeding is initiated, whether by an agency or any other person.

(j) "Superior agency" means an agency required or authorized by law to review the orders of another agency.

(2) This section does not prohibit an agency from designating by rule the names or titles of the agency head or the presiding officers with responsibility for adjudicative proceedings before the agency.

63-46b-3. Commencement of adjudicative proceedings.

(1) Except as otherwise permitted by Section 63-46b-20, all adjudicative proceedings shall be commenced by either:

(a) a notice of agency action, if proceedings are commenced by the agency; or

(b) a request for agency action, if proceedings are commenced by persons other than the agency.

(2) A notice of agency action shall be filed and served according to the following requirements:

(a) The notice of agency action shall be in writing, signed by a presiding officer, and shall include:

(i) the names and mailing addresses of all persons to whom notice is being given by the presiding officer, and the name, title, and mailing address of any attorney or employee who has been designated to appear for the agency;

(ii) the agency's file number or other reference number;

(iii) the name of the adjudicative proceeding;

(iv) the date that the notice of agency action was mailed;

(v) a statement of whether the adjudicative proceeding is to be conducted informally according to the provisions of rules adopted under Sections 63-46b-4 and 63-46b-5, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(vi) if the adjudicative proceeding is to be formal, a statement that each respondent must file a written response within 30 days of the mailing date of the notice of agency action;

(vii) if the adjudicative proceeding is to be formal, or if a hearing is required by statute or rule, a statement of the time and place of any scheduled hearing, a statement of the purpose for which the hearing is to be held, and a statement that a party who fails to attend or participate in the hearing may be held in default;

(viii) if the adjudicative proceeding is to be informal and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, a statement that the parties may request a hearing

within the time provided by the agency's rules;

(ix) a statement of the legal authority and jurisdiction under which the adjudicative proceeding is to be maintained;

(x) the name, title, mailing address, and telephone number of the presiding officer; and

(xi) a statement of the purpose of the adjudicative proceeding and, to the extent known by the presiding officer, the questions to be decided.

(b) When adjudicative proceedings are commenced by the agency, the agency shall:

(i) mail the notice of agency action to each party;

(ii) publish the notice of agency action, if required by statute; and

(iii) mail the notice of agency action to any other person who has a right to notice under statute or rule.

(3) (a) Where the law applicable to the agency permits persons other than the agency to initiate adjudicative proceedings, that person's request for agency action shall be in writing and signed by the person invoking the jurisdiction of the agency, or by his representative, and shall include:

(i) the names and addresses of all persons to whom a copy of the request for agency action is being sent;

(ii) the agency's file number or other reference number, if known;

(iii) the date that the request for agency action was mailed;

(iv) a statement of the legal authority and jurisdiction under which agency action is requested;

(v) a statement of the relief or action sought from the agency; and

(vi) a statement of the facts and reasons forming the basis for relief or agency action.

(b) The person requesting agency action shall file the request with the agency and shall send a copy by mail to each person known to have a direct interest in the requested agency action.

(c) An agency may, by rule, prescribe one or more printed forms eliciting the information required by Subsection (3)(a) to serve as the request for agency action when completed and filed by the person requesting agency action.

(d) The presiding officer shall promptly review a request for agency action and shall:

(i) notify the requesting party in writing that the request is granted and that the adjudicative proceeding is completed;

(ii) notify the requesting party in writing that the request is denied and, if the proceeding is a formal adjudicative proceeding, that the party may request a hearing before the agency to challenge the denial; or

(iii) notify the requesting party that further proceedings are required to determine the agency's response to the request.

(e) (i) Any notice required by Subsection (3)(d)(ii) shall contain the information required by Subsection 63-46b-5(1)(i) in addition to disclosure required by Subsection (3)(d)(ii) of this section.

(ii) The agency shall mail any notice required by Subsection (3)(d) to all parties, except that any notice required by Subsection

(3)(d)(iii) may be published when publication is required by statute.

(iii) The notice required by Subsection (3)(d)(iii) shall:

(A) give the agency's file number or other reference number;

(B) give the name of the proceeding;

(C) designate whether the proceeding is one of a category to be conducted informally according to the provisions of rules enacted under Sections 63-46b-4 and 63-46b-5, with citation to the applicable rule authorizing that designation, or formally according to the provisions of Sections 63-46b-6 to 63-46b-11;

(D) in the case of a formal adjudicative proceeding, and where respondent parties are known, state that a written response must be filed within 30 days of the date of the agency's notice if mailed, or within 30 days of the last publication date of the agency's notice, if published;

(E) if the adjudicative proceeding is to be formal, or if a hearing is to be held in an informal adjudicative proceeding, state the time and place of any scheduled hearing, the purpose for which the hearing is to be held, and that a party who fails to attend or participate in a scheduled and noticed hearing may be held in default;

(F) if the adjudicative proceeding is to be informal, and a hearing is required by statute or rule, or if a hearing is permitted by rule and may be requested by a party within the time prescribed by rule, state the parties' right to request a hearing and the time within which a hearing may be requested under the agency's rules; and

(G) give the name, title, mailing address, and telephone number of the presiding officer.

1) When initial agency determinations or actions not governed by this chapter, but agency and judicial review of those initial determinations or actions subject to the provisions of this chapter, the request for agency action seeking review must be filed with the agency within the time prescribed by the agency's rules.

2) For designated classes of adjudicative proceedings, an agency may, by rule, provide for a longer response time than allowed by this section, and may provide for a shorter response time if required or permitted by applicable federal law.

3) Unless the agency provides otherwise by rule or order, applications for licenses filed under authority of Chapters 3, 4, and 5, Title 32A, are not considered as a request for agency action under this chapter.

4) If the purpose of the adjudicative proceeding is to award a license or other privilege as to which there are multiple competing applicants, the agency may, by rule or order, conduct a single adjudicative proceeding to determine the award of that license or privilege.

63-46b-4. Designation of adjudicative proceedings as formal or informal.

1) The agency may, by rule, designate categories of adjudicative proceedings to be conducted informally according to the procedures set forth in rules enacted under the authority of this chapter if:

(a) the use of the informal procedures does not violate any procedural requirement imposed by a statute other than this chapter;

(b) in the view of the agency, the rights of the parties to the proceedings will be reasonably protected by the informal procedures;

(c) in the view of the agency, the agency's administrative efficiency will be enhanced by categorizations; and

(d) the cost of formal adjudicative proceedings outweighs the potential benefits to the public of a formal adjudicative proceeding.

(2) Subject to the provisions of Subsection (3), all agency adjudicative proceedings not specifically designated as informal proceedings by the agency's rules shall be conducted formally in accordance with the requirements of this chapter.

(3) Any time before a final order is issued in any adjudicative proceeding, the presiding officer may convert a formal adjudicative proceeding to an informal adjudicative proceeding, or an informal adjudicative proceeding to a formal adjudicative proceeding if:

(a) conversion of the proceeding is in the public interest; and

(b) conversion of the proceeding does not unfairly prejudice the rights of any party.

63-46b-5. Procedures for informal adjudicative proceedings.

(1) If an agency enacts rules designating one or more categories of adjudicative proceedings as informal adjudicative proceedings, the agency shall, by rule, prescribe procedures for informal adjudicative proceedings that include the following:

(a) Unless the agency by rule provides for and requires a response, no answer or other pleading responsive to the allegations contained in the notice of agency action or the request for agency action need be filed.

(b) The agency shall hold a hearing if a hearing is required by statute or rule, or if a hearing is permitted by rule and is requested by a party within the time prescribed by rule.

(c) In any hearing, the parties named in the notice of agency action or in the request for agency action shall be permitted to testify, present evidence, and comment on the issues.

(d) Hearings will be held only after timely notice to all parties.

(e) Discovery is prohibited, but the agency may issue subpoenas or other orders to compel production of necessary evidence.

(f) All parties shall have access to information contained in the agency's files and to all materials and information gathered in any investigation, to the extent permitted by law.

(g) Intervention is prohibited, except that the agency may enact rules permitting intervention where a federal statute or rule requires that a state permit intervention.

(h) All hearings shall be open to all parties.

(i) Within a reasonable time after the closing of an informal adjudicative proceeding, the presiding officer shall issue a signed order in writing that states the following:

(i) the decision;

(ii) the reasons for the decision;

(iii) a notice of any right of administrative or judicial review available to the parties; and

(iv) the time limits for filing an appeal or requesting a review.

(j) The presiding officer's order shall be based on the facts appearing in the agency's files and on the facts presented in evidence at any hearings.

(k) A copy of the presiding officer's order shall be promptly mailed to each of the parties.

(2) (a) The agency may record any hearing.

(b) Any party, at his own expense, may have a reporter approved by the agency prepare a transcript from the agency's record of the hearing.

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute.

63-46b-6. Procedures for formal adjudicative proceedings — Responsive pleadings.

(1) In all formal adjudicative proceedings, unless modified by rule according to Subsection 63-46b-3(5), the respondent, if any, shall file and serve a written response signed by the respondent or his representative within 30 days of the mailing date or last date of publication of the notice of agency action or the notice under Subsection 63-46b-3(3)(d), which shall include:

(a) the agency's file number or other reference number;

(b) the name of the adjudicative proceeding;

(c) a statement of the relief that the respondent seeks;

(d) a statement of the facts; and

(e) a statement summarizing the reasons that the relief requested should be granted.

(2) The response shall be filed with the agency and one copy shall be sent by mail to each party.

(3) The presiding officer, or the agency by rule, may permit or require pleadings in addition to the notice of agency action, the request for agency action, and the response. All papers permitted or required to be filed shall be filed with the agency and one copy shall be sent by mail to each party.

63-46b-7. Procedures for formal adjudicative proceedings — Discovery and subpoenas.

(1) In formal adjudicative proceedings, the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure.

(2) Subpoenas and other orders to secure the attendance of witnesses or the production of evidence in formal adjudicative proceedings shall be issued by the presiding officer when requested by any party, or may be issued by the presiding officer on his own motion.

(3) Nothing in this section restricts or precludes any investigative right or power given to an agency by another statute.

63-46b-8. Procedures for formal adjudicative proceedings — Hearing procedure.

(1) Except as provided in Subsections 63-46b-3(d)(i) and (ii), in all formal adjudicative proceedings, a hearing shall be conducted as follows:

(a) The presiding officer shall regulate the course of the hearing to obtain full disclosure of relevant facts and to afford all the parties reasonable opportunity to present their positions.

(b) On his own motion or upon objection by a party, the presiding officer:

(i) may exclude evidence that is irrelevant, immaterial, or unduly repetitious;

(ii) shall exclude evidence privileged in the courts of Utah;

(iii) may receive documentary evidence in the form of a copy or excerpt if the copy or excerpt contains all pertinent portions of the original document;

(iv) may take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record of other proceedings before the agency, and of technical or scientific facts within the agency's specialized knowledge.

(c) The presiding officer may not exclude evidence solely because it is hearsay.

(d) The presiding officer shall afford to all parties the opportunity to present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.

(e) The presiding officer may give persons not a party to the adjudicative proceeding the opportunity to present oral or written statements at the hearing.

(f) All testimony presented at the hearing, if offered as evidence to be considered in reaching a decision on the merits, shall be given under oath.

(g) The hearing shall be recorded at the agency's expense.

(h) Any party, at his own expense, may have a person approved by the agency prepare a transcript of the hearing, subject to any restrictions that the agency is permitted by statute to impose to protect confidential information disclosed at the hearing.

(i) All hearings shall be open to all parties.

(2) This section does not preclude the presiding officer from taking appropriate measures necessary to preserve the integrity of the hearing.

63-46b-9. Procedures for formal adjudicative proceedings — Intervention.

(1) Any person not a party may file a signed, written petition to intervene in a formal adjudicative proceeding with the agency. The person who wishes to intervene shall mail a copy of the petition to each party. The petition shall include:

(a) the agency's file number or other reference number;

(b) the name of the proceeding;

(c) a statement of facts demonstrating that the petitioner's legal rights or interests are substantially affected by the formal adjudicative proceeding, or that the petitioner qualifies as an intervenor under any provision of law; and

(d) a statement of the relief that the petitioner seeks from the agency.

(2) The presiding officer shall grant a petition for intervention if he determines that:

(a) the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding; and

(b) the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing the intervention.

(3) (a) Any order granting or denying a petition to intervene shall be in writing and sent by mail to the petitioner and each party.

(b) An order permitting intervention may impose conditions on the intervenor's participation in the adjudicative proceeding that are necessary for a just, orderly, and prompt conduct of the adjudicative proceeding.

(c) The presiding officer may impose the conditions at any time after the intervention. 1987

63-46b-10. Procedures for formal adjudicative proceedings — Orders.

In formal adjudicative proceedings:

(1) Within a reasonable time after the hearing, or after the filing of any post-hearing papers permitted by the presiding officer, or within the time required by any applicable statute or rule of the agency, the presiding officer shall sign and issue an order that includes:

(a) a statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

(b) a statement of the presiding officer's conclusions of law;

(c) a statement of the reasons for the presiding officer's decision;

(d) a statement of any relief ordered by the agency;

(e) a notice of the right to apply for reconsideration;

(f) a notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) the time limits applicable to any reconsideration or review.

(2) The presiding officer may use his experience, technical competence, and specialized knowledge to evaluate the evidence.

(3) No finding of fact that was contested may be based solely on hearsay evidence unless that evidence is admissible under the Utah Rules of Evidence.

(4) This section does not preclude the presiding officer from issuing interim orders to:

(a) notify the parties of further hearings;

(b) notify the parties of provisional rulings on a portion of the issues presented; or

(c) otherwise provide for the fair and efficient conduct of the adjudicative proceeding. 1988

63-46b-11. Default.

(1) The presiding officer may enter an order of default against a party if:

(a) a party in an informal adjudicative proceeding fails to participate in the adjudicative proceeding;

(b) a party to a formal adjudicative proceeding fails to attend or participate in a properly scheduled hearing after receiving proper notice; or

(c) a respondent in a formal adjudicative proceeding fails to file a response under Section 63-46b-6.

(2) An order of default shall include a statement of the grounds for default and shall be mailed to all parties.

(3) (a) A defaulted party may seek to have the agency set aside the default order, and any order in the adjudicative proceeding issued subsequent to the default order, by following the procedures outlined in the Utah Rules of Civil Procedure.

(b) A motion to set aside a default and any subsequent order shall be made to the presiding officer.

(c) A defaulted party may seek agency review under Section 63-46b-12, or reconsideration under Section 63-46b-13, only on the decision of the

presiding officer on the motion to set aside the default.

(4) (a) In an adjudicative proceeding begun by the agency, or in an adjudicative proceeding begun by a party that has other parties besides the party in default, the presiding officer shall, after issuing the order of default, conduct any further proceedings necessary to complete the adjudicative proceeding without the participation of the party in default and shall determine all issues in the adjudicative proceeding, including those affecting the defaulting party.

(b) In an adjudicative proceeding that has no parties other than the agency and the party in default, the presiding officer shall, after issuing the order of default, dismiss the proceeding. 1988

63-46b-12. Agency review — Procedure.

(1) (a) If a statute or the agency's rules permit parties to any adjudicative proceeding to seek review of an order by the agency or by a superior agency, the aggrieved party may file a written request for review within 30 days after the issuance of the order with the person or entity designated for that purpose by the statute or rule.

(b) The request shall:

(i) be signed by the party seeking review;

(ii) state the grounds for review and the relief requested;

(iii) state the date upon which it was mailed; and

(iv) be sent by mail to the presiding officer and to each party.

(2) Within 15 days of the mailing date of the request for review, or within the time period provided by agency rule, whichever is longer, any party may file a response with the person designated by statute or rule to receive the response. One copy of the response shall be sent by mail to each of the parties and to the presiding officer.

(3) If a statute or the agency's rules require review of an order by the agency or a superior agency, the agency or superior agency shall review the order within a reasonable time or within the time required by statute or the agency's rules.

(4) To assist in review, the agency or superior agency may by order or rule permit the parties to file briefs or other papers, or to conduct oral argument.

(5) Notice of hearings on review shall be mailed to all parties.

(6) (a) Within a reasonable time after the filing of any response, other filings, or oral argument, or within the time required by statute or applicable rules, the agency or superior agency shall issue a written order on review.

(b) The order on review shall be signed by the agency head or by a person designated by the agency for that purpose and shall be mailed to each party.

(c) The order on review shall contain:

(i) a designation of the statute or rule permitting or requiring review;

(ii) a statement of the issues reviewed;

(iii) findings of fact as to each of the issues reviewed;

(iv) conclusions of law as to each of the issues reviewed;

(v) the reasons for the disposition;

(vi) whether the decision of the presiding officer or agency is to be affirmed, reversed, or modified, and whether all or any portion

of the adjudicative proceeding is to be remanded;

(vii) a notice of any right of further administrative reconsideration or judicial review available to aggrieved parties; and

(viii) the time limits applicable to any appeal or review. 1988

63-46b-13. Agency review — Reconsideration.

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63-46b-12 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied. 1988

63-46b-14. Judicial review — Exhaustion of administrative remedies.

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63-46b-13(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter. 1988

63-46b-15. Judicial review — Informal adjudicative proceedings.

(1) (a) The district courts shall have jurisdiction to review by trial de novo all final agency actions resulting from informal adjudicative proceedings, except that the juvenile court shall have jurisdiction over all state agency actions relating to removal or placement decisions regarding children in state custody.

(b) Venue for judicial review of informal adjudicative proceedings shall be as provided in the statute governing the agency or, in the absence of such a venue provision, in the county where the petitioner resides or maintains his principal place of business.

(2) (a) The petition for judicial review of informal adjudicative proceedings shall be a complaint governed by the Utah Rules of Civil Procedure and shall include:

(i) the name and mailing address of the party seeking judicial review;

(ii) the name and mailing address of the respondent agency;

(iii) the title and date of the final agency action to be reviewed, together with a duplicate copy, summary, or brief description of the agency action;

(iv) identification of the persons who were parties in the informal adjudicative proceedings that led to the agency action;

(v) a copy of the written agency order from the informal proceeding;

(vi) facts demonstrating that the party seeking judicial review is entitled to obtain judicial review;

(vii) a request for relief, specifying the type and extent of relief requested;

(viii) a statement of the reasons why the petitioner is entitled to relief.

(b) All additional pleadings and proceedings in the district court are governed by the Utah Rules of Civil Procedure.

(3) (a) The district court, without a jury, shall determine all questions of fact and law and any constitutional issue presented in the pleadings.

(b) The Utah Rules of Evidence apply in judicial proceedings under this section. 1988

63-46b-16. Judicial review — Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

- (a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;
- (b) the agency has acted beyond the jurisdiction conferred by any statute;
- (c) the agency has not decided all of the issues requiring resolution;
- (d) the agency has erroneously interpreted or applied the law;
- (e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;
- (f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;
- (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
- (h) the agency action is:
 - (i) an abuse of the discretion delegated to the agency by statute;
 - (ii) contrary to a rule of the agency;
 - (iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or
 - (iv) otherwise arbitrary or capricious.

1988

3-46b-17. Judicial review — Type of relief.

- (1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.
- (b) In granting relief, the court may:
 - (i) order agency action required by law;
 - (ii) order the agency to exercise its discretion as required by law;
 - (iii) set aside or modify agency action;
 - (iv) enjoin or stay the effective date of agency action; or
 - (v) remand the matter to the agency for further proceedings.
- (2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, authorized by statute.

1987

3-46b-18. Judicial review — Stay and other temporary remedies pending final disposition.

- (1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.
- (2) Parties shall petition the agency for a stay or her temporary remedies unless extraordinary circumstances require immediate judicial intervention.
- (3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.
- (4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may grant a stay or other temporary remedy unless it finds that:

- (a) the agency violated its own rules in denying the stay; or
- (b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;
- (ii) the party seeking judicial review will suffer irreparable injury without immediate relief;
- (iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and
- (iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

1987

63-46b-19. Civil enforcement.

- (1) (a) In addition to other remedies provided by law, an agency may seek enforcement of an order by seeking civil enforcement in the district courts.
- (b) The action seeking civil enforcement of an agency's order must name, as defendants, each alleged violator against whom the agency seeks to obtain civil enforcement.
- (c) Venue for an action seeking civil enforcement of an agency's order shall be determined by the requirements of the Utah Rules of Civil Procedure.
- (d) The action may request, and the court may grant, any of the following:
 - (i) declaratory relief;
 - (ii) temporary or permanent injunctive relief;
 - (iii) any other civil remedy provided by law; or
 - (iv) any combination of the foregoing.
- (2) (a) Any person whose interests are directly impaired or threatened by the failure of an agency to enforce an agency's order may timely file a complaint seeking civil enforcement of that order, but the action may not be commenced:
 - (i) until at least 30 days after the plaintiff has given notice of his intent to seek civil enforcement of the alleged violation to the agency head, the attorney general, and to each alleged violator against whom the petitioner seeks civil enforcement;
 - (ii) if the agency has filed and is diligently prosecuting a complaint seeking civil enforcement of the same order against the same or a similarly situated defendant;
 - (iii) if a petition for judicial review of the same order has been filed and is pending in court.
- (b) The complaint seeking civil enforcement of an agency's order must name, as defendants, the agency whose order is sought to be enforced, the agency that is vested with the power to enforce the order, and each alleged violator against whom the plaintiff seeks civil enforcement.
- (c) Except to the extent expressly authorized by statute, a complaint seeking civil enforcement of an agency's order may not request, and the court may not grant, any monetary payment apart from taxable costs.
- (3) In a proceeding for civil enforcement of an agency's order, in addition to any other defenses allowed by law, a defendant may defend on the grounds that:

- (a) the order sought to be enforced was issued by an agency without jurisdiction to issue the order;
- (b) the order does not apply to the defendant;
- (c) the defendant has not violated the order; or
- (d) the defendant violated the order but has subsequently complied.
- (4) Decisions on complaints seeking civil enforcement of an agency's order are reviewable in the same manner as other civil cases.

1987

63-46b-20. Emergency adjudicative proceedings.

- (1) An agency may issue an order on an emergency basis without complying with the requirements of this chapter if:
 - (a) the facts known by the agency or presented to the agency show that an immediate and significant danger to the public health, safety, or welfare exists; and
 - (b) the threat requires immediate action by the agency.
- (2) In issuing its emergency order, the agency shall:
 - (a) limit its order to require only the action necessary to prevent or avoid the danger to the public health, safety, or welfare;
 - (b) issue promptly a written order, effective immediately, that includes a brief statement of findings of fact, conclusions of law, and reasons for the agency's utilization of emergency adjudicative proceedings; and
 - (c) give immediate notice to the persons who are required to comply with the order.
- (3) If the emergency order issued under this section will result in the continued infringement or impairment of any legal right or interest of any party, the agency shall commence a formal adjudicative proceeding in accordance with the other provisions of this chapter.

1987

63-46b-21. Declaratory orders.

- (1) Any person may file a request for agency action, requesting that the agency issue a declaratory order determining the applicability of a statute, rule, or order within the primary jurisdiction of the agency in specified circumstances.
- (2) Each agency shall issue rules that:
 - (a) provide for the form, contents, and filing of petitions for declaratory orders;
 - (b) provide for the disposition of the petitions;
 - (c) define the classes of circumstances in which the agency will not issue a declaratory order;
 - (d) are consistent with the public interest and with the general policy of this chapter; and
 - (e) facilitate and encourage agency issuance of reliable advice.
- (3) (a) An agency may not issue a declaratory order if:
 - (i) the request is one of a class of circumstances that the agency has by rule defined as being exempt from declaratory orders; or
 - (ii) the person requesting the declaratory order participated in an adjudicative proceeding concerning the same issue within 12 months of the date of the present request.
- (b) An agency may issue a declaratory order that would substantially prejudice the rights of a person who would be a necessary party, only if that person consents in writing to the determination of the matter by a declaratory proceeding.

- (4) Persons may intervene in declaratory proceedings if:
 - (a) they meet the requirements of Section 63-46b-9; and
 - (b) they file timely petitions for intervention according to agency rules.
- (5) An agency may provide, by rule or order, that other provisions of Sections 63-46b-4 through 63-46b-13 apply to declaratory proceedings.
- (6) (a) After receipt of a petition for a declaratory order, the agency may issue a written order:
 - (i) declaring the applicability of the statute, rule, or order in question to the specified circumstances;
 - (ii) setting the matter for adjudicative proceedings;
 - (iii) agreeing to issue a declaratory order within a specified time; or
 - (iv) declining to issue a declaratory order and stating the reasons for its action.
- (b) A declaratory order shall contain:
 - (i) the names of all parties to the proceeding on which it is based;
 - (ii) the particular facts on which it is based; and
 - (iii) the reasons for its conclusion.
- (c) A copy of all orders issued in response to a request for a declaratory proceeding shall be mailed promptly to the petitioner and any other parties.
- (d) A declaratory order has the same status and binding effect as any other order issued in an adjudicative proceeding.
- (7) Unless the petitioner and the agency agree in writing to an extension, if an agency has not issued a declaratory order within 60 days after receipt of the petition for a declaratory order, the petition is denied.

1988

63-46b-22. Transition procedures.

- (1) The procedures for agency action, agency review, and judicial review contained in this chapter are applicable to all agency adjudicative proceedings commenced by or before an agency on and after January 1, 1988.
- (2) Statutes and rules governing agency action, agency review, and judicial review that are in effect on December 31, 1987, govern all agency adjudicative proceedings commenced by or before an agency on or before December 31, 1987, even if those proceedings are still pending before an agency or a court on January 1, 1988.

1987

CHAPTER 47**COMMISSION FOR WOMEN AND FAMILIES**

- Section 63-47-1. Creation — Purpose.
- 63-47-2. Members — Appointment — Terms — Vacancies.
- 63-47-3. Qualifications of members.
- 63-47-4. Election of chairman — Meetings.
- 63-47-5. Duties.
- 63-47-6. Administrative assistant — Appointment of personnel.
- 63-47-7. Authority to accept funds, gifts, and donations.
- 63-47-8. Enactment of bylaws and rules.

63-47-1. Creation — Purpose.

There is hereby established the governor's Commission for Women and Families. The purpose of the

CHAPTER 2

PRINCIPLES OF CRIMINAL RESPONSIBILITY

Part 1

Culpability Generally

- Section
76-2-101. Requirements of criminal conduct and criminal responsibility.
- 76-2-102. Culpable mental state required — Strict liability.
- 76-2-103. Definitions of "intentionally, or with intent or willfully"; "knowingly, or with knowledge"; "recklessly, or maliciously"; and "criminal negligence or criminally negligent."
- 76-2-104. Conduct — When defined as offense.

Part 2

Criminal Responsibility for Conduct of Another

- 76-2-201. Definitions.
- 76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.
- 76-2-203. Defenses unavailable in prosecution based on conduct of another.
- 76-2-204. Criminal responsibility of corporation or association.
- 76-2-205. Criminal responsibility of person for conduct in name of corporation or association.

Part 3

Defenses to Criminal Responsibility

- 76-2-301. Person under fourteen years old not criminally responsible.
- 76-2-302. Compulsion.
- 76-2-303. Entrapment.
- 76-2-304. Ignorance or mistake of fact or law.
- 76-2-304.5. Mistake as to victim's age not a defense.
- 76-2-305. Mental illness — Use as a defense — Influence of alcohol or other substance voluntarily consumed — Definition.
- 76-2-306. Voluntary intoxication.
- 76-2-307. Voluntary termination of efforts prior to offense.
- 76-2-308. Affirmative defenses.

Part 4

Justification Excluding Criminal Responsibility

- 76-2-401. Justification as defense — When allowed.
- 76-2-402. Force in defense of person — Forcible felony defined.
- 76-2-403. Force in arrest.
- 76-2-404. Peace officer's use of deadly force.
- 76-2-405. Force in defense of habitation.
- 76-2-406. Force in defense of property.

PART 1

CULPABILITY GENERALLY

- 76-2-101. Requirements of criminal conduct and criminal responsibility.

No person is guilty of an offense unless his conduct is prohibited by law and:

- (1) He acts intentionally, knowingly, recklessly, with criminal negligence, or with a mental state otherwise specified in the statute defining the offense, as the definition of the offense requires; or
- (2) His acts constitute an offense involving strict liability.

These standards of criminal responsibility shall not apply to the violations set forth in Title 41, Chapter 6, unless specifically provided by law. 1963

76-2-102. Culpable mental state required — Strict liability.

Every offense not involving strict liability shall require a culpable mental state, and when the definition of the offense does not specify a culpable mental state and the offense does not involve strict liability, intent, knowledge, or recklessness shall suffice to establish criminal responsibility. An offense shall involve strict liability if the statute defining the offense clearly indicates a legislative purpose to impose criminal responsibility for commission of the conduct prohibited by the statute without requiring proof of any culpable mental state. 1963

76-2-103. Definitions of "intentionally, or with intent or willfully"; "knowingly, or with knowledge"; "recklessly, or maliciously"; and "criminal negligence or criminally negligent."

A person engages in conduct:

- (1) Intentionally, or with intent or willfully with respect to the nature of his conduct or to a result of his conduct, when it is his conscious objective or desire to engage in the conduct or cause the result.
- (2) Knowingly, or with knowledge, with respect to his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or the existing circumstances. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.
- (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

(4) With criminal negligence or is criminally negligent with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint. 1974

76-2-104. Conduct — When defined as offense.

Conduct is an offense if a person engages in it with criminal negligence. Conduct is also an offense if a person engages in it intentionally, knowingly, or recklessly. Conduct is an offense if a person engages

in it recklessly, the conduct is an offense also if a person engages in it intentionally or knowingly. Conduct is an offense if a person engages in it knowingly, the conduct is an offense also if a person engages in it intentionally. 1973

PART 2

CRIMINAL RESPONSIBILITY FOR CONDUCT OF ANOTHER

76-2-201. Definitions.

As used in this part:

- (1) "Agent" means any director, officer, employee, or other person authorized to act in behalf of a corporation or association.
- (2) "High managerial agent" means:
 - (a) A partner in a partnership;
 - (b) An officer of a corporation or association;
 - (c) An agent of a corporation or association who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.
- (3) "Corporation" means all organizations required by the laws of this state or any other state to obtain a certificate of authority, a certificate of incorporation, or other form of registration to transact business as a corporation within this state or any other state and shall include domestic, foreign, profit and nonprofit corporations, but shall not include a corporation sole, as such term is used in Chapter 7, Title 16, Utah Code Annotated 1953. Lack of an appropriate certificate of authority, incorporation, or other form of registration shall be no defense when such organization conducted its business in a manner as to appear to have lawful corporate existence. 1973

76-2-202. Criminal responsibility for direct commission of offense or for conduct of another.

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct. 1973

76-2-203. Defenses unavailable in prosecution based on conduct of another.

In any prosecution in which an actor's criminal responsibility is based on the conduct of another, it is no defense:

- (1) That the actor belongs to a class of persons who by definition of the offense is legally incapable of committing the offense in an individual capacity, or
- (2) That the person for whose conduct the actor is criminally responsible has been acquitted, has not been prosecuted or convicted, has been convicted of a different offense or of a different type or class of offense or is immune from prosecution. 1973

76-2-204. Criminal responsibility of corporation or association.

A corporation or association is guilty of an offense when:

- (1) The conduct constituting the offense consists of an omission to discharge a specific duty of

affirmative performance imposed on corporations or associations by law; or

(2) The conduct constituting the offense is authorized, solicited, requested, commanded, or undertaken, performed, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment and in behalf of the corporation or association. 1973

76-2-205. Criminal responsibility of person for conduct in name of corporation or association.

A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or on behalf of a corporation or association to the same extent as if such conduct were performed in his own name or behalf. 1973

PART 3

DEFENSES TO CRIMINAL RESPONSIBILITY

76-2-301. Person under fourteen years old not criminally responsible.

A person is not criminally responsible for conduct performed before he reaches the age of fourteen years. This section shall in no way limit the jurisdiction of or proceedings before the juvenile courts of this state. 1973

76-2-302. Compulsion.

(1) A person is not guilty of an offense when he engaged in the proscribed conduct because he was coerced to do so by the use or threatened imminent use of unlawful physical force upon him or a third person, which force or threatened force a person of reasonable firmness in his situation would not have resisted.

(2) The defense of compulsion provided by this section shall be unavailable to a person who intentionally, knowingly, or recklessly places himself in a situation in which it is probable that he will be subjected to duress.

(3) A married woman is not entitled, by reason of the presence of her husband, to any presumption of compulsion or to any defense of compulsion except as in Subsection (1) provided. 1973

76-2-303. Entrapment.

(1) It is a defense that the actor was entrapped into committing the offense. Entrapment occurs when a law enforcement officer or a person directed by or acting in cooperation with the officer induces the commission of an offense in order to obtain evidence of the commission for prosecution by methods creating a substantial risk that the offense would be committed by one not otherwise ready to commit it. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

(2) The defense of entrapment shall be unavailable when causing or threatening bodily injury is an element of the offense charged and the prosecution is based on conduct causing or threatening the injury to a person other than the person perpetrating the entrapment.

(3) The defense provided by this section is available even though the actor denies commission of the conduct charged to constitute the offense.

(4) Upon written motion of the defendant, the court shall hear evidence on the issue and shall determine as a matter of fact and law whether the defendant was entrapped to commit the offense. Defendant's mo-

(e) final orders and decrees in formal adjudicative proceedings originating with:

- (i) the Public Service Commission;
- (ii) the State Tax Commission;
- (iii) the Board of State Lands and Forestry;
- (iv) the Board of Oil, Gas, and Mining; or
- (v) the state engineer;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction of a first degree or capital felony; and

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction.

The Supreme Court may transfer to the Court appeals any of the matters over which the Supreme Court has original appellate jurisdiction, ex-

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) general water adjudication;

(f) taxation and revenue; and

(g) those matters described in Subsection (3)(a) through (f).

The Supreme Court has sole discretion in denying or granting a petition for writ of certiorari review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified by the Court of Appeals under Subsection (3)(b).

The Supreme Court shall comply with the requirements of Chapter 46b, Title 63, in its review of any adjudicative proceedings.

3. Repealed.

4. Supreme Court — Rulemaking, judges pro tempore, and practice of law.

The Supreme Court shall adopt rules of procedure and evidence for use in the courts of the state and shall by rule manage the appellate process. The court may amend the rules of procedure and evidence adopted by the Supreme Court upon a vote of two-thirds of all members of both houses of the legislature.

Except as otherwise provided by the Utah Constitution, the Supreme Court by rule may authorize justices and judges and judges pro tempore to perform judicial duties. Judges pro tempore shall be citizens of the United States, Utah residents, and admitted to practice law in Utah.

The Supreme Court shall by rule govern the practice of law, including admission to practice law, the conduct and discipline of persons admitted to practice of law.

5. Repealed.

6. Appellate court administrator.

The appellate court administrator shall appoint clerks and support staff as necessary for the operation of the Supreme Court and the Court of Appeals. The duties of the clerks and support staff shall be established by the appellate court administrator, and powers established by rule of the Supreme Court.

78-2-7. Repealed.

78-2-7.5. Service of sheriff to court.

The court may at any time require the attendance and services of any sheriff in the state.

78-2-8 to 78-2-14. Repealed.

CHAPTER 2a

COURT OF APPEALS

Section

78-2a-1. Creation — Seal.

78-2a-2. Number of judges — Terms — Functions — Filing fees.

78-2a-3. Court of Appeals jurisdiction.

78-2a-4. Review of actions by Supreme Court.

78-2a-5. Location of Court of Appeals.

78-2a-1. Creation — Seal.

There is created a court known as the Court of Appeals. The Court of Appeals is a court of record and shall have a seal.

78-2a-2. Number of judges — Terms — Functions — Filing fees.

(1) The Court of Appeals consists of seven judges. The term of appointment to office as a judge of the Court of Appeals is until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office of a judge of the Court of Appeals is six years and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified. The presiding judge of the Court of Appeals shall receive as additional compensation \$1,000 per annum or fraction thereof for the period served.

(2) The Court of Appeals shall sit and render judgment in panels of three judges. Assignment to panels shall be by random rotation of all judges of the Court of Appeals. The Court of Appeals by rule shall provide for the selection of a chair for each panel. The Court of Appeals may not sit en banc.

(3) The judges of the Court of Appeals shall elect a presiding judge from among the members of the court by majority vote of all judges. The term of office of the presiding judge is two years and until a successor is elected. A presiding judge of the Court of Appeals may serve in that office no more than two successive terms. The Court of Appeals may by rule provide for an acting presiding judge to serve in the absence or incapacity of the presiding judge.

(4) The presiding judge may be removed from the office of presiding judge by majority vote of all judges of the Court of Appeals. In addition to the duties of a judge of the Court of Appeals, the presiding judge shall:

- (a) administer the rotation and scheduling of panels;
- (b) act as liaison with the Supreme Court;
- (c) call and preside over the meetings of the Court of Appeals; and

(d) carry out duties prescribed by the Supreme Court and the Judicial Council.

(5) Filing fees for the Court of Appeals are the same as for the Supreme Court.

78-2a-3. Court of Appeals jurisdiction.

(1) The Court of Appeals has jurisdiction to issue all extraordinary writs and to issue all writs and process necessary:

- (a) to carry into effect its judgments, orders, and decrees; or
- (b) in aid of its jurisdiction.

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

- (a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, Board of State Lands, Board of Oil, Gas, and Mining, and the state engineer;
- (b) appeals from the district court review of:
 - (i) adjudicative proceedings of agencies of political subdivisions of the state or other local agencies; and
 - (ii) a challenge to agency action under Section 63-46a-12.1;
- (c) appeals from the juvenile courts;
- (d) appeals from the circuit courts, except those from the small claims department of a circuit court;

(e) interlocutory appeals from any court of record in criminal cases, except those involving a charge of a first degree or capital felony;

(f) appeals from district court in criminal cases, except those involving a conviction of a first degree or capital felony;

(g) appeals from orders on petitions for extraordinary writs sought by persons who are incarcerated or serving any other criminal sentence, except petitions constituting a challenge to a conviction of or the sentence for a first degree or capital felony;

(h) appeals from district court involving domestic relations cases, including, but not limited to, divorce, annulment, property division, child custody, support, visitation, adoption, and paternity;

(i) appeals from the Utah Military Court; and

(j) cases transferred to the Court of Appeals from the Supreme Court.

(3) The Court of Appeals upon its own motion only and by the vote of four judges of the court may certify to the Supreme Court for original appellate review and determination any matter over which the Court of Appeals has original appellate jurisdiction.

(4) The Court of Appeals shall comply with the requirements of Chapter 46b, Title 63, in its review of agency adjudicative proceedings.

78-2a-4. Review of actions by Supreme Court. Review of the judgments, orders, and decrees of the Court of Appeals shall be by petition for writ of certiorari to the Supreme Court.

78-2a-5. Location of Court of Appeals. The Court of Appeals has its principal location in Salt Lake City. The Court of Appeals may perform any of its functions in any location within the state.

CHAPTER 3

DISTRICT COURTS

Section

78-3-1 to 78-3-2. Repealed.

78-3-3. Term of judges — Vacancy.

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals.

78-3-5. Repealed.

78-3-6. Terms — Minimum of once quarterly.

78-3-7 to 78-3-11. Repealed.

78-3-11.5. State District Court Administrative System — Primary and secondary county locations.

78-3-12. Repealed.

78-3-12.5. Costs of system.

78-3-13. Repealed.

78-3-13.4. Counties joining court system — Procedure — Facilities — Salaries.

78-3-13.5, 78-3-14. Repealed.

78-3-14.5. Allocation of district court fees and fines.

78-3-15, 78-3-16. Repealed.

78-3-16.5. Fees for filing and other services or actions.

78-3-17. Repealed.

78-3-17.5. Application of savings accruing to counties.

78-3-18. Judicial Administration Act — Short title.

78-3-19. Purpose of act.

78-3-20. Definitions.

78-3-21. Judicial Council — Creation — Members — Terms and election — Responsibilities — Reports.

78-3-22. Presiding officer — Compensation — Duties.

78-3-23. Administrator of the courts — Appointment — Qualifications — Salary.

78-3-24. Court administrator — Powers, duties, and responsibilities.

78-3-25. Assistants for administrator of the courts — Appointment of trial court executives.

78-3-26. Courts to provide information and statistical data to administrator of the courts.

78-3-27. Annual judicial conference.

78-3-28. Repealed.

78-3-29. Presiding judge — Election — Term — Compensation — Powers — Duties.

78-3-30. Duties of the clerk of the district court.

78-3-31. Court commissioners — Qualifications — Appointment — Functions governed by rule.

78-3-1 to 78-3-2. Repealed.

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78-3-3. Term of judges — Vacancy.

Judges of the district courts shall be appointed initially until the first general election held more than three years after the effective date of the appointment. Thereafter, the term of office for judges of the district courts is six years, and commences on the first Monday in January, next following the date of election. A judge whose term expires may serve, upon request of the Judicial Council, until a successor is appointed and qualified.

78-3-4. Jurisdiction — Transfer of cases to circuit court — Appeals.

(1) The district court has original jurisdiction in all

lance with Subsection A(1)(b) of this Rule, and the fee as determined in R177-18-4C(2)(b).

(b) Inactive agents may renew within the two year period by requesting in writing to the Division that their registration be renewed. Such requests shall be accompanied by payment of the annual renewal fee or the current year and a reinstatement fee, as determined by R177-18-4 of the Division.

(c) Inactive investment advisers may renew within the two year period by filing with the Division the following written request that the registration be renewed, the fee required by R177-18-4 of the Division, those pages of Form ADV as may require amendment, and Form ADV-S.

(6) Withdrawal of Registration

A non NASD broker-dealer may withdraw registration by filing a Form BDW with the Division. A NASD broker-dealer may withdraw registration by filing a Form BDW with the CRD. An investment adviser may withdraw registration by submitting to the Division a SEC Form ADV-W. Withdrawal is effective 30 days following receipt of the Form BDW or DV-W unless the broker-dealer or investment adviser is otherwise notified by the Division. An agent of a NASD member broker-dealer may withdraw registration by submitting a completed Form U-5 (Uniform Termination Notice for Securities Industry Registration) to the Division. NASD members may cancel registration by submitting a completed Form U-5 to the CRD. Agents of issuers and issuers may withdraw agent registration by submitting to the Division a completed Form U-5. Agents, broker-dealers and issuers are reminded of their statutory duty to notify the Division when an agent has been terminated or has terminated his association with his principal.

(7) Transfers of Registration

An agent may transfer registration by the following procedures:

(a) If the agent was formerly registered with an ASD member broker-dealer, the agent may transfer registration to another NASD broker-dealer by following CRD procedures for transfer of registration. The agent recognizes and participated in the NASAA/CRD Temporary Agent Transfer ("TAT") Program and will not transfer effected through TAT procedures.

(b) Agents not formerly registered with an NASD member broker-dealer, or transferring to a broker-dealer not a member of the NASD, must file with the Division a completed Form U-5, a completed Form 4, and a fee as indicated in R177-18-4 of the Division. Transfer and notice of transfer is effective when all of the above items are received by the Division and none of the information filed is materially incomplete.

R177-4-4. Minimum Capital Requirements of Registered Broker-Dealers and Investment Advisers.

A. Minimum Capital Requirements for Broker-Dealers

A broker-dealer shall comply with SEC Rules c3-1 (Net capital requirements for brokers or dealers, 17 CFR 240 15c3-1) and 15c3-3 (Customer protection—reserves and custody of securities, 17 CFR 240 15c3-3).

B. Minimum Capital Requirements for Investment Advisers

(1) Every investment adviser registered or required to be registered under the Act who holds custody of clients' funds or securities shall maintain at

all times a minimum net capital of \$20,000 or a minimum tangible net worth of \$35,000.

(2) Unless otherwise exempted as a condition of the right to continue to transact business in this state, every investment adviser registered or required to be registered under the Act shall within 24 hours notify the Division if such investment adviser's total net capital or tangible net worth is less than the minimum required net capital or minimum required tangible net worth. Within 24 hours after transmitting such notice, each investment adviser shall file a report of its financial condition including the following:

(a) A proof of money balanced of all ledger accounts in the form of a trial balance,

(b) A computation of net capital or tangible net worth (See this subsection 3),

(c) An analysis of all client's securities and funds which are not segregated,

(d) A computation of the aggregate amount of client ledger debit balances, and

(e) A statement as to the approximate number of client accounts.

(3) For the purpose of this section, the following terms shall have the following meanings:

(a) The term "net capital" shall have the meaning set forth in SEC Rule 15c3-1 (Net capital requirements for brokers or dealers), 17 CFR Section 240 15c3-1 (1981), promulgated under the Securities Exchange Act of 1934, 15 USC §§ 78a—78kk,

(b) The term "net worth" shall mean an excess of assets over liabilities, all as determined by generally accepted accounting principles,

(c) The term "tangible net worth" shall mean the net worth of an investment adviser registered or required to be registered under the act reduced by the following:

(i) Prepaid expenses except as to items properly classified as current assets under generally accepted accounting principles,

(ii) Deferred charges,

(iii) Goodwill, franchises, organizational expenses, unamortized debt discount and expense and all other assets of intangible nature

(iv) Home, furnishings, and automobile(s)—less any indebtedness secured by such assets but only to the extent that such indebtedness does not exceed the carrying value of the assets—and any personal items not readily marketable in the case of an individual, advances or loans to stockholders and officers in the case of a corporation, and advances or loans to partners in the case of a partnership.

(4) For those investment advisers registered or required to be registered under the Act who maintain a minimum tangible net worth requirement rather than a minimum net capital requirement, the Division may require that a current appraisal be submitted in order to establish the worth of any asset being calculated under the tangible net worth formulation.

R177-4-5. Bonding of Broker-Dealers, Agents and Investment Advisers.

A. Bonding of Broker-Dealers

All broker-dealers shall be bonded in the amount of \$10,000 by a corporate bonding company, qualified to do business in the State of Utah. No bond is required of broker-dealers who are members of the Securities Investors Protection Corporation ("SIPC").

B. Bonding of Agents

No bond is required of agents other than that required by R177-11-1 of the Division.

C. Bonding of Investment Advisers

Investment advisers, having custody of customers' funds or securities, shall be bonded in the amount of \$10,000 by a corporate bonding company qualified to do business in the State of Utah.

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R177-5. Broker-Dealer and Investment Adviser Books and Records.

R177-5-1 Books and Records Required

R177-5-3 Financial Reporting

R177-5-1. Books and Records Required.

A. Broker-Dealer Records

Broker-dealers shall comply with SEC Rule 10b-10 (Confirmation of Transactions, 17 CFR 240 10b-10), 17a-3 (Records to Be Made by Certain Exchange Members, Brokers and Dealers, 17 CFR 240 17a-3), and 17a-4 (Records to Be Preserved by Certain Exchange Members, Brokers and Dealers, 17 CFR 240 17a-4). Any individual responsible for the maintenance of the books and records required by this rule must be the broker-dealer himself—in the case of a proprietorship, an officer of the broker-dealer, or its registered agent.

B. Complaint File

Every broker-dealer and investment adviser shall keep and maintain current a file containing copies of any complaints of customers relating to the activity of the broker-dealer, investment adviser, agent or associated person of the broker-dealer or investment adviser. The file shall also contain copies of any legal or administrative action brought by a state, federal or self-regulatory agency. Such files shall be located both at the branch office where the complaint arose and at the home office of the broker-dealer or investment adviser.

C. Market Maker Records

Any broker-dealer which makes a market in a security and solicits retail trades in that security shall maintain and preserve for a period of at least three years, the following:

(1) Proof that the securities are either registered or exempt from registration under Section 14 of the Utah Uniform Securities Act and applicable federal law.

(2) Information which the broker-dealer reasonably believes is true and correct and reasonably current, and which was obtained by him from sources which he reasonably believes are reliable. This information shall be available upon request to any person expressing an interest in a proposed transaction in the security with the broker-dealer. The information shall include:

(a) the exact name of the issuer and its predecessor (if any),

(b) the address for the issuer's principal executive offices,

(c) the state of incorporation, or organization of the issuer,

(d) the exact title and class of the security,

(e) the number of shares or total amount of the securities outstanding as of the end of the issuer's fiscal year,

(f) the name and address of the transfer agent,

(g) the nature of products or services offered by the issuer,

(h) the nature and extent of the issuer's facilities,

(i) the name of the chief executive officer and members of the board of directors,

(j) the issuer's most recent balance sheet, profit and loss and retained earnings statement,

(k) similar financial information for such part of the two preceding fiscal years as the issuer or its predecessor has been in existence, and

(l) whether the broker-dealer or any associated persons are affiliated, directly or indirectly, with the issuer,

(m) the term "market maker" shall mean a broker-dealer who, with respect to a particular type of security, 1) regularly publishes bona fide, competitive bid and ask quotations in a recognized inter-dealer quotation system or regularly furnishes bona fide competitive bid and offer quotations to other broker-dealers of request, and, 2) is ready, willing and able to effect transactions in reasonable quantities at his quoted price with other broker-dealers on a regular basis.

D. Investment Adviser Required Records

(1) Any investment adviser registered or required to be registered under the Utah Uniform Securities Act who is registered with the Securities and Exchange Commission under the provisions of the Investment Advisers Act of 1940, 15 USC Section 80b-1 et seq (1971), and who maintains the books, ledgers, and other records required to be maintained as described in Rule 204-2 (17 CFR Section 275 204-2 (1974)), adopted under the Investment Advisers Act of 1940, 15 USC Section 80b-1 et seq (1971), shall be deemed to be in compliance with this section.

(2) Every investment adviser registered or required to be registered under the Act, except as set forth in subsection (a) of this section, shall make and keep for three years the following books, ledgers and records:

(a) Ledgers (or other records) reflecting all assets and liabilities, income and expense, and capital accounts.

(b) Journals showing all monies received, including date of receipt, purpose and from whom received, and all disbursements, including date paid, purpose and to whom made.

(c) A record showing all receivables and payables.

(d) Records showing separately for each customer the securities purchased or sold, and to the extent it has been made available to the investment adviser, the date and amount of and price at which such purchases or sales were executed. If available to the investment adviser, this record should also show the name of the broker-dealer who handled the transaction, such records, to the extent the information has been made available, should be adequate to show separately all securities purchased or sold by the customer of the investment adviser pursuant to its recommendation or of which it has custody and indicating thereon the proper identification of the individual account, the date, amount and price at which such securities were purchased or sold by or for each customer.

(e) Copies of the broker-dealer confirmations of all transactions placed by the investment adviser for any account, and such other broker-dealer confirmation as may be supplied to the investment adviser by a customer dealer.

(f) A list showing all accounts in which the investment adviser is vested with discretionary power.

(g) Originals of all communications received and copies of all communications sent by such investment adviser relating to the business of the investment adviser.

(h) All powers of attorney and other evidence of the granting of any discretionary authority in any account.

3. This rule applies to the Division and to persons subject to adjudicative proceedings of the Division.

R177-46b-6B. Categorization of Adjudicative Proceedings.

All adjudicative proceedings under the Act, enumerated in this Rule, are designated as informal adjudicative proceedings.

R177-46b-6C. Commencement of Adjudicative Proceedings.

Filing of the following documents with the Division shall be deemed to be a request for initial Division action:

1. SEC Form BD — Application for registration as broker-dealer pursuant to Section 61-1-4(1) and Rule 1.1 (whether filed with the division or the Central Registration Depository (CRD));
2. Form U-4 — Application for registration as agent pursuant to Section 61-1-4(1) and Rule 4.1 whether filed with the division or the CRD;
3. SEC Form ADV — Application for registration as investment advisor pursuant to Section 61-1-4(1) and Rule 4.1 (whether filed with the division or the CRD);
4. Application for Registration by Notification — Filed pursuant to Section 61-1-8;
5. Form U-1 — Application for registration by coordination pursuant to Section 61-1-9 and Rule 9.1;
6. Form 10.2-1 — Application for registration by qualification pursuant to Section 61-1-10 and Rule 10.2-1;
7. Request for order under Section 61-1-13(3)(h) — Order designating a person as not being within the definition of "broker-dealer";
8. Request for order 61-1-13(10)(g) — Order designating a person as not being within the definition of "investment adviser";
9. Request for order under Section 61-1-14(1)(k) — Order finding that registration is not necessary or appropriate (exempt securities);
10. Request for order under Section 61-1-14(2)(q) — Order finding that registration is not necessary or appropriate (exempt transactions);
11. Request for order under Rule 11.7(b)(2)(B) — Order releasing impounded funds;
12. Request under Rule 14.1g — Confirmation of exemption (exchange);
13. Request under Rule 14.2b — Confirmation of exemption (manual);
14. Request under Rule 14.2m — Confirmation of exemption (secondary trading).

R177-46b-6D. Procedures for Informal Adjudicative Proceedings.

A hearing will be held only if required by the Act or by the provisions of this Rule 177-6b. Where a hearing is permitted but not required, a hearing will be held only if requested by a party within 20 days after receipt of a notice of Division action.

R177-46b-6E. Hearings: When Held.

1. Under the Act and Rules, a hearing is not required and will not be held in the following adjudicative proceedings:

- a. 61-1-4 Registration of broker-dealer, agent, investment adviser;
- b. 61-1-4(1) Order requiring applicant to publish announcement of application;
- c. 61-1-6(5) Cancellation of registration or application of broker-dealer, agent, investment adviser;
- d. 61-1-8 Grant of registration by notification;
- e. 61-1-9 Grant of registration by coordination;

f. 61-1-9(3) Stop order based on failure to file price amendments;

g. 61-1-10 Grant of registration by qualification;

h. 61-1-10(2)(q) Order requiring additional information or verification;

i. 61-1-11(7) Order imposing conditions of registration;

j. 61-1-12(4) Order vacating or modifying stop order;

k. 61-1-13(3)(h) Order designating a person as not being within the definition of a "broker-dealer";

l. 61-1-13(10)(g) Order designating a person as not being within the definition of "investment adviser";

m. 61-1-14(1)(k) Order finding that registration is not necessary or appropriate (exempt securities);

n. 61-1-14(2)(q) Order finding that registration is not necessary or appropriate (exempt transactions);

o. 61-1-15 Order requiring filing of prospectus, sales literature, etc.;

p. Rule 11.7(b)(e) Order releasing fund impound;

q. 61-1-20(1)(a) Order to show cause;

r. Rule 14.1g Confirmation of exemption (exchange);

s. Rule 14.2b Confirmation of exemption (manual);

t. Rule 14.2m Confirmation of exemption (secondary trading).

2. In the following proceedings, a hearing will be held only if timely requested:

a. 61-1-6(1) or (2) Denial, suspension, revocation of registration of broker-dealer, agent, investment adviser;

b. 61-1-6(4) Denial, suspension, revocation of registration of broker-dealer, agent, investment adviser (emergency action);

c. 61-1-12(1) Stop order denying, suspending or revoking effectiveness of a securities registration statement;

d. 61-1-12(2) Stop order denying, suspending or postponing effectiveness of a securities registration statement (emergency action);

e. 61-1-14(2)(p)(v) Order denying or revoking exemption under 14(2)(p);

f. 61-1-14(3) Denial or revocation of exemption from registration;

3. In a proceeding held under Section 61-1-20(1)(d) (a cease and desist order), a hearing is required before issuance of an order and a notice of hearing will be provided in the Order to Show Cause issued.

R177-46b-6F. Declaratory Orders.

a. The Division will not issue declaratory orders where a petition requests a ruling with respect to the applicability of Section 1 of the Utah Uniform Securities Act.

2. A request for a "no-action" letter under Rule 25.5 shall be deemed to be a petition for a declaratory order.

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61-1-16.6, 63-46b-4(1), 63-46b-5, 61-1-24(1)

Community and Economic Development

R211. Community Development.

R213. Community Service.

R220. Expositions.

R222. Fine Arts.

R224. History.

R226. Job Training for Economic Development.

R230. Library.

R211. Community Development.

R211-1. State and Regional Funding Processes.

R211-2. Eligible Grant Applicants, National Objectives and Eligible Projects.

R211-3. Grantee Responsibilities.

R211-4. Threshold Requirements.

R211-5. Application Process.

R211-6. Economic Development.

R211-7. Adjudicative Proceedings to Appeal Decisions of Regional Review Committees ("RRC").

R211-8. Permanent Community Impact Fund Board Criteria for Evaluating Project Requests.

R211-9. Policy Concerning Enforceability and Taxability of Bonds Purchased.

R211-10. Procedures in Case of Inability to Formulate Contract for Alleviation of Impact.

R211-1. State and Regional Funding Processes.

R211-1-1. Regional Distribution Process.

R211-1-2. Rating and Ranking.

R211-1-1. Regional Distribution Process.

A. Review.

The role of each review committee is to receive, review and to prioritize the CDBG applications in its region.

R211-1-2. Rating and Ranking.

The development of a RATING AND RANKING SYSTEM must be prepared by the RRC prior to the receipt of grant applications.

A. The ranking criteria must contain, at a minimum, the following six general criteria:

1. Capacity of Grantee to Carry Out the Grant
2. Community Development and Furthering Fair Housing Plans
3. Job Creation
4. Improvement or Expansion of Housing Stock
5. Extent of Property
6. Financial Commitment to Community Development.

B. Following the completion of the rating and ranking process, each RRC will present to the State a list of: 1) ALL projects submitted to them for ranking, 2) copies of ranking result sheets, 3) the rationale for not ranking any submitted projects, and 4) a summary of all final ranking results.

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10-6-1 et seq.

R211-2. Eligible Grant Applicants, National Objectives and Eligible Projects.

R211-2-1. Eligible Grant Applicants.

R211-2-2. Aiding in the Prevention or Elimination of Slums or Blight pursuant to Utah Code Annotated 1953 11-15-2.

R211-2-3. Inclusive Federal Compliance Requirements.

R211-2-4. Eligible Activities.

R211-2-1. Eligible Grant Applicants.

A. Eligible applicants for the State CDBG Program are:

1. Incorporated cities and towns with population of less than 50,000 except those jurisdictions located in Salt Lake County;

2. All of Utah's counties except Salt Lake;

3. Units of local government recognized by the Secretary of HUD which include six of the seven associations of government.

R211-2-2. Aiding in the Prevention or Elimination of Slums or Blight pursuant to Utah Code Annotated 1953 11-15-2.

A. This National Objective may be met in one three possible ways:

1. Perform activities in a slum or blighted area.

The eligible activity selected must, under Utah Code Annotated 1953, section 11-15-2, be characterized by buildings or structures considered unsafe unfit to occupy, are conducive to ill health, transmission of disease, infant mortality, juvenile delinquency and crime because of any one or a combination of the following factors (indicate those selected).

(a) Defective design and character of physical construction,

(b) Faulty interior arrangement and exterior appearance,

(c) High density of population and overcrowding,

(d) Inadequate provision for ventilation, light, sanitation, open spaces, and recreation facilities,

(e) Age, obsolescence, deterioration, dilapidation, mixed character, or shifting of uses,

(f) Economic dislocation, deterioration, or disuse resulting from faulty planning,

(g) Subdividing and sale of lots of irregular form and shape and inadequate size for proper usefulness and development,

(h) Laying out of lots in disregard of the contours and other physical characteristics of the ground and surrounding conditions,

(i) Existence of inadequate streets, open space and utilities, or

(j) Existence of lots or other areas which are subject to being submerged by water, AND where the applicant can document (e.g., by written comments or photograph that, AT THE TIME OF APPLICATION, there existed a substantial number of deteriorated or dilapidated buildings or improvements throughout the area.

R211-2-3. Inclusive Federal Compliance Requirements.

A. Applicants must be in compliance with all applicable federal and state regulations and over statutes. The federal statutes which will apply to the 1987-1988 program include:

— Davis-Bacon Fair Labor Standards Act (40 USC 276a-276a-5);

— Copeland "Anti-Kickback" Act (40 USC 276(c));

— Contract Work Hours and Safety Standards Act, as amended (40 USC 327-333);

— Title VI of the Civil Rights Act of 1964 (42 USC 200(d));

— Title VIII of the Civil Rights Act of 1968 (42 USC 3601);

— Section 3 of the Housing and Urban Development Act of 1968, as amended (12 USC 1701(u));

— Section 109 of the Housing and Urban Development Act of 1974, as amended (42 USC 5309);

— Age Discrimination Act of 1975, as amended (42 USC 6101);

nile, or circuit court to the appellate court with jurisdiction over the appeal from all final orders and judgments, except as otherwise provided by law, by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal or other sanctions short of dismissal, as well as the award of attorney fees.

(b) **Joint or consolidated appeals.** If two or more parties are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may file a joint notice of appeal or may join in an appeal of another party after filing separate timely notices of appeal. Joint appeals may proceed as a single appeal with a single appellant. Individual appeals may be consolidated by order of the appellate court upon its own motion or upon motion of a party, or by stipulation of the parties to the separate appeals.

(c) **Designation of parties.** The party taking the appeal shall be known as the appellant and the adverse party as the appellee. The title of the action or proceeding shall not be changed in consequence of the appeal, except where otherwise directed by the appellate court. In original proceedings in the appellate court, the party making the original application shall be known as the petitioner and any other party as the respondent.

(d) **Content of notice of appeal.** The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order, or part thereof, appealed from; shall designate the court from which the appeal is taken; and shall designate the court to which the appeal is taken.

(e) **Service of notice of appeal.** The party taking the appeal shall give notice of the filing of a notice of appeal by serving personally or mailing a copy thereof to counsel of record of each party to the judgment or order; or, if the party is not represented by counsel, then on the party at the party's last known address.

(f) **Filing and docketing fees in civil appeals.** At the time of filing any notice of separate, joint, or cross appeal in a civil case, the party taking the appeal shall pay to the clerk of the trial court such filing fees as are established by law, and also the fee for docketing the appeal in the appellate court. The clerk of the trial court shall not accept a notice of appeal unless the filing and docketing fees are paid.

(g) **Docketing of appeal.** Upon the filing of the notice of appeal and payment of the required fees, the clerk of the trial court shall immediately transmit one copy of the notice of appeal, showing the date of its filing, together with the docketing fee, to the clerk of the appellate court. Upon receipt of the copy of the notice of appeal and the docketing fee, the clerk of the appellate court shall enter the appeal upon the docket. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if the title does not contain the name of the appellant, such name shall be added to the title.

Rule 4. Appeal as of right: when taken.

(a) **Appeal from final judgment and order.** In a case in which an appeal is permitted as a matter of right from the trial court to the appellate court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the

date of entry of the judgment or order appealed from. However, when a judgment or order is entered in a statutory forcible entry or unlawful detainer action, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 10 days after the date of entry of the judgment or order appealed from.

(b) **Motions post judgment or order.** If a timely motion under the Utah Rules of Civil Procedure is filed in the trial court by any party (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59 to alter or amend the judgment; or (4) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. Similarly, if a timely motion under the Utah Rules of Criminal Procedure is filed in the trial court by any party (1) under Rule 24 for a new trial; or (2) under Rule 26 for an order, after judgment, affecting the substantial rights of a defendant, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order of the trial court disposing of the motion as provided above.

(c) **Filing prior to entry of judgment or order.** Except as provided in paragraph (b) of this rule, a notice of appeal filed after the announcement of a decision, judgment, or order but before the entry of the judgment or order of the trial court shall be treated as filed after such entry and on the day thereof.

(d) **Additional or cross-appeal.** If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by paragraph (a) of this rule, whichever period last expires.

(e) **Extension of time to appeal.** The trial court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by paragraph (a) of this rule. A motion filed before expiration of the prescribed time may be ex parte unless the trial court otherwise requires. Notice of a motion filed after expiration of the prescribed time shall be given to the other parties in accordance with the rules of practice of the trial court. No extension shall exceed 30 days past the prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

Rule 5. Discretionary appeals from interlocutory orders.

(a) **Petition for permission to appeal.** An appeal from an interlocutory order may be sought by any party by filing a petition for permission to appeal from the interlocutory order with the clerk of the appellate court with jurisdiction over the case within 30 days after the entry of the order of the trial court, with proof of service on all other parties to the action.

(b) **Fees and copies of petition.** The petitioner shall file with the Clerk of the Supreme Court an original and seven copies of the petition, or, with the Clerk of the Court of Appeals, an original and four copies, together with the fee for filing a notice of ap-

peal in the trial court and the docketing fee in the appellate court. If an order is issued authorizing the appeal, the clerk of the appellate court shall immediately give notice of the order by mail to the respective parties and shall transmit a certified copy of the order, together with a copy of the petition and filing fee, to the trial court where the petition and order shall be filed in lieu of a notice of appeal. If the petition is denied, the filing fee shall be refunded.

(c) **Content of petition.** The petition shall contain:

(1) A statement of the facts necessary to an understanding of the controlling question of law determined by the order sought to be reviewed;

(2) A statement of the question of law and a demonstration that the question was properly raised before the trial court and ruled upon;

(3) A statement of the reasons why an immediate interlocutory appeal should be permitted; and

(4) A statement of the reason why the appeal may materially advance the termination of the litigation.

(5) The petition shall include a copy of the order of the trial court from which an appeal is sought and any related findings of fact, conclusions of law and opinion.

(d) **Answer.** Within 10 days after service of the petition, any other party may file an answer in opposition or concurrence. An original and seven copies of the answer shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals. The petition and any answer shall be submitted without oral argument unless otherwise ordered.

(e) **Grant of permission.** An appeal from an interlocutory order may be granted only if it appears that the order involves substantial rights and may materially affect the final decision or that a determination of the correctness of the order before final judgment will better serve the administration and interests of justice. The order permitting the appeal may set forth the particular issue or point of law which will be considered and may be on such terms, including the filing of a bond for costs and damages, as the appellate court may determine. If the petition is granted, the appeal shall be deemed to have been docketed by the granting of the petition, and all proceedings subsequent to the granting of the petition shall be as, and within the time required, for appeals from final judgments.

Rule 6. Bond for costs on appeal.

Except in a criminal case, at the time of filing the notice of appeal, the appellant shall file with the notice a bond for costs on appeal, unless the bond is waived in writing by the adverse party, or unless an affidavit as provided for in Section 21-7-3, Utah Code Ann. 1953 as amended, is filed. The bond shall be in the sum of at least \$300.00 or such greater amount as the trial court may order on motion of the appellee to secure payment of costs on appeal. No separate bond for costs on appeal is required when a supersedeas bond is filed. The bond on appeal shall be with sufficient sureties and shall be conditioned to secure payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. The adverse party may except to the sufficiency of the sureties in accordance with the provisions of Rule 62(i), Utah Rules of Civil Procedure.

Rule 7. Security: Proceedings against sureties.

Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety must consent therein to the exercise of personal jurisdiction by the trial court and must irrevocably appoint the clerk of that court as an agent upon whom any papers affecting liability on the bond or undertaking may be served. The sureties' liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the trial court prescribes may be served on the clerk of the trial court, who shall forthwith mail copies to the sureties if their addresses are known.

Rule 8. Stay or injunction pending appeal.

(a) **Stay must ordinarily be sought in the first instance in trial court; motion for stay in appellate court.** Application for a stay of the judgment or order of a trial court pending appeal, or disposition of a petition under Rule 5, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute, the motion shall be supported by affidavits or other sworn statements or copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be considered by a single justice or judge of the court.

(b) **Stay may be conditioned upon giving of bond.** Relief available in the appellate court under this rule may be conditioned upon the filing of a bond or other appropriate security in the trial court.

(c) **Stays in criminal cases.** Stays in criminal cases pending appeal are governed by Section 77-35-27 Utah Code Ann. 1953, as amended (Rule 27 U.R. Crim.P.).

Rule 9. Docketing statement.

(a) **Time for filing.** Within 21 days after a notice of appeal, cross-appeal, or a petition for review is filed, the appellant, cross-appellant, or petitioner shall file a docketing statement with the clerk of the appellate court. An original and seven copies of the docketing statement shall be filed in the Supreme Court. An original and four copies shall be filed in the Court of Appeals.

(b) **Purpose of docketing statement.** The docketing statement is not a brief and should not contain arguments or procedural motions. It is used by the appellate court in assigning cases to the Supreme Court or to the Court of Appeals when both have jurisdiction, in making certifications to the Supreme Court, in classifying cases for determining the priority to be accorded them, in making summary dispositions when appropriate, and in making calendar assignments.

(c) **Content of docketing statement.** The docketing statement shall contain the following information in the order set forth below:

(1) The date of the judgment or order sought to be reviewed; the date of all motions filed pursuant to Rules 50(a) and (b), 52(b), 54(b), or 59, Utah Rules of Civil Procedure; the date and effect of all orders disposing of such motions; and the date the notice of appeal or the petition for review was filed.

(2) The specific rule or statutory authority that confers jurisdiction on the appellate court to decide the appeal, the petition for review, or, in the case of an interlocutory appeal, the date of the appellate court order allowing the appeal and the issues which may be appealed pursuant to the granting of the interlocutory appeal. Particular attention should be paid to the requirements of Rule 54(b), Utah Rules of Civil Procedure, if an appeal is from an order in a multiple-party or a multiple-claim case.

(3) A concise statement of the nature of the proceeding, e.g., "this appeal is from a final judgment or decree of the _____ court" or "this petition is to review an order of _____ administrative agency."

(4) A concise statement of facts material to a consideration of the questions presented.

(5) The issues presented by the appeal, expressed in the terms and circumstances of the case, but without unnecessary detail. The questions should not be repetitious. General conclusions such as "the judgment of the trial court is not supported by the law or facts," are not acceptable. For each issue appellant must state the applicable standard of appellate review and cite supporting authority.

(6) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the phrase "Subject to assignment to the Court of Appeals" should appear immediately under the title of the document, i.e., "Docketing Statement."

(7) If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the appellant may set forth concisely in not more than two pages why the Supreme Court should decide the case. The Supreme Court may, for example, consider whether the case presents or involves one or more of the following:

(A) a substantial constitutional issue not yet decided and, if so, what the issue or issues are;

(B) an issue of first impression in the state and of substantial importance in the administration of justice;

(C) a conflict in Court of Appeals decisions that needs to be resolved by the Supreme Court;

(D) any other persuasive reason why the Supreme Court should resolve the issue.

(8) Citations to statutes, rules, or cases believed to be determinative of the respective issues stated.

(9) A reference to all related or prior appeals in the case. If the reference is to a prior appeal, the appropriate citation should be given.

(d) **Necessary attachments.** Attached to each copy of the docketing statement shall be a copy of the following:

(1) The judgment or order sought to be reviewed;

(2) Any opinion or findings;

(3) All motions filed pursuant to Rules 50(a) and (b), 52(b), 54(b), and 59, Utah Rules of Civil Procedure, and orders disposing of such motions; and

(4) The notice of appeal and any order extending the time for the filing of a notice of appeal.

(e) **Attachment to indicate date filed.** The attachments required by this rule must bear a clear representation of the original date of filing by means of the trial court's filing seal or mark or a copy conformed to the original by the trial court.

(f) **Response to statement regarding assignment.** If the appeal is subject to assignment by the Supreme Court to the Court of Appeals, the appellee may file a response to the appellant's contentions in subparagraph (c)(7). The response may support or oppose the appellant's position, shall not be more than two pages long, and shall be filed within 10 days after service of the docketing statement.

(g) **Consequences of failure to comply.** Docketing statements which fail to comply with this rule will not be accepted. Failure to comply may result in dismissal of the appeal or the petition.

Rule 10. Motion for summary disposition.

(a) **Time for filing; grounds for motion.** Within 10 days after the docketing statement is served, a party may move:

(1) To dismiss the appeal or the petition for review on the basis that the appellate court has no jurisdiction; or

(2) To affirm the order or judgment which is the subject of review on the basis that the grounds for review are so insubstantial as not to merit further proceedings and consideration by the appellate court; or

(3) To reverse the order or judgment which is the subject of review on the basis of manifest error.

(b) **Number of copies; form of motion.** An original and seven copies of a motion made pursuant to this rule shall be filed with the Clerk of the Supreme Court. An original and four copies shall be filed with the Clerk of the Court of Appeals. The motion shall be in the form prescribed by Rule 23.

(c) **Filing of response.** The party moved against shall have 10 days from the service of such a motion in which to file a response. An original response and seven copies shall be filed in the Supreme Court. An original response and four copies shall be filed in the Court of Appeals.

(d) **Submission of motion; suspension of further proceedings.** Upon the filing of a response to the expiration of time therefor, the motion shall be submitted to the court for consideration and an appropriate order. The time for taking other steps in the appellate procedure is suspended pending disposition of a motion to affirm or reverse or dismiss.

(e) **Ruling of court.** The court, upon its own motion, and on such notice as it directs, may dismiss an appeal or petition for review if the court lacks jurisdiction; or may summarily affirm the judgment or order which is the subject of review, if it plainly appears that no substantial question is presented; or may summarily reverse in cases of manifest error.

(f) **Deferral of ruling.** As to any issue raised by motion for summary disposition, the court may defer its ruling until plenary presentation and consideration of the case.

Rule 11. The record on appeal.

(a) **Composition of the record on appeal.** The original papers and exhibits filed in the trial court, the transcript of proceedings, if any, the index prepared by the clerk of the trial court, and where available the docket sheet, shall constitute the record on appeal in all cases. However, with respect to papers only those prescribed under paragraph (d) of this rule shall be transmitted to the appellate court.

(b) **Pagination and indexing of record.** Immediately upon filing of the notice of appeal, the clerk of the trial court shall paginate all of the original papers filed in that court in chronological order and shall prepare an alphabetical index of those papers. The index shall contain a reference to the date on which the paper was filed in the trial court and the starting page of the record on which the paper will be found.

(c) **Duty of appellant.** After filing the notice of appeal, the appellant, or in the event that more than one appeal is taken, each appellant, shall comply with the provisions of paragraphs (d) and (e) of this rule and shall take any other action necessary to enable the clerk of the trial court to assemble and transmit the record. A single record shall be transmitted.

(d) **Papers and exhibits on appeal.**

(1) **Criminal cases.** All of the original papers in a criminal case shall be included by the clerk of the trial court as part of the record on appeal.

(2) **Civil cases.** In all civil cases, the record shall remain in the custody of the clerk of the trial court, as set forth in Rule 12(b)(2), during preparation and filing of briefs.

The clerk of the trial court shall establish rules and procedures for checking out the record, after pagination, for use by the parties in briefing.

(A) **Civil cases with short records.** In civil cases where all the original papers total fewer than 300 pages, all of the original papers will be transmitted to the appellate court upon completion of the filing of briefs by the parties, as set forth in Rule 12(b)(2). In such cases, the appellant shall serve upon the clerk of the trial court, simultaneously with the filing of appellant's reply brief, notice of the date on which appellant's reply brief was filed. If appellant does not intend to file a reply brief, appellant shall notify the clerk of the trial court of that fact within 30 days of the filing of appellee's brief.

(B) **All other civil cases.** In all other civil cases where the original papers are or exceed 300 pages, all parties shall file with the clerk of the trial court, within 10 days after briefing is completed, a joint or separate designation of those papers referred to in their respective briefs. Only those designated papers and the following, to the extent applicable, shall be transmitted to the clerk of the appellate court by the clerk of the trial court:

(i) the pleadings as defined in Rule 7(a), Utah Rules of Civil Procedure;

(ii) the pretrial order, if any;

(iii) the final judgment, order, or interlocutory order from which the appeal is taken;

(iv) other orders sought to be reviewed, if any;

(v) any supporting opinion, findings of fact or conclusions of law filed or delivered by the trial court;

(vi) the motion, response, and accompanying memoranda upon which the court rendered judgment, if any;

(vii) jury instructions given, if any;

(viii) jury verdicts and interrogatories, if any;

(ix) the notice of appeal.

(e) **The transcript of proceedings; duty of appellant to order; notice to appellee if partial transcript is ordered.**

(1) **Request for transcript; time for filing.** Within 10 days after filing the notice of appeal, the appellant shall request from the reporter a transcript of such parts of the proceedings not already on file as the appellant deems necessary. The request shall be in writing, and, within the same period, a copy shall be filed with the clerk of the trial court and the clerk of the appellate court. If no such parts of the proceedings are to be requested, within the same period the appellant shall file a certificate to that effect with the clerk of the trial court and a copy with the clerk of the appellate court. If there was no reporter but the proceedings were otherwise recorded, the appellant shall request from a court transcriber, certified in accordance with the rules and procedures of the Judicial Council, a transcript of such parts of the proceeding not already on file as the appellant deems necessary. By stipulation of the parties approved by the appellate court, a person other than a certified court transcriber may transcribe a recorded hearing. The clerk of the appellate court shall, upon request, provide a list of all certified court transcribers. The transcriber is subject to all of the obligations imposed on reporters by these rules.

(2) **Transcript required of all evidence regarding challenged finding or conclusion.** If the appellant intends to urge on appeal that a finding or conclusion is unsupported by or is contrary to the evidence, the appellant shall include in the record a transcript of all evidence relevant to such finding or conclusion.

(3) **Statement of issues; cross-designation by appellee.** Unless the entire transcript is to be included, the appellant shall, within 10 days after filing the notice of appeal, file a statement of the issues that will be presented on appeal and shall serve on the appellee a copy of the request or certificate and a copy of the statement. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 10 days after the service of the request or certificate and the statement of the appellant, file and serve on the appellant a designation of additional parts to be included. Unless within 10 days after service of such designation the appellant has requested such parts and has so notified the appellee, the appellee may within the following 10 days either request the parts or move in the trial court for an order requiring the appellant to do so.

(4) **Payment of reporter.** At the time of the request, a party shall make satisfactory arrangements with the reporter or transcriber for payment of the cost of the transcript.

(f) **Agreed statement as the record on appeal.** In lieu of the record on appeal as defined in paragraph (a) of this rule, the parties may prepare and sign a statement of the case, showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts

counsel of record or by a party who is not represented by counsel.

Rule 22. Computation and enlargement of time.

(a) **Computation of time.** In computing any period of time prescribed by these rules, by an order of the court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes days designated as holidays by the state or federal governments.

(b) **Enlargement of time.** The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time, but the court may not enlarge the time for filing a notice of appeal or a petition for review from an order of an administrative agency, except as specifically authorized by law. A motion for an enlargement of time shall be filed prior to the expiration of the time for which the enlargement is sought. A motion for enlargement of time shall:

- (1) State with particularity the reasons for granting the motion;
- (2) State whether the movant has previously been granted an enlargement of time and, if so, the number and duration of such enlargements;
- (3) State when the time will expire for doing the act for which the enlargement of time is sought; and
- (4) State the date on which the act for which the enlargement of time is sought will be completed.

(c) **Ex parte motion.** Except as to enlargements of time for filing and service of briefs under Rule 26(a), a party may file one ex parte motion for enlargement of time not to exceed 14 days if no enlargement of time has been previously granted, if the time has not already expired for doing the act for which the enlargement is sought, and if the motion otherwise complies with the requirements and limitations of paragraph (b) of this rule.

(d) **Additional time after service by mail.** Whenever a party is required or permitted to do an act within a prescribed period after service of a paper and the paper is served by mail, 3 days shall be added to the prescribed period.

Rule 23. Motions.

(a) **Content of motion; response; reply.** Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by the following:

- (1) A specific and clear statement of the relief sought;
- (2) A particular statement of the factual grounds;
- (3) If the motion is for other than an enlargement of time, a memorandum of points and authorities in support; and
- (4) Affidavits and papers, where appropriate.

Any party may file a response in opposition to a motion within 10 days after service of the motion; however, the court may, for good cause shown, dispense with, shorten or extend the time for responding to any motion.

(b) **Determination of motions for procedural orders.** Notwithstanding the provisions of paragraph (a) of this rule as to motions generally, motions for procedural orders which do not substantially affect the rights of the parties or the ultimate disposition of the appeal, including any motion under Rule 22(b), may be acted upon at any time, without awaiting a response. Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. The court may review a disposition by the clerk upon motion of a party or upon its own motion.

(c) **Power of a single justice or judge to entertain motions.** In addition to the authority expressly conferred by these rules or by law, a single justice or judge of the court may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single justice or judge may not dismiss or otherwise determine an appeal or other proceeding, and except that the court may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single justice or judge may be reviewed by the court.

(d) **Form of papers; number of copies.**

(1) Except for motions to enlarge time, five copies shall be filed with the original in the Supreme Court, and four copies shall be filed with the original in the Court of Appeals, but the court may require that additional copies be furnished. Only the original of a motion to enlarge time shall be filed.

(2) Motions and other papers shall be type-written on opaque, unglazed paper 8½ by 11 inches in size. The text shall be in type not smaller than ten characters per inch. Lines of text shall be double spaced and shall be upon one side of the paper only. Consecutive sheets shall be attached at the upper left margin.

(3) A motion or other paper shall contain a caption setting forth the name of the court, the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper. The attorney shall sign all papers filed with the court with his or her individual name. The attorney shall give his or her business address, telephone number, and Utah State Bar number in the upper left hand corner of the first page of every paper filed with the court except briefs. A party who is not represented by an attorney shall sign any paper filed with the court and state the party's address and telephone number.

Rule 24. Briefs.

(a) **Brief of the appellant.** The brief of the appellant shall contain under appropriate headings and in the order indicated:

- (1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.
- (2) A table of contents, with page references.
- (3) A table of authorities with cases alphabetically arranged and with parallel citations, rules,

statutes and other authorities cited, with references to the pages of the brief where they are cited.

(4) A brief statement showing the jurisdiction of the appellate court.

(5) A statement of the issues presented for review and the standard of appellate review for each issue with supporting authority for each issue.

(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and in that event, the provision shall be set forth as provided in paragraph (f) of this rule.

(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record (see paragraph (e)).

(8) Summary of arguments. The summary of arguments, suitably paraphrased, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, with citations to the authorities, statutes, and parts of the record relied on.

(10) A short conclusion stating the precise relief sought.

(b) **Brief of the appellee.** The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that a statement of the issues or of the case need not be made unless the appellee is dissatisfied with the statement of the appellant.

(c) **Reply brief.** The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. No further briefs may be filed except with leave of the appellate court.

(d) **References in briefs to parties.** Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee". It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) **References in briefs to the record.** References shall be made to the pages of the original record as paginated pursuant to Rule 11(b), to pages of the reporter's transcript, or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to exhibits shall include exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the transcript at which the evidence was identified, offered, and received or rejected.

(f) **Reproduction of opinions, statutes, rules, regulations, documents, etc.**

(1) Any opinion, memorandum of decision, findings of fact, conclusions of law, or order pertaining to the issues on appeal and any jury instructions or other part of the record of central importance to the determination of the appeal shall be reproduced in the brief or in an addendum to the brief.

(2) If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, to the extent not set forth under subparagraph (a)(6) of this rule, they shall be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form.

(g) **Length of briefs.** Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (f) of this rule.

(h) **Briefs in cases involving cross-appeals.** If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant for the purposes of this rule and Rule 26, unless the parties otherwise agree or the court otherwise orders. The brief of the appellee shall contain the issues and arguments involved in the cross-appeal as well as the answer to the brief of the appellant.

(i) **Briefs in cases involving multiple appellants or appellees.** In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) **Citation of supplemental authorities.** When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citations. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) **Requirements and sanctions.** All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

(l) **Brief covers.** The covers of all briefs shall be of heavy cover stock and shall comply with Rule 27.

Rule 25. Brief of an amicus curiae or guardian ad litem.

A brief of an amicus curiae or of a guardian ad litem representing a minor who is not a party to the appeal may be filed only if accompanied by written consent of all parties, or by leave of court granted on motion or at the request of the court. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae or the guardian ad litem is desirable. Except

persons unknown, claiming any right, title, estate or interest in, or lien upon the real property described in the pleading adverse to the complainant's ownership, or clouding his title thereto."

(b) Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.

(c) Conditions precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically with particularity, and when so made the party pleading the performance or occurrence shall on the pleading establish the facts showing such performance or occurrence.

(d) Official document or act. In pleading an official document or act it is sufficient to aver that the document was issued or the act done in compliance with law.

(e) Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial, or of a board or officer, it is sufficient to aver that the judgment or decision without setting forth the facts showing jurisdiction to render it. A denial of the judgment or decision shall be made specifically and with particularity and when so made the party pleading the judgment or decision shall establish on the pleading all controverted jurisdictional facts.

(f) Time and place. For the purpose of testing the sufficiency of a pleading, averments of time and place material and shall be considered like all other averments of material matter.

(g) Special damage. When items of special damage are claimed, they shall be specifically stated.

(h) Statute of limitations. In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing such statute specifically and definitely by section number, chapter designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it. If such allegation is controverted, the pleading the statute must establish, on the pleading the facts showing that the cause of action is so barred.

(i) Private statutes; ordinances. In pleading a private statute of this state, or an ordinance of any local subdivision thereof, or a right derived from statute or ordinance, it is sufficient to refer to the statute or ordinance by its title and the day of its passage or by its section number or other designation by official publication of the statutes or ordinances. The court shall thereupon take judicial notice of the statute or ordinance.

(j) Libel and slander.

(1) Pleading defamatory matter. It is not necessary in an action for libel or slander to set forth any intrinsic facts showing the application of the law to the facts of the case, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. If such allegation is controverted, the party alleging such defamatory matter must establish, on the trial, that it was published or spoken.

(2) Pleading defense. In his answer to an action for libel or slander, the defendant may allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and, whether he proves the justification or not, he may give in evidence the mitigating circumstances.

Rule 10. Form of pleadings and other papers.

(a) Caption; names of parties; other necessary information. All pleadings and other papers filed with the court shall contain a caption setting forth the name of the court, the title of the action, the file number, the name of the pleading or other paper, and the name, if known, of the judge to whom the case is assigned. In the complaint, the title of the action shall include the names of all the parties, but other pleadings and papers need only state the name of the first party on each side with an indication that there are other parties. A party whose name is not known shall be designated by any name and the words "whose true name is unknown." In an action in rem, unknown parties shall be designated as "all unknown persons who claim any interest in the subject matter of the action." Every pleading and other paper filed with the court shall also state the name, address, telephone number and bar number of any attorney representing the party filing the paper, which information shall appear in the top left-hand corner of the first page. Every pleading shall state the name and address of the party for whom it is filed; this information shall appear in the lower left-hand corner of the last page of the pleading.

(b) Paragraphs; separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

(c) Adoption by reference; exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading, or in any motion. An exhibit to a pleading is a part thereof for all purposes.

(d) Paper quality, size, style and printing. All pleadings and other papers filed with the court, except printed documents or other exhibits, shall be typewritten, printed or photocopied in black type on good, white, unglazed paper of letter size (8 1/2" x 11"), with a top margin of not less than 2 inches above any typed material, a left-hand margin of not less than 1 inch, a right-hand margin of not less than one-half inch, and a bottom margin of not less than one-half inch. All typing or printing shall be clearly legible, shall be double-spaced, except for matters customarily single-spaced or indented, and shall not be smaller than pica size. Typing or printing shall appear on one side of the page only.

(e) Signature line. Names shall be typed or printed under all signature lines, and all signatures shall be made in permanent black or blue ink.

(f) Enforcement by clerk; waiver for pro se parties. The clerk of the court shall examine all pleadings and other papers filed with the court. If they are not prepared in conformity with this rule, the clerk shall accept the filing but may require counsel to substitute properly prepared papers for nonconforming

papers. The clerk or the court may waive the requirements of this rule for parties appearing pro se. For good cause shown, the court may relieve any party of any requirement of this rule.

(g) Replacing lost pleadings or papers. If an original pleading or paper filed in any action or proceeding is lost, the court may, upon motion, with or without notice, authorize a copy thereof to be filed and used in lieu of the original.

(Amended effective Jan. 1, 1983; April 1, 1990.)

Rule 11. Signing of pleadings, motions, and other papers; sanctions.

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in his individual name who is duly licensed to practice in the state of Utah. The attorney's address also shall be stated. A party who is not represented by an attorney shall sign his pleading, motion, or other paper and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(Amended, effective Sept. 4, 1985.)

Rule 12. Defenses and objections.

(a) When presented. A defendant shall serve his answer within twenty days after the service of the summons and complaint is complete unless otherwise expressly provided by statute or order of the court. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within twenty days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within twenty days after service of the answer or, if a reply is ordered by the court, within twenty days after service of the order, unless the order otherwise directs. The service of a motion under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after notice of the court's action;

(2) If the court grants a motion for a more definite statement, the responsive pleading shall be

served within ten days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join an indispensable party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion or by further pleading after the denial of such motion or objection. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (1)-(7) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearings and determination thereof be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon him, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses. A party who makes a motion under this rule may join with it the other motions herein provided for and then available

§ 55. Default.

Default.

(1) **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear the clerk shall enter his default.

(2) **Notice to party in default.** After the entry of the default of any party, as provided in Subdivision (a)(1) of this rule, it shall not be necessary to give such party in default any notice of action taken or to be taken or to serve any notice or paper otherwise required by these rules to be served on a party to the action or proceeding, except as provided in Rule 5(a), in Rule 58A(d) or in the event that it is necessary for the court to conduct a hearing with regard to the amount of damages of the nondefaulting party.

Judgment. Judgment by default may be entered as follows:

(1) **By the clerk.** When the plaintiff's claim against a defendant is for a sum certain or for a sum which can be computed by the clerk, and the defendant has been personally served otherwise than by publication or by personal service outside of this state, the clerk upon request of the plaintiff shall enter judgment for the amount due and costs against the defendant, if the defendant has been defaulted for failure to appear and if the defendant is not an infant or incompetent person.

(2) **By the court.** In all other cases the party entitled to a judgment by default shall apply to the court therefor. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper.

Setting aside default. For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set aside in accordance with Rule 60(b).

Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

Judgment against the state or officer or agent thereof. No judgment by default shall be entered against the state of Utah or against an officer or agent thereof unless the claimant establishes his right to relief by evidence satisfactory to the court.

(Amended effective Sept. 4, 1985.)

§ 56. Summary judgment.

For claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor on all or any part thereof.

For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a judgment is sought, may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

mary judgment in his favor as to all or any part thereof.

(c) **Motion and proceedings thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case not fully adjudicated on motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of affidavits; further testimony; defense required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits made in bad faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 57. Declaratory judgments.

The procedure for obtaining a declaratory judgment pursuant to Chapter 33 of Title 78, U.C.A. 1953,

shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Rule 58A. Entry.

(a) **Judgment upon the verdict of a jury.** Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be forthwith signed by the clerk and filed. If there is a special verdict or a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49, the court shall direct the appropriate judgment which shall be forthwith signed by the clerk and filed.

(b) **Judgment in other cases.** Except as provided in Subdivision (a) hereof and Subdivision (b)(1) of Rule 55, all judgments shall be signed by the judge and filed with the clerk.

(c) **When judgment entered; notation in register of actions and judgment docket.** A judgment is complete and shall be deemed entered for all purposes, except the creation of a lien on real property, when the same is signed and filed as herein above provided. The clerk shall immediately make a notation of the judgment in the register of actions and the judgment docket.

(d) **Notice of signing or entry of judgment.** The prevailing party shall promptly give notice of the signing or entry of judgment to all other parties and shall file proof of service of such notice with the clerk of the court. However, the time for filing a notice of appeal is not affected by the notice requirement of this provision.

(e) **Judgment after death of a party.** If a party dies after a verdict or decision upon any issue of fact and before judgment, judgment may nevertheless be rendered thereon.

(f) **Judgment by confession.** Whenever a judgment by confession is authorized by statute, the party seeking the same must file with the clerk of the court in which the judgment is to be entered a statement, verified by the defendant, to the following effect:

(1) If the judgment to be confessed is for money due or to become due, it shall concisely state the claim and that the sum confessed therefor is justly due or to become due;

(2) If the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the claim and that the sum confessed therefor does not exceed the same;

(3) It must authorize the entry of judgment for a specified sum.

The clerk shall thereupon endorse upon the statement, and enter in the judgment docket, a judgment of the court for the amount confessed, with costs of entry, if any.

(Amended effective Sept. 4, 1985; Jan. 1, 1987.)

Rule 59B. Satisfaction of judgment.

(a) **Satisfaction by owner or attorney.** A judgment may be satisfied, in whole or in part, as to any or all of the judgment debtors, by the owner thereof, or by the attorney of record of the judgment creditor where no assignment of the judgment has been filed and such attorney executes such satisfaction within eight years after the entry of the judgment, in the

following manner: (1) by written instrument, duly acknowledged by such owner or attorney; or (2) by acknowledgment of such satisfaction signed by the owner or attorney and entered on the docket of the judgment in the county where first docketed, with the date affixed and witnessed by the clerk. Every satisfaction of a part of the judgment, or as to one or more of the judgment debtors, shall state the amount paid thereon or for the release of such debtors, naming them.

(b) **Satisfaction by order of court.** When a judgment shall have been fully paid and not satisfied of record, or when the satisfaction of judgment shall have been lost, the court in which such judgment was recovered may, upon motion and satisfactory proof, authorize the attorney of the judgment creditor to satisfy the same, or may enter an order declaring the same satisfied and direct satisfaction to be entered upon the docket.

(c) **Entry by clerk.** Upon receipt of a satisfaction of judgment, duly executed and acknowledged, the clerk shall file the same with the papers in the case, and enter it on the register of actions. He shall also enter a brief statement of the substance thereof, including the amount paid, on the margin of the judgment docket, with the date of filing of such satisfaction.

(d) **Effect of satisfaction.** When a judgment shall have been satisfied, in whole or in part, or as to any judgment debtor, and such satisfaction entered upon the docket by the clerk, such judgment shall, to the extent of such satisfaction, be discharged and cease to be a lien. In case of partial satisfaction, if any execution shall thereafter be issued on the judgment, such execution shall be endorsed with a memorandum of such partial satisfaction and shall direct the officer to collect only the residue thereof, or to collect only from the judgment debtors remaining liable thereon.

(e) **Filing transcript of satisfaction in other counties.** When any satisfaction of a judgment shall have been entered on the judgment docket of the county where such judgment was first docketed, a certified transcript of satisfaction, or a certificate by the clerk showing such satisfaction, may be filed with the clerk of the district court in any other county where the judgment may have been docketed. Thereupon a similar entry in the judgment docket shall be made by the clerk of such court; and such entry shall have the same effect as in the county where the same was originally entered.

Rule 59. New trials; amendments of judgment.

(a) **Grounds.** Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; provided, however, that on a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion by which either party was prevented from having a fair trial.

(2) Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by resort to a determination by chance or as a result of bribery, such misconduct may be proved by the affidavit of any one of the jurors.



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Salt Lake City, UT 84111
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Attorney for Respondents

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REGISTRATION
OF:

JOHNSON-BOWLES COMPANY, INC.

CRD NO. 07678

STIPULATION OF FACTS FOR
PURPOSES OF HEARING

Case No. SD-89-46BD

IN THE MATTER OF THE REGISTRATION
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

The petitioner and respondents, by and through their respective and mutual counsel, hereby stipulate to the following facts for purposes of expediting the prospective hearing in the above-matter before the Securities Advisory Board.

STIPULATION OF FACTS

1. Respondents Johnson-Bowles Company, Inc., and Marlen V. Johnson are registered with the Utah Division of Securities as a securities broker-dealer and agent, respectively.

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2. As of January 22, 1989, respondent Johnson-Bowles was "short" exactly 53,500 shares of the securities of U.S.A. Medical Corporation, a Wyoming Corporation ("U.S.A. Medical" or "Company").

3. Effective January 23, 1989, U.S.A. Medical effected a 10 for 1 forward split which automatically increased Johnson-Bowles' "short" position tenfold. For example, instead of being "short" only 53,500 shares, Johnson-Bowles suddenly was "short" 535,000 shares.

4. Following the January 23, forward split, the price of U.S.A. Medical stock rapidly increased to approximately \$1 per share.

5. On February 16, 1989, Johnson-Bowles brought a 10b-5 securities fraud action in the U.S. District Court for the Central District of Utah seeking a preliminary injunction and declaration that Johnson-Bowles' outstanding contracts and obligations to certain brokerage firms and clearing corporations to whom Johnson-Bowles owed U.S.A. Medical stock were void for illegality. In such action, Johnson-Bowles, alleged improprieties and fraud in the issuance and trading of U.S.A. Medical's securities.

6. The U.S. District Court granted Johnson-Bowles' Motion for Temporary Restraining Order on February 17, 1989 as against Midwest Clearing, thereby preventing Midwest Clearing from effecting any "buy-ins" for ten (10) days as against Johnson-Bowles.

7. Following a hearing for Preliminary Injunction held on February 27 and 28, 1989, the Court denied Johnson-Bowles' Motion for Preliminary Injunction. However, U.S. District Judge J. Thomas Greene did rule that the securities of U.S.A. Medical were and had been the subject of market manipulation and securities fraud.

8. During February, 1989, Marlen Johnson furnished information to the Division relative to the problems associated with U.S.A. Medical and its securities.

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9. On March 1, 1989, the Division issued a Summary Order suspending all §14(2) exemptions from registration under the Utah Uniform Securities Act relative to U.S.A. Medical's securities. On March 29, 1989, the Division's March 1, 1989 Order was made permanent by default. True and correct copies of the petitioner's March, 1989, Orders are attached hereto and incorporated by reference as Exhibits "A" and "B" respectively.

10. On March 6, 1989, the U.S. Securities and Exchange Commission suspended trading in the securities of U.S.A. Medical for ten (10) days. A true and correct copy of such Order is attached hereto and incorporated by reference as Exhibit "C".

11. The respondents received copies of the Division's March 1 and 29, 1989 Orders (Exhibits "A" and "B" hereto) on or about the date of their respective issuance.

12. As of March 1, 1989, Johnson-Bowles' owed several hundred thousand shares of U.S.A. Medical stock to several broker-dealers and clearing corporations. During March, 1989, respondents purchased a total of 397,900 shares of U.S.A. Medical securities from six (6) Utah residents and one (1) New York resident.

13. Of the seven (7) individuals from whom respondents purchased U.S.A. Medical stock after March 1, 1989, five (5) have submitted affidavits that they were not "solicited" by respondents or any of their agents and such individuals have further attested that they were aware of not only Judge Greene's February 28, 1989 ruling, but that they were also aware of the Division's March 1989 orders. True and correct copies of such affidavits, including their respective exhibits, are attached hereto as Exhibits "D", "E", "F", "G", and "H".

14. The remaining two (2) individuals from whom respondents purchased U.S.A. Medical stock after March 1, 1989, are New York resident Sheldon Flateman and Utah

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resident Paul Jones. Such individuals were also aware of Judge Greene's ruling and the Division's March 1989 Orders. Further, both individuals are registered representatives with the National Association of Securities Dealers, Inc., ("NASD") and prior to the Division's March 1, 1989, order, Paul Jones, a licensed securities agent with Wasatch Stock Trading, was involved in the trading of the securities of U.S.A. Medical. Because Flateman is a New York resident, and, in an effort to expedite these proceedings, whether respondents "solicited" him or not will not be an issue in these proceedings.

15. During April, 1989, respondent Marlen V. Johnson was informed by one Karl Smith that a Mr. John Dawson had stock of U.S.A. Medical that Smith thought Dawson was desirous of selling. Based on Mr. Johnson's conversation with Mr. Smith, Mr. Johnson contacted Mr. Dawson to determine if he was interested in selling his U.S.A. Medical stock. Such conversation never resulted in either a sale of U.S.A. Medical stock or a violation of the Division's March 1989 orders.

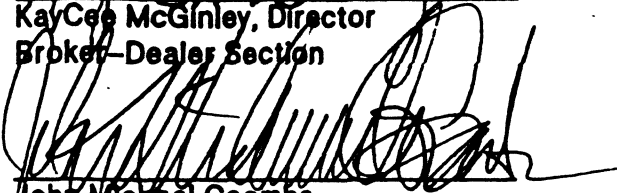
16. The purchases undertaken by the respondents in U.S.A. Medical stock during the pendency of the Division's order from six (6) Utah residents and one (1) New York resident are as follows in the amounts indicated:

<u>SELLER</u>	<u>AMOUNT OF SHARES</u>
Paul Jones	180,900
Richard Sax	18,000
Philip Tanzini	20,000
Jim Coleman	30,000
Nick Julian	69,500
Leo Pavich	67,500
Sheldon Flateman, a New York resident	12,000
TOTAL	<u>397,900</u>

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DATED this 8 th day of July, 1990.


Kaycee McGinley, Director
Broker-Dealer Section


John Michael Coombs
Attorney for Respondents

In re: Johnson-Bowles Company, Inc., and Marlen V. Johnson
Case No. SD-89-45BD
STIPULATION OF FACTS FOR PURPOSES OF HEARING

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____ day of July, 1990, (s)he mailed a true and correct copy of the foregoing STIPULATION OF FACTS FOR PURPOSES OF HEARING by regular mail, postage prepaid to John C. Baldwin, Director and Kathleen C. McGinley, Director of Broker-Dealer Section, Securities Division, Utah Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Administrative Law Judge J. Steven Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Craig F. McCullough, Esq., Callister, Duncan, & Nebeker, Co-Counsel to Respondents, 8th Floor, Kennecott Bldg., 10 East South Temple Street, Salt Lake City, Utah 84133; and Mark J. Griffin, Esq., Assistant Attorney General, 115 State Capitol Building, Salt Lake City, Utah 84114.

J:STIP.3-4

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**BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

In the Matter of the	:	FINDINGS OF FACT
Registration of	:	CONCLUSIONS OF LAW
Johnson-Bowles Company, Inc.	:	AND ORDER
CRD No. 7678	:	Case No. SD-89-46BD
	:	
In the Matter of the	:	
Registration of	:	
Marlen Vernon Johnson	:	
CRD No. 259888	:	Case No. SD-89-47AG

Appearances:

Mark J. Griffin and Kathleen C. McGinley for the Division of Securities

John Michael Coombs and Craig F. McCullough for Respondents

BY THE SECURITIES ADVISORY BOARD:

The above entitled matter came on regularly for hearing on July 16, 1990 before J. Steven Eklund, Administrative Law Judge for the Department of Commerce, and the Securities Advisory Board. Four (4) members of the Board were present for the hearing, to wit: Keith Cannon, Kent Burgon, Margaret Wickens and Truman Bowler. Thereafter, evidence was offered and received.

The Board, being fully advised on the premises, now submits the following Findings of Fact, Conclusions of Law and Order to John C. Baldwin, Director of the Division of Securities, for his review:

FINDINGS OF FACT

1. Respondents Johnson-Bowles Company, Inc. and Marlen

Vernon Johnson are, and all times relevant to these proceedings have been, registered with the Division of Securities as a broker-dealer and agent, respectively. Respondent Marlen Vernon Johnson is the President of Respondent Johnson-Bowles Company, Inc.

2. As of January 22, 1989, Respondent Johnson-Bowles Company, Inc. was short 53,500 shares of the securities of U.S.A. Medical Corporation, a Wyoming corporation. On January 23, 1989, U.S.A. Medical Corporation effected a 10 for 1 forward split, which increased Respondent Johnson-Bowles Company, Inc.'s short position to 535,000 shares. Following the just-described forward split, the price of U.S.A. Medical Corporation stock rapidly increased to approximately \$1 per share.

3. During February 1989, Respondent Marlen Vernon Johnson had furnished information to the Division as to the problems associated with U.S.A. Medical Corporation and its securities. On February 6, 1989, Respondent Johnson-Bowles Company, Inc. received notice from Otra Clearing, Inc. of the latter's buy-in of 150,000 shares of U.S.A. Medical Corporation securities at \$.10 per share and that Respondent Johnson-Bowles Company, Inc. had until February 15, 1989 to make delivery of those securities. As of February 14, 1989, the price of those securities had risen to approximately \$10 per share.

4. By letter, dated February 15, 1989, Respondent Marlen Vernon Johnson informed Otra Clearing, Inc. that Respondent Johnson-Bowles Company, Inc. would not honor the buy-in notice because it (Respondent Johnson-Bowles Company, Inc.) considered

U.S.A. Medical Corporation common stock to be unregistered securities and it declined to "engage or participate in an unlawful distribution of unregistered securities".

5. On February 16, 1989 Respondent Johnson-Bowles Company, Inc. filed a 10b-5 securities fraud action in Federal District Court seeking a preliminary injunction and declaration that Respondent Johnson-Bowles Company, Inc.'s outstanding contracts and obligations to certain brokerage firms and clearing corporations, to whom Respondent Johnson-Bowles Company, Inc. owed U.S.A. Medical Corporation securities, were void for illegality. In the just-described action, Respondent Johnson-Bowles Company, Inc. alleged improprieties and fraud in the issuance and trading of U.S.A. Medical Corporation securities.

6. On February 17, 1989, the Court in the just-referenced litigation granted Respondent Johnson-Bowles Company, Inc.'s motion for a temporary restraining order as to Midwest Clearing Corporation, thus preventing Midwest Clearing Corporation from effecting any "buy-ins" for ten (10) days as against Respondent Johnson-Bowles Company, Inc. A hearing on the pending motion for a preliminary injunction was conducted on February 27-28, 1989. The Court denied that motion, but found as follows:

"...the stock of U.S.A. Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

The stock of U.S.A. Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially

inflate the price of that stock in violation of the securities laws."

7. On March 1, 1989, the Division issued a summary order suspending all Section 14(2) exemptions under the Utah Uniform Securities Act relative to U.S.A. Medical Corporation securities. Also on March 1, 1989, Respondent Johnson-Bowles Company, Inc. received notice from Otra Clearing, Inc. of the latter's buy-in of 150,000 shares of U.S.A. Medical Corporation securities.

8. On March 6, 1989, the U.S. Securities and Exchange Commission suspended trading in the securities of U.S.A. Medical Corporation for ten (10) days. By letter, dated March 21, 1989, Respondent Marlen Vernon Johnson advised the National Association of Securities Dealers (NASD), Inc. of the March 1, 1989 notice from Otra Clearing and stated as follows:

"On March 1, 1989 at 2:00 p.m. (MST), Otra Clearing called, buying-in 150,000 shares of U.S.A. Medical Corp. The buy-in price was \$.70 based on guaranteed delivery of 148,000 (P.B. Jameson, seller) and the buy-in price of \$.50, 2,000 shares (R.A. Johnson, seller). See attached confirmation of Execution of Buy-ins:

It is Johnson-Bowles Company, Inc.'s position that these buy-ins were illegal. First, shares of stock in U.S.A. Medical Corp. were unlawfully issued, were never lawfully registered and do not qualify for any valid exemption under federal or state law. As such, any trading of or transaction involving U.S.A. Medical stock has been, would have been and is unlawful under Section 5 of the Securities Act of 1933, 15 U.S.C. §77e, and Section 10 of the Securities and Exchange Act of 1934, 15 U.S.C. §78j(b).

Second, all open trades or outstanding contracts for the purchase or sale of shares of stock in U.S.A. Medical Corp. are illegal contracts

and therefore unenforceable. The enforcement or performance of any and all such open trades or contracts would constitute and serve to complete illegal trades and unenforceable contracts. This would violate securities laws."

Respondent Marlen Vernon Johnson sent the just-stated letter to prompt the initiation of an NASD arbitration proceeding with respect to the dispute concerning the buy-in of U.S.A. Medical Corporation securities by Otra Clearing, Inc.

9. On March 29, 1989, the Division's March 1, 1989 Summary Order was made permanent by default. Respondents received copies of the Division's March 1, 1989 and March 29, 1989 Orders on or about the date of their respective issuance.

10. As of March 1, 1989, Respondent Johnson-Bowles Company, Inc. owed several hundred thousand shares of U.S.A. Medical Corporation securities to several broker-dealers and clearing corporations. Sometime after the just-stated date, Respondents purchased a total of 397,900 shares of U.S.A. Medical Corporation securities from six (6) Utah residents and one (1) New York resident. The Utah residents and the amount of shares so purchased were: Paul Jones (180,900), Nick Julian (69,500), Leo Pavich (67,500), Jim Coleman (30,000), Philip Tanzani (20,000) and Richard Sax (18,000). The New York resident was Sheldon Flateman (12,000). Respondents purchased U.S.A. Medical Corporation securities as the means to satisfy outstanding contracts for the delivery of those securities to several broker-dealers and clearing corporations.

11. Prior to Respondents' purchase of U.S.A. Medical Corporation securities from the above-named seven individuals,

Respondent Marlen Vernon Johnson informed Mr. Julian, Mr. Pavich, Mr. Coleman, Mr. Tanzani and Mr. Sax of the February 28, 1989 ruling which had been entered by the Court in the previously-referenced security fraud action and the March 1, 1989 and March 29, 1989 Orders entered by the Division. Mr. Flateman and Mr. Jones, who were both registered NASD representatives, were also aware of the Federal Court ruling and the Division's Orders. Prior to March 1, 1989, Mr. Jones, a licensed securities agent with Wasatch Stock Trading, was involved with the trading of U.S.A. Medical Corporation securities.

12. During April 1989, Respondent Marlen Vernon Johnson was informed by a Karl Smith that a John Dawson had U.S.A. Medical Corporation securities which Mr. Smith believed Mr. Dawson was desirous of selling. Based on that information, Respondent Marlen Vernon Johnson contacted Mr. Dawson to determine if he was interested in selling those securities. No sale resulted and the conversation between Respondent Marlen Vernon Johnson and Mr. Dawson did not constitute a violation of the Division's March 1989 Order. Further, there is no sufficient evidence to find that Respondents or their agents solicited any of the above-named seven (7) individuals to sell their U.S.A. Medical Corporation securities.

13. Given the price which Respondents sold U.S.A. Medical Corporation securities prior to entry of the March 1, 1989 Order and the subsequent price which Respondents paid the above-named seven (7) individuals to purchase said securities after March 1,

1989, Respondents realized a profit totalling \$6,538 in that regard to thus deliver those securities to satisfy existing contracts with various broker-dealers and clearing corporations.

14. On March 20, 1990, Respondent Marlen Vernon Johnson purchased 54,000 shares of U.S.A. Medical Corporation securities from Mr. Sax. During the instant proceeding, Respondent testified that he purchased those securities for an entity known as the January Corporation as the means to possibly satisfy a pending NASD arbitration proceeding between Respondent Johnson-Bowles Company, Inc. and Otra Clearing, Inc. regarding the March 1, 1989 buy-in of U.S.A. Medical Corporation securities by Otra Clearing, Inc. On March 29, 1990 Respondent Marlen Vernon Johnson - through the January Corporation - sold the 54,000 shares to a firm known as Sorenson, Chiddo & May.

15. Sometime within the last two (2) months, Respondent Johnson-Bowles Company, Inc. filed a Form BDW with the Division to request that its' broker-dealer registration be withdrawn. Said request was denied, given the pending disciplinary proceeding as to that registration.

CONCLUSIONS OF LAW

Respondents contend they did not engage in any dishonest or unethical conduct and that no disciplinary sanction should enter with regard to their registration as a securities broker-dealer and agent, respectively. Specifically, Respondents assert that: (1) the Division's March 1, 1989 Order prevented only the sale of U.S.A. Medical Corporation securities; (2) Respondents purchased

those securities to satisfy existing contracts to thus deliver the securities to various broker-dealers and clearing corporations; and (3) Section 61-1-6(1)(g), Utah Code Ann. 1953 (as amended), quoted below, may not be applied to interfere with Respondents' attempts to honor their contractual obligations to such third parties.

Respondents urge that the Division has taken no action against other individuals who may have participated in the purchase or sale of U.S.A. Medical Corporation securities after entry of the March 1, 1989 Order. Respondents also contend that the imposition of any sanction in this proceeding would be inconsistent with their duty to have complied with NASD requirements which prompted their purchase of the securities in order to avoid entry of a possible sanction with regard to their NASD affiliation.

Section 61-1-6(1) provides as follows:

"Upon approval by a majority of the Securities Advisory Board, the director...may issue an order...suspending, or revoking any registration,...if the director finds that it is in the public interest and if he finds...with respect to the...registrant or, in the case of a broker-dealer..., any partner, officer, or director or any person occupying a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer..., that such person:

(g) engaged in dishonest or unethical practices in the securities business..."

To be further noted is Section 61-1-7, which provides:

"It is unlawful for any person to offer or sell any security in this state unless it is registered under this chapter or the security or transaction is exempted under Section 61-1-14."

The proper scope and operative effect of the March 1, 1989 Order

entered by the Division was to prohibit any trading of U.S.A. Medical Corporation securities within this state. Since those securities were neither registered nor exempt from registration and had been traded in a fraudulent scheme designed to manipulate the price of those securities, the just-stated order was duly entered to protect the public interest. It is specious to argue, as Respondents assert, that the order only prohibited the sale of U.S.A. Medical Corporation securities. Given the unlawful issuance of those securities and that the subsequent trading of those securities was tainted by fraudulent and manipulative practices, the proper scope of the March 1, 1989 Order must be broadly interpreted and in a manner consistent with the purpose for the issuance of that order.

Concededly, Respondents had an existing contractual obligation to deliver U.S.A. Medical Corporation securities to various broker-dealers and clearing corporations prior to the entry of the March 1, 1989 Order. It is obvious that Respondents elected to trade in the securities at issue in an effort to mitigate their "short" position, avoid potentially severe economic consequences and escape the entry of a possible sanction on their NASD membership. Under the circumstances, no other alternative existed to thus foster Respondents' economic interests and the motivation for their conduct is clearly understandable.

Nevertheless, Respondents purchased U.S.A. Medical Corporation securities after March 1, 1989 with knowledge that a sale of those securities would constitute a violation of the March 1, 1989 Order.

Such conduct clearly constitutes a "dishonest or unethical practice" within the meaning of Section 61-1-6(1)(g) and provides a sufficient basis upon which to enter a disciplinary sanction as to Respondents' registration.

Regardless of the factors which prompted Respondents purchase of U.S.A. Medical Corporation securities, that conduct frustrated the Division's appropriate efforts to preclude trading in those securities and thus partially emasculated the effect of the March 1, 1989 Order. While the record does not identify when Respondents purchased U.S.A. Medical Corporation securities after March 1, 1989, any delay between entry of the March 1, 1989 Order and Respondents' subsequent purchase of the securities appears to be more reflective of the common knowledge that the price of those securities would decrease after entry of the March 1, 1989 Order rather than any intended compliance by Respondents with that order.

Respondents' contention that the Division has engaged in selective enforcement of the March 1, 1989 Order lacks serious merit. The Board notes that a disciplinary proceeding has been initiated as to Mr. Jones. It is unknown whether any disciplinary proceeding may be subsequently initiated as to Otra Clearing, Inc., P.B. Jameson, R.A. Johnson or any of their agents with regard to the buy-in notice issued to Respondents by Otra Clearing, Inc. In any event, the fact remains that Respondents engaged in misconduct which subjects them to entry of a disciplinary sanction regardless of whether other proceedings are initiated by the Division as to other entities or individuals.

Given the circumstances of this case, it may well have been impossible for Respondents to have either satisfied their existing contractual obligations to various broker-dealers and clearing corporations and avoid the subsequent entry of a disciplinary sanction in the proceeding or to have scrupulously avoided trading in U.S.A. Medical Corporation securities and escape possible action on their NASD membership. However, the existence of that dilemma does not support Respondents' assertions that their duty to comply with the March 1, 1989 Order was inferior and subordinate to their satisfaction of any NASD requirements and that no disciplinary sanction can enter in this forum because they could have been potentially subject to adverse NASD action if they did not satisfy their contractual obligations to third parties.

Concededly, there is no evidence that Respondents' violation of the March 1, 1989 Order resulted in any harm to the investing public. Nevertheless, entry of a disciplinary sanction in this proceeding is in the public interest and clearly warranted due to Respondents' non-compliance with the March 1, 1989 Order which was duly entered to regulate the trading of U.S.A. Medical Corporation securities. The record reflects that Respondents' dishonest and unethical conduct was driven by a desire to realize monetary gain and/or avoid financial loss and that Respondents' willingness to engage in trading the securities shifted over time, depending upon whatever would promote Respondents' economic interests. Adherence to orders duly entered by the Division which govern the practices of broker-dealers and agents engaged in the securities business

should not be a matter dictated by the potential for monetary gain. By reason of the serious nature of Respondents' misconduct, an appropriately severe sanction should be entered.


ORDER

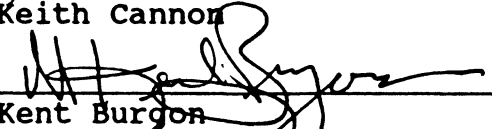
WHEREFORE, IT IS ORDERED that the registration of Respondent Johnson-Bowles Company, Inc. as a broker-dealer in the State of Utah and the registration of Respondent Marlen Vernon Johnson as an agent in this state shall be suspended for one (1) year.

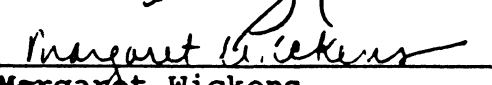
It is further ordered that said suspensions shall be deemed retroactively effective from the date that Respondent Johnson-Bowles Company, Inc. filed its' Form BDW with the Division of Securities.

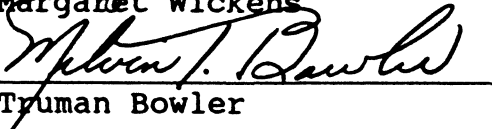
It is further ordered that, upon expiration of the period of suspension set forth above, Respondents' registration shall be placed on probation for two (2) years. Should Respondents fail to comply with the statutes and rules which govern their registration during that time, further proceedings shall be conducted and a determination made whether a sanction of greater severity than that set forth herein is warranted.

Dated this 10th day of August, 1990.



Keith Cannon


Kent Burdon



Margaret Wickens


Truman Bowler

BY THE DIRECTOR:

The foregoing Findings of Fact, Conclusions of Law and Order are hereby approved. Said Order shall become effective thirty (30) days from the date set forth below.

Dated this 13th day of August, 1990.



John C. Baldwin
Director

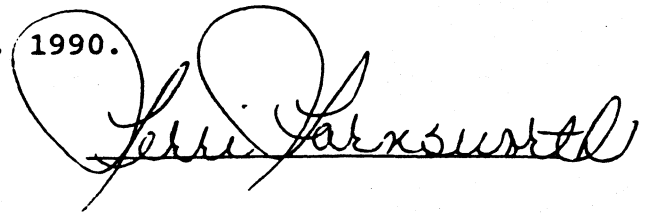
Administrative Review of this Order may be obtained by filing a Request for Review within thirty (30) days after the issuance of this Order. Any request for a review shall comply with the requirements set forth in Sections 61-1-23, 63-46b-12(1) and the departmental rules which govern agency review.

Judicial Review of this Order may be obtained by filing a Petition for Review within thirty (30) days after the issuance of this Order. Any petition for such Review shall comply with the requirements set forth in Section 63-46b-16.

CERTIFICATE OF SERVICE

I hereby certify that I have this day hand-delivered the foregoing Findings of Fact, Conclusions of Law and Order properly addressed to: Mark J. Griffin, Assistant Attorney General for the Division of Securities at Tax & Business Regulation Division, 130 State Capitol, Salt Lake City, Utah 84114; Kathleen C. McGinley, Director, Broker/Dealer Section, Division of Securities, Department of Commerce; Steven J. Eklund, Administrative Law Judge, Department of Commerce; John Michael Coombs, 72 East 400 South, Suite 220, Salt Lake City, Utah 84111; and mailed postage prepaid to: Craig F. McCullough, Callister, Duncan & Nebeker, 8th Floor, Kennecott Building, 10 East South Temple, Salt Lake City, Utah 84113, co-counsel for Respondents.

Dated this 13th day of August, 1990.

A handwritten signature in cursive script, appearing to read "Terri L. Hensworth", is written over a horizontal line. The signature is enclosed within a large, hand-drawn oval.

FEB 16 1989

JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
ATTORNEY FOR PLAINTIFF

MARKUS B. ZIMMER, CLERK
BY _____
DEPUTY CLERK

IN THE THE UNITED STATES DISTRICT COURT IN AND FOR THE
DISTRICT OF UTAH - CENTRAL DIVISION

JOHNSON-BOWLES COMPANY, INC.,

Plaintiff,

v.

U.S.A. MEDICAL CORPORATION, a
Wyoming corporation, LUKE H.
GLENN, TED W. HILLSTEAD, JUDY
GLENN, MICHAEL W. STRAND, JAMES L.
AVERETT, RICK HERMANSON, REED
PETERSON, Utah residents, LEIGH
STEWART, a California resident,
MINGO OIL PRODUCERS, a Wyoming
corporation, BAGLEY SECURITIES, a
Utah corporation, WILLIAM V.
FRANKEL, a New Jersey corporation,
HUGHES SECURITIES, a Utah
corporation, P.B. JAMESON, a
Utah corporation, M.H. MEYERSON,
a New Jersey corporation, PARAGON
CAPITAL CORP., a New York
corporation, WASATCH STOCK
TRADING, a Utah corporation, J.P.
MICHAEL, a California corporation,
PRUDENTIAL BACHE, a New York
corporation, INTEGRATED RESOURCES,
EQUITY, a New York Corporation,
FIRST EAGLE, a Colorado corpora-
tion, LIVINGSTON, an Oregon
corporation, R.A. JOHNSON, a Utah
corporation, WILSON-DAVIS, a Utah
corporation, OTRA FINANCIAL a
California corporation, SPEAR,
LEEDS & KELLOG, a New York
corporation, MIDWEST CLEARING

COMPLAINT FOR SECURITIES
FRAUD AND DECLARATORY
RELIEF

89-C- 157-G

CASE NO.

JUDGE:

Exhibit R-5

market prices for the shares of U.S.A. Medical, including other frauds relative thereto, Plaintiff and those similarly situated traded securities for the benefit of such Defendants, their agents, employees, witting and unwitting nominees and co-conspirators. As a direct result of such Defendants' purchases and sales and other frauds, Plaintiff has been seriously damaged in an amount to be proven at trial, but not less than \$300,000.

22. Plaintiff asserts that a court appointed receiver, trustee, or master whose duties are to take complete possession and control of U.S.A. Medical's transfer records and shareholder list is the only means by which Plaintiff and the Broker-Dealer Defendants can be assured that they will not be further irreparably harmed.

FACTUAL ALLEGATIONS

23. Since December, 1988, Plaintiff has traded in the securities of U.S.A. Medical.

24. On or about December 23, 1988, Defendant Hermanson placed an order to sell 15,000 shares of U.S.A. Medical with Plaintiff.

25. Hermanson failed to deliver 15,000 shares as promised and Plaintiff was required to buy him "in" at a loss.

26. Plaintiff believes Hermanson was directed by the U.S.A. Medical Conspirators to place such a sell order and fail

instrument was not honorable by the drawee bank based on Plaintiff's conversation that day with Brighton Bank.

35. Plaintiff is presently "short" several hundred thousand shares of U.S.A. Medical stock, and based on having discovered the SEC Enforcement Action on February 8, 1989, Plaintiff is fearful of honoring its commitments with the numerous Broker-Dealer Defendants, including either taking delivery of stock or otherwise delivering such itself, as it does not want to aid and abet, or otherwise participate or engage in an unlawful distribution of unregistered securities, namely, the securities of U.S.A. Medical.

36. Since February 9, 1989, Plaintiff, has discovered and believes that in 1988 Roger Coleman, dba Efficient Transfer, sold and delivered 100% of the issued and outstanding shares, comprising 1,053,000 "free-trading" shares and 1,000,000 restricted shares, to Defendants Averett and Hermanson, including one Don Cunlinger, by and through two intermediaries named Don Freemole and Howard Simmonds.

37. Based on the foregoing, specifically, that all the shares of U.S.A. Medical were purchased and held by one or two person(s), Plaintiff believes and asserts that there is no exemption for any U.S.A. Medical shares trading in interstate commerce.

74. Section 9(e) of the Securities Exchange Act of 1934 provides a private right of action for any violation of §9 relative to a security registered on a national exchange, and inasmuch as the securities in issue in this case are over-the-counter securities, present authority provides that the U.S.A. Medical Conspirators' violation of §9 respecting an over-the-counter security is a violation of §10 and Rule 10b-5 promulgated thereunder.

75. The U.S.A. Medical Conspirators sought to gain and benefit from their violations of §9, §10, and Rule 10b-5 directed to Plaintiff and broker-dealers similarly situated and such Defendants have each and all so gained and benefited at the expense and detriment of Plaintiff and those brokers similarly situated.

SECOND CAUSE OF ACTION

DECLARATORY RELIEF

76. Plaintiff incorporates each and every allegation elsewhere herein as if each were set forth more fully hereafter verbatim.

77. Plaintiff either owes or is owed U.S.A. Medical stock to or from the Broker-Dealer Defendants named herein.

78. Plaintiff asserts that there is no exemption for the shares of U.S.A. Medical trading in interstate commerce.

COPY

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

-oOo-

IN THE MATTER OF :
THE REGISTRATION OF :
JOHNSON-BOWLES COMPANY, INC.: CASE NO.: SD-89-46BD

CRD NUMBER 7578 :

IN THE MATTER OF :
THE REGISTRATION OF : CASE NO.: SD-89-47AG
MARLEN VERNON JOHNSON :

CRD NUMBER 259888 :

-oOo-

REPORTER'S TRANSCRIPT OF PROCEEDINGS

-oOo-

DATE: July 16, 1990
Taken at:
160 East 300 South
Fourth Floor, Room 451
Salt Lake City, Utah

A P P E A R A N C E S

For the Division: Mark J. Griffin
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114
Phone: (801) 538-1015

For the Respondants: John Michael Coombs
Craig F. McCullough
Attorneys at Law
72 East 400 South
Suite 220
Salt Lake City, Utah 84111
Phone: (801) 359-0833

-oOo-



**Rocky Mountain
Reporting Service, Inc.**

322 Newhouse Building
10 Exchange Place
Salt Lake City, Utah 84111
Phone (801) 531-0256

Kelly L. Hollenbeck, C.S.R., R.P.R.

0000560

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02/15/89

09:18

EXHIBIT P-2

002

JOHNSON-BOWLES COMPANY, INC.

430 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 364-1900

15 February 1989

Buy-In Department
Ms. Karen Seifert
Otra Clearing, Inc.
PO Box 750
Gendale, CA 91209

Dear Ms. Seifert:

Please be advised that Johnson-Bowles Company, Inc., will not honor attached buy-in notice.

Johnson-Bowles Company, Inc., considers U.S.A. Medical Corp., common stock to be unregistered securities. We choose not to engage or participate in an unlawful distribution of unregistered securities.

Sincerely,

Marlen Johnson
President

lf



attachment

ACCOUNT NUMBER

59670-1-3

100

FROM

OTRA CLEARING, INC.
P. O. BOX 750
GLENDALE, CA 91209

NOTICE OF BUY-IN

DATE

02/06/89

PH: 818-502-1555

030-1341

CONTRACT DATE	SETTLE DATE	THE FOLLOWING IS DUE FROM YOU TO THE UNDERSIGNED ON A CONTRACT MADE ON:	
01/30/89	01/30/89		
QUANTITY	SECURITY DESCRIPTION	PRICE	AMOUNT
150000	U S A MEDICAL CORP	.10	15000.00

HEREBY NOTIFY YOU

AT UNLESS YOU MAKE DELIVERY OF THE AFOREGOING SECURITY ON OR BEFORE 11:30 A.M. 2/15/89
SECURITY WILL BE BOUGHT IN FOR YOUR ACCOUNT AND YOUR RISK PURSUANT TO SECTION 59(B) OF THE UNIFORM
SECURITIES CODE.

Some or all of the foregoing securities are due you by another member of the National Association of Security Dealers, Inc.,
Section 59(B) permits the use of the Re-transmitted Buy-in.

SON-BOWLES COMPANY INC
E 4TH SOUTH
LAKE CITY UT 84111

BY

FIRM SIGNATURE

Merrill Daine
2/28 11:40 = 11:30
✓ under

14452-1

1 order in this particular: It is ordered that the motion of
2 defendant, OTRA Financial for a stay in proceedings with respect
3 to the claims raised in plaintiff's Complaint, and to compel
4 arbitration is granted as to all members of NSAD (sic).

5 All proceedings in the above-entitled matter regarding
6 the claims raised in plaintiff's Complaint are stayed as to
7 members of NASD pending arbitration under the rules of NASD.

8 All parties who are members of NASD are ordered to
9 submit their claims, whatever they may be against each other, to
10 the arbitration panel pursuant to the rules of NASD.

11 So that we have a bifurcated proceeding and the
12 arbitration matter will go forward with the broker-dealers and
13 any further proceedings by the plaintiff or anyone else outside
14 of the arbitration proceedings are stayed.

15 With respect to Midwest Clearing, the Court does find
16 and rules that the Temporary Restraining Order which dissolved
17 by its terms, and any further injunctive relief against Midwest
18 Clearing is denied.

19 The Court finds that it likely would cause
20 interference with the prompt and accurate clearance and
21 settlement of securities transactions and would negatively
22 affect the goals of Section 17(a) of the Act to continue
23 injunctive relief and restrain from the clearing functions of
24 Midwest Clearing.

25 With respect to the balance of the case, the Court

1 finds that the stock of U.S.A. Medical was unlawfully issued,
2 has never been registered with any proper regulatory authority,
3 is not exempt from such requisite registration, and has been and
4 is continuing to be traded illegally.

5 Further, that the stock of U.S.A. Medical has been,
6 and continues to be, traded as part of a fraudulent scheme and
7 device to manipulate and artificially inflate the price of that
8 stock in violation of the securities laws.

9 The Court finds, however, that the plaintiff, Johnson-
10 Bowles, knew or should have known about the alleged
11 irregularities as to non-registration, non-exempt status, and
12 illegal trading of U.S.A. Medical stock, and that, in fact,
13 Johnson-Bowles participated in trading in the stock after it
14 became a market maker, and is charged with knowledge of these
15 irregularities.

16 The Court finds that relative burden between Johnson-
17 Bowles and other parties, as well as damage to the public
18 interest, has not been shown by a preponderance of the evidence,
19 and that there is a failure of burden of proof to establish
20 those elements. Therefore, injunctive relief in favor of the
21 plaintiff is denied, and the security lodged with the court is
22 ordered forthwith delivered to Counsel for the plaintiff.

23 THE COURT: All right. Anything further?

24 MR. LEEDY: Nothing, Your Honor.

25 (Hearing adjourned.)

RECEIVED
MAY 01 1989

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

OFFICE OF JUDGE

J. THOMAS GREENE

JOHNSON-BOWLES COMPANY, INC.,)

Plaintiff,)

v.)

U.S.A. MEDICAL CORPORATION, a)
Wyoming corporation, LUKE H.)
GLENN, TED W. HILLSTEAD, JUDY)
GLENN, MICHAEL W. STRAND,)
JAMES L. AVERETT, RICK)
HERMANSON, REED PETERSON, Utah)
residents, LEIGH STEWART, a)
California resident, MINGO)
OIL PRODUCERS, a Wyoming)
corporation, BAGLEY)
SECURITIES, a Utah corporation,)
WILLIAM V. FRANKEL, a New)
Jersey corporation, HUGHES)
SECURITIES, a Utah corporation,)
P. B. JAMESON, a Utah)
corporation, M. H. MEYERSON, a)
New Jersey corporation,)
PARAGON CAPITAL CORPORATION, a)
New York corporation, WASATCH)
STOCK TRADING, a Utah)
corporation, J. P. MICHAEL, a)
California corporation,)
PRUDENTIAL BACHE, a New York)
corporation, INTEGRATED)
RESOURCES EQUITY, a New York)
corporation, FIRST EAGLE, a)
Colorado corporation,)
LIVINGSTON, an Oregon)
corporation, R. A. JOHNSON, a)
Utah corporation, WILSON-DAVIS,)
a Utah corporation, OTRA)
FINANCIAL, a California)
corporation, SPEAR, LEEDS &)
KELLOG, a New York corporation,)
MIDWEST CLEARING CORPORATION,)
an Illinois corporation,)
FINANCIAL CLEARING SERVICES, a)
New York corporation, EMMETT)
A. LARKING COMPANY, INC., a)
California corporation, MERRILL)
LYNCH, a New York corporation,)
and JOHN and JANE DOES I-XXV,)
inclusive,)

Defendants.)

FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND
ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION AND
GRANTING MOTION TO STAY
ACTION AND COMPEL
ARBITRATION

Case No. 89-C-157-G

Judge J. Thomas Greene

EXHIBIT

R-3

A hearing having been held in the above-entitled Court on plaintiff's motion for entry of a preliminary injunction and defendant OTRA Financial's motion to stay action and compel arbitration on February 27, 1989 at 1:00 p.m., which was continued until February 28, 1989 at 9:30 a.m. Plaintiff, having been represented by Jay D. Gurmankin, Richard W. Casey and John Michael Coombs; defendant U.S.A. Medical having been represented by Richard J. Leedy; defendant Michael W. Strand having been represented by John T. Caine; defendant C. Reed Peterson having been represented by Mark O. Van Wagoner and Alexander H. Walker III; defendant Rick Hermanson having been represented by Robert J. Nielson; defendant P. B. Jameson having been represented by Steven R. Chambers; defendant OTRA Financial having been represented by Mark O. Van Wagoner and Alexander H. Walker III; defendant Midwest Clearing Corporation having been represented by Robin Omahana and Robert B. Lochhead; and the Court having permitted A. G. Edwards & Sons, Inc. to intervene at the hearing through its counsel James W. Stewart; the Court having heard the evidence presented and having considered evidence previously presented at the hearing on plaintiff's motion for a temporary restraining order which occurred on February 16 and 17, 1989, and good cause further appearing ruled as follows:

A. WITH REGARD TO THE MOTION OF OTRA TO STAY ACTION ON PLAINTIFF'S COMPLAINT AND REFER THE ISSUES TO ARBITRATION, THE COURT ENTERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. Plaintiff commenced the above-entitled action against defendant OTRA Financial, among others, on or about February 16, 1989. Plaintiff's Complaint alleges securities fraud and requests declaratory relief in connection with plaintiff's sale of stock in U.S.A. Medical, Inc., a Wyoming corporation.

2. Plaintiff is a member of the NASD.

3. As a member of the NASD, plaintiff has agreed to be bound by the rules and regulations of the NASD.

4. The rules of the NASD, inter alia, mandate the submission to arbitration "of any dispute, claim or controversy arising out of or in connection with the business of any member of the association, with the exception of disputes involving insurance business of any member which is also an insurance company: (1) between or among members; (2) between or among members and public customers, or others; and (3) between or

among members, registered clearing agencies with which the association has entered into an agreement to utilize the association's arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency."

5. Defendant OTRA Financial has submitted an application to stay the proceedings in this action and compelling arbitration of plaintiff's claims in binding arbitration under the NASD rules.

6. The NASD rules regarding arbitration constitute a valid written agreement to arbitrate to which plaintiff is bound.

7. The claims plaintiff makes in its Complaint in this action fall within the scope of the arbitration provisions of the NASD rules.

8. Plaintiff has failed or has refused to arbitrate the issues raised in its Complaint.

CONCLUSIONS OF LAW

1. Arbitration of the claims raised in plaintiff's Complaint is mandated under the provisions of the rules of the NASD and under Title 9 U.S.C. § 3.

2. Defendant OTRA Financial is entitled to a stay of these proceedings and an order compelling arbitration of the claims raised in plaintiff's Complaint.

B. WITH REGARD TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION, THE COURT ENTERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. With respect to Midwest Clearing, the Court does find and rules that the temporary restraining order which dissolved by its terms and any further injunctive relief against Midwest Clearing is denied. The Court finds that it likely would cause interference with the prompt and accurate clearance and settlement of securities transactions and would negatively affect the goals of Section 17(a) of the Act to continue injunctive relief and restrain from the clearing functions of Midwest Clearing.

2. The Court finds that the stock of U.S.A. Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

3. The stock of U.S.A. Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

4. The Court finds, however, that the plaintiff, Johnson-Bowles, knew or should have known about the alleged irregularities as to non-registration, non-exempt status and illegal trading of U.S.A. Medical stock, and that in fact Johnson-Bowles participated in trading in the stock after it became a market maker, and is charged with knowledge of these irregularities.

5. The Court finds that relative burden between Johnson-Bowles and other parties as well as damage to the public interest has not been shown by a preponderance of the evidence and that there is a failure of burden of proof to establish those elements.

ORDER

WHEREFORE, the Court enters the following Order:

1. It is ordered that the motion of defendant, OTRA Financial, for a stay of proceedings with respect to the claims raised in plaintiff's Complaint, and to compel arbitration is granted as to all members of NASD.

2. All proceedings in the above-entitled matter regarding the claims raised in plaintiff's Complaint are stayed as to members of NASD pending arbitration under the rules of NASD. This matter is hereby bifurcated. Those claims between plaintiff and parties not members of the NASD may continue and those proceedings are not stayed by this Order.

3. All parties who are members of NASD are ordered to submit their claims, whatever they may be against each other to the arbitration panel pursuant to the rules of NASD.

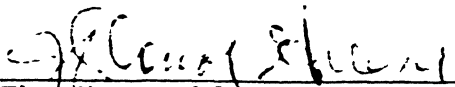
4. Injunctive relief in favor of the plaintiff is denied and the security lodged with the Court is ordered forthwith delivered to counsel for the plaintiff.

DATED: March 1, 1989.

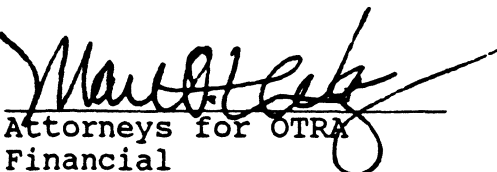
Copies mailed to cnsl 3/2/89mp:

Gary F. Bendinger,
Richard J. Leedy, Esq.
Stephen G. Crockett, Esq.
Mark Van Wagoner, Esq.
W. Sterling Mason, Jr., Esq.
Ronald C. Barker, Esq.
James L. Averett
John Michael Coombs, Esq.
John T. Caine, Esq.
Alexander H. Walker, Jr., Esq.
Robert B. Lochhead, Esq.
Robin J. Omaha ~~APPROVED FOR~~ Esq.


BY THE COURT:


The Honorable J. Thomas Greene
District Court Judge

VAN WAGONER & STEVENS
Mark O. Van Wagoner
Alexander H. Walker III

By: 
Attorneys for OTRA
Financial

JOHN MICHAEL COOMBS
JAY D. GURMANKIN
RICHARD W. CASEY

By: 
Attorneys for Plaintiff

John C. Baldwin, Director
Patricia Louie, Director of
Registration
Securities Division
Utah Department of Business Regulation
160 East 300 South
Post Office Box 45802
Salt Lake City, Utah 84145-45802
Telephone: (801) 530-6600

**BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF BUSINESS REGULATION
OF THE STATE OF UTAH**

IN THE MATTER OF	:	SUMMARY ORDER DENYING
USA MEDICAL CORPORATION	:	AVAILABILITY OF EXEMPTIONS
	:	FROM REGISTRATION
	:	
FILE NUMBER ST 1619	:	CASE NUMBER SD-89-030

Pursuant to § 61-1-14(3) of the Utah Uniform Securities Act (Title 61, Chapter 1, Utah Code Annotated, as amended, 1983) ("the Act"), the Utah Securities Division ("the Division") has found that this Summary Order is in the public interest. It appears to the Division that:

FINDINGS OF FACT

1. S.M.I., Inc. was incorporated under the laws of the state of Wyoming on January 12, 1979. On or about December 8, 1987, S.M.I., Inc. merged with USA Medical Corporation, a Utah corporation. The surviving company is domiciled in the state of Wyoming under the name USA Medical Corporation ("USA").

2. The anti-fraud provisions contained in § 61-1-1 of the Act prohibits (1) employment of any device, scheme or artifice to defraud, (2) the making of any untrue statement of a material fact, or omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading and (3) engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

3. Section 61-1-7 of the Act states that it is unlawful for any person to offer or sell any security in Utah unless it is registered or exempt from registration under § 61-1-14 of the Act.

4. Offers and sales of the securities of USA have been made in the state of Utah during the period June 1, 1988 through this date.

A. Failure to Register Securities

5. A search of the Division's records indicates that a registration statement pursuant to § 61-1-8, § 61-1-9 or § 61-1-10 of the Act has never been filed by USA with the Division.

B. Failure to Qualify for Exemptions from Registration

6. Section 61-1-14(2) of the Act contains several transactional exemptions from registration, including the exemptions commonly referred to as the "manual listing" exemption contained in § 61-1-14(2)(b) and the "secondary trading" exemption contained in § 61-1-14(2)(m) of the Act.

7. On or about February 17, 1989, USA filed with the Division an application for confirmation of the availability of the manual listing exemption pursuant to § 61-1-14(2)(b) of the Act and Rule 177-14-2b of the Division. However, the listing for USA contained in Moody's OTC Industrial did not contain the minimal information required by § 61-1-14(2)(b) of the Act and Rule 177-14-2b of the Division. Specifically, the listing did not contain a profit and loss statement for either the fiscal year preceding the date of the balance sheet, or the most recent year of operations. By letter dated February 21, 1989, the Division notified USA that the filing was incomplete and that additional information was required.

8. Section 61-1-14(2)(m) of the Act provides a transactional exemption for "[a]ny nonissuer transaction effected by or through a registered broker-dealer where the broker-dealer maintains in his records, and makes reasonably available upon request to any person expressing an interest in a proposed transaction in the security with the broker-dealer information prescribed by the division under its rules and regulations."

9. Rule 177-14-2m of the Division sets forth the exclusive method of claiming the transactional exemption contained in § 61-1-14(2)(m) of the Act. In particular, the rule requires that specific information, i.e., a "due diligence package" be filed with the Division. A search of the Division's records does not reflect that USA has ever made a "due diligence" filing with the Division pursuant to Rule 177-14-2m of the Division.

C. Fraudulent Scheme to Defraud

10. In the matter of Johnson Bowles Company, Inc. v. USA Medical Corporation, et al, Case No. C89-157, (U.S. District Court, Central Division) (March 1, 1989), the court found, after having heard testimony on the matter, that:

. . . that the stock of USA Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

Further that the stock of USA Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

Based upon the foregoing Findings of Fact, the Division hereby issues the following

CONCLUSIONS OF LAW

11. Failure of USA Medical Corporation to register its securities, or claim an appropriate exemption from registration as provided in § 61-1-14 of the Act, is a violation of § 61-1-7 of the Act;

12. Offers and sales of the securities of USA Medical Corporation have been made as part of a device, scheme or artifice to defraud in violation of § 61-1-1(1) of the Act;

13. Untrue statements of material facts and omission to state material facts have been made in the offer and sale of the securities of USA Medical Corporation in violation of § 61-1-1(2) of the Act; and

14. Persons engaged in the offer and sale of the securities of USA Medical Corporation have engaged in acts, practices and/or a course of business which has operated as a fraud or deceit in violation of § 61-1-1(3) of the Act.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is in the public interest to issue the following

SUMMARY ORDER

IT IS HEREBY ORDERED, in accordance with the provisions set forth in § 61-1-14(3) of the Act, that the availability of any and all transactional exemptions contained in § 61-1-14(2) of the Act, be and hereby are, summarily denied.

Pursuant to § 61-1-14(3) of the Act, notice is hereby given that within fifteen (15) days after receipt of a written request, this matter will be set down for hearing.

DONE AND ORDERED this 1st day of March, 1989.

SECURITIES DIVISION
DEPARTMENT OF BUSINESS REGULATION


JOHN C. BALDWIN
DIRECTOR

CERTIFICATE OF SERVICE

____I hereby certify that on the 1st day of March, 1989, I personally delivered a copy of the foregoing Summary Order Denying Availability of Exemptions from Registration to Johnson Bowles, 430 East 400 South, Salt Lake City, Utah 84111.



BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF	:	FINDINGS OF FACT,
USA MEDICAL CORPORATION	:	CONCLUSIONS OF LAW AND
	:	DEFAULT ORDER
	:	
Respondent.	:	CASE NUMBER SD-89-031

By the Presiding Officer:

The instant proceeding was initiated via a Petition for Order Denying Availability of Transactional Exemptions from Registration dated March 1, 1989. A Notice of Agency Action was sent, certified mail, return receipt requested to Respondent and Respondent's authorized representative on March 2, 1989. The Notice of Agency Action and Petition was also sent, postage prepaid, regular mail, to the parties listed on Exhibit A, attached hereto and made a part hereof. A hearing has not been requested by Respondent or any other interested party within twenty (20) days of the date of the Notice of Agency Action as required pursuant to the provisions of the Utah Administrative Procedures Act.

EN00432.21

0001164

Entity	3334-17
Person	
File	A02166-17

Section 63-46b-11 of the Utah Administrative Procedures Act provides that failure of a party to participate in an adjudicative proceeding may result in an order of default against such party.

The Presiding Officer, being fully advised in the premises, now enters the following Findings of Fact, Conclusions of Law and Default Order:

FINDINGS OF FACT

1. S.M.I., Inc. was incorporated under the laws of the state of Wyoming on January 12, 1979. On or about December 8, 1987, S.M.I., Inc. merged with USA Medical Corporation, a Utah corporation. The surviving company is domiciled in the state of Wyoming under the name USA Medical Corporation ("USA"). Offers and sales of the securities of USA have been made in the state of Utah.

2. In the matter of Johnson Bowles Company, Inc. v. USA Medical Corporation, et al, Case No. C89-157, (U.S. District Court, Central Division) (March 1, 1989), the court found, after having heard testimony on the matter, that:

2. [T]he stock of USA Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

3. The stock of USA Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

Such findings of fact are adopted herein. A copy of the Findings of Fact, Conclusions of Law and Order Denying Motion for

Preliminary Injunction and Granting Motion to Stay Action and Compel Arbitration is attached hereto as Exhibit B and made a part hereof.

3. The securities of USA, or its predecessor S.M.I., Inc., have never been registered in Utah pursuant to the provisions of § 61-1-8, § 61-1-9 or § 61-1-10 of the Act.

4. The exemption from registration contained in § 61-1-14(2)(b) of the Act is unavailable for nonissuer transactions of the securities of USA inasmuch as the listing in Moody's OTC Industrial manual for USA did not contain the information required by § 61-1-14(2)(b) of the Act and Rule 177-14-2b of the Division. Specifically, the listing did not contain a profit and loss statement for either the fiscal year preceding the date of the balance sheet, or the most recent year of operations.

5. USA did not file an application for any other transactional exemption from registration contained in 61-1-14(2) of the Act with the Division.

CONCLUSIONS OF LAW

6. Offers and sales of the securities of USA Medical Corporation have been made in violation of § 61-1-7 of the Act;

7. Offers and sales of the securities of USA Medical Corporation have been made as part of a device, scheme or artifice to defraud in violation of § 61-1-1(1) of the Act;

8. Untrue statements of material facts and omissions to state material facts have been made in the offer and sale of the

securities of USA Medical Corporation in violation of § 61-1-1(2) of the Act; and

9. Persons engaged in the offer and sale of the securities of USA Medical Corporation have engaged in acts, practices and/or a course of business which has operated as a fraud or deceit in violation of § 61-1-1(3) of the Act.

DEFAULT ORDER

WHEREFORE, IT IS HEREBY ORDERED that the availability of the transactional exemptions from registration contained in § 61-1-14(2) of the Utah Uniform Securities Act be, and hereby are, denied for the securities of USA Medical Corporation, any affiliate or successor to USA Medical Corporation, or any entity subsequently organized by or on behalf of USA Medical Corporation.

AGENCY REVIEW

A defaulted party may seek to set aside the Default Order by filing a request for agency review within ten (10) days after the issuance of the order in accordance with the procedure set forth in Rule 151-46b-12 of the Utah Administrative Procedures Act rules.

DATED this 24th day of March, 1989.

SECURITIES DIVISION
DEPARTMENT OF COMMERCE



JOHN C. BALDWIN
PRESIDING OFFICER

0001167

BY THE EXECUTIVE DIRECTOR:

The foregoing Findings of Fact, Conclusions of Law and Default Order are hereby accepted, confirmed and approved by the Executive Director of the Department of Commerce.

DATED this 27 th day of March, 1989.

DEPARTMENT OF COMMERCE

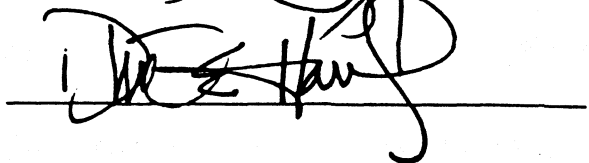
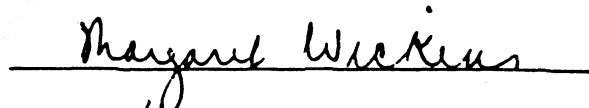


DAVID L. BUHLER
EXECUTIVE DIRECTOR

BY THE SECURITIES ADVISORY BOARD:

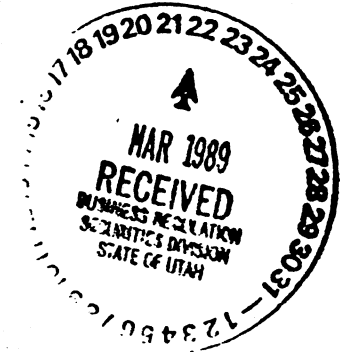
The foregoing Default Order is hereby accepted, confirmed and approved by the Utah Securities Advisory Board.

DATED this 27th day of March, 1989.



JOHNSON-BOWLES COMPANY, INC.

430 EAST 400 SOUTH
SALT LAKE CITY, UTAH 84111
(801) 364-1900



21 March 1989

Mr. Ken Schaeffer
National Association of Securities
Dealers, Inc.
District No. 3
1401 - 17th Street, Suite 700
Denver, CO 80303

RE: U.S.A. Medical Corp. Buy-In;
P.B. Jameson Clearing Through Otra

Dear Mr. Schaeffer:

On February 28, 1989, the Honorable J. Thomas Greene entered Findings of Fact and Conclusions of Law in Johnson-Bowles v. U.S.A. Medical Corp., et al., Civil No. C-89-15A, wherein he found "that the stock in U.S.A. Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally", and further, that "(t)he stock of U.S.A. has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws". (A true and correct copy of the Findings of Fact; Conclusions of Law; and Order Denying Motion for Preliminary Injunction and Granting Motion to Stay Action and Compel Arbitration ("Findings"), dated March 1, 1989, is attached hereto.)

On March 1, 1989, Johnson-Bowles transmitted by facsimile copies of the Findings to:

- | | |
|--|---|
| 1. P.B. Jameson,
President | Time: 10:08 a.m. (MST)
Message confirmed |
| 2. R.A. Johnson (Ron),
President | Time: 10:16 a.m. (MST)
Message confirmed |
| 3. Wasatch Trading
Matt White, President | Time: 10:46 a.m. (MST)
Message confirmed |
| 4. Otra Clearing
Buy-Ins and
Bill Stratton | Time: 9:59 a.m. (MST)
Message confirmed |

Mr. Ken Schaeffer
March 21, 1989
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It is our understanding that all of these parties were either represented or present at the hearing when the Findings of the Court were entered. In addition, I called Otra Clearing to confirm that they had received the Findings about U.S.A. Medical Corp. Mr. Wayne Hilt confirmed that they had. I explained to Mr. Hilt that any delivery by Johnson-Bowles, of stock in U.S.A. Medical would violate the federal securities laws. Mr. Hilt said to call Otra Clearing's attorney, Mr. Gary McMaster in Salt Lake City, Utah. I did so and Mr. McMaster told me he was in court at the time of ruling and understood the Findings. I stated that Johnson-Bowles could not and would not honor any buy-in of U.S.A. Medical stock since any trading in it was illegal. He said fine. The conversation then ended.

The history quotes for U.S.A. Medical stock is as follows:

A. February 29, 1989, 8:10 a.m. (MST) - Wm. V. Frankel requested quotes - Marlen Johnson verified:

1. Paragon Capital	Dropped U.S.A. Medical
2. J.P. Michael	1/8 - 5/8
3. Olsen-Payne	Temp. out
4. Wasatch	Offered at 1/2
5. P.B. Jameson	1/4 - 3/4 nominal, trader not in
6. R.A. Johnson	1/8 - 1/2
7. Nash Weiss	1/8 - 1/2

B. February 28, 1989, 12:38 p.m. (MST) - Wm. V. Frankel - verified by Richard Hock, Johnson-Bowles:

1. P.B. Jameson	Temp. out of U.S.A. Medical
2. Nash Weiss	No bid - offered at 3/8
3. Wasatch	No bid - offered at 1/2 trading
4. R.A. Johnson	No bid - offered at 1/2

C. February 28, 1989, 12:47 p.m. (MST) - Hughes Securities, Cliff - verified by Richard Hock, Johnson-Bowles:

1. Wasatch Trading	No bid - offered at 1/2
2. Olsen-Payne	Dropped U.S.A. Medical
3. Paragon Capital	Dropped U.S.A. Medical
4. Nash Weiss	No bid - offered at 3/8
5. Wm. V. Frankel	1/8 - 5/16
6. P.B. Jameson	1/8 - 5/8 temp. out
7. R.A. Johnson	No bid - offered at 1/2
8. Aseir Securities	No bid - offered at 1/4

Mr. Ken Schaeffer
March 21, 1989
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D. March 1, 1989 (after court finding on U.S.A. Medical),
11:59 a.m. (MST) - Alliance Securities, Ted Knodel -
verified by Bruce Eatchel, Johnson-Bowles:

1. R.A. Johnson	1/8 - 5/8
2. Wasatch	1/4 - 5/8
3. P.B. Jameson	1/4 - 1.00
4. Nash Weiss	1/4 - 1/2

E. March 1, 1989, 12:21 p.m. (MST) - verified by Jana
Larsen, Johnson-Bowles:

1. Wasatch	1/4 - 5/8
2. P.B. Jameson	Won't give Johnson-Bowles any price or quote
3. R.A. Johnson	1/4 - 3/4
4. Nash Weiss	1/8 - 1/2
5. Wm. V. Frankel	Dropped U.S.A. Medical

F. March 1, 1989, 12:26 p.m. (MST) - Wm. V. Frankel provided
Jana Larsen with quotes:

1. Wasatch	1/4 - 5/8
2. P.B. Jameson	1/4 - 1.00
3. R.A. Johnson	No bid - offered at 1/2
4. Nash Weiss	1/4 - 1/2

G. March 1, 1989, 12:53 p.m. (MST) - quotes verified by
Jana Larsen, Johnson-Bowles:

1. Nash Weiss	1/4 - 5/8
2. R.A. Johnson	1/4 - 3/4
3. P.B. Jameson	1/4 - 1.00
4. Wasatch	1/4 - 5/8

H. March 1, 1989, 1:21 p.m. (MST) - Wm. V. Frankel - verified
by Jana Larsen, Johnson-Bowles:

1. P.B. Jameson	1/3 - 3/4
2. R.A. Johnson	1/4 - 3/4 workout
3. Wasatch	1/4 - 3/4 - called back with 1/4 - 5/8
4. Nash Weiss	1/4 - 5/8

I. March 1, 1989, 1:45 p.m. (MST) - Wilson-Davis - verified
by Jana Larsen, Johnson-Bowles:

1. P.B. Jameson	1/4 - 3/4
2. R.A. Johnson	1/4 - 3/4 workout
3. Wasatch	1/4 - 5/8
4. Nash Weiss	1/4 - 3/4

Mr. Ken Schaeffer
March 21, 1989
Page 4

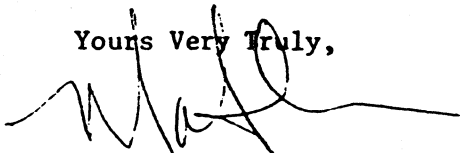
On March 1, 1989, at 2:00 p.m. (MST), Otra Clearing called, buying-in 150,000 shares of U.S.A. Medical Corp. The buy-in price was \$.70 based on guarantee delivery of 148,000 (P.B. Jameson, seller) and the buy-in price of \$.50, 2,000 shares (R.A. Johnson, seller). See attached confirmation of Execution of Buy-Ins.

It is Johnson-Bowles Company, Inc.'s position that these buy-ins were illegal. First, shares of stock in U.S.A. Medical Corp. were unlawfully issued, were never lawfully registered and do not qualify for any valid exemption under federal or state law. As such, any trading of or transaction involving U.S.A. Medical stock has been, would have been and is unlawful under Section 5 of the Securities Act of 1933, 15 USC § 77e, and Section 10 of the Securities and Exchange Act of 1934, 15 USC § 78j(b).

Second, all open trades or outstanding contracts for the purchase or sale of shares of stock in U.S.A. Medical Corp. are illegal contracts and therefore unenforceable. The enforcement or performance of any and all such open trades or contracts would constitute and serve to complete illegal trades and unenforceable contracts. This would violate securities laws.

Finally, it seems that on March 1, 1989, R.A. Johnson, Wasatch Stock Trading Co., and P.B. Jameson knowingly continued to engage in or further a fraudulent scheme and device to manipulate and artificially inflate the price of U.S.A. Medical Corp. stock, in violation of the securities laws, by continuing to trade U.S.A. Medical Corp. stock illegally after having knowledge of such illegality. Their participation in the buy-in process of Johnson-Bowles Company, Inc., and the sale of U.S.A. Medical Corp. stock to other securities brokers without regard to the court findings and securities laws of the United States and the N.A.S.D. rules cannot be condoned.

Yours Very Truly,



Marlen Johnson
President

tf

enclosures

CONFIRMATION / COMPARISON



OTRA

OTRA CLEARING, INC.
P. O. BOX 750
GLENDALE, CA 91209
(818) 502-1555

CORR.		ACCOUNT NUMBER	AE	TRANS. NO.	TR	CAP*	DEPT.	AI*	TRADE DATE	PAYMENT DATE	ENTRY DA
001	00-59670-1-3	00	060-2332	100	8-B	ZY	5	03/01/89	03/02/89		
NAME AND ADDRESS						SYMBOL		SPECIAL DELIVERY INSTRUCTIONS			
87-0335041 JOHNSON-BOWLES COMPANY INC 430 E 4TH SOUTH SALT LAKE CITY UT 84111 FROZEN-999999								JBOWOH			
						ACCOUNT OF: OR SPECIAL DISPOSITION					
WE SLD	QUANTITY	CUSIP NUMBER	SECURITY DESCRIPTION						NET AMOUNT		
	148,000	902916-10-5	U S A MEDICAL CORP (FWD SPLIT)						103,600.		
BUY-IN/FAIL TO DELIVER STOCK SOLD											
PRICE	PRINCIPAL	INTEREST	COMMISSION	TAX	MISC.*	SEC FEE					
.70	103600.00										
										TAX IDENT	

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* SEE REVERSE SIDE FOR ADDITIONAL INFORMATION AND EXPLANATION.

Notify your Registered Representative in writing of any material change in your investment objectives or financial status at the office listed above.

CONFIRMATION / COMPARISON



OTRA

OTRA CLEARING, INC.
P. O. BOX 750
GLENDALE, CA 91209
(818) 502-1555

CORR.	ACCOUNT NUMBER	AE	TRANS. NO.	TR	CAP*	DEPT	AI*	TRADE DATE	PAYMENT DATE SETTLEMENT DATE	ENTRY DATE
001	00-59670-1-3	00	060-2331	100	8-B	ZY	5	03/01/89	03/02/89	

NAME AND ADDRESS	SYMBOL	SPECIAL DELIVERY INSTRUCTIONS
87-0335041 JOHNSON-BOWLES COMPANY INC 430 E 4TH SOUTH SALT LAKE CITY UT 84111 FROZEN-999999		
ACCOUNT OF: OR SPECIAL DISPOSITION		

WE	QUANTITY	CUSIP NUMBER	SECURITY DESCRIPTION	NET AMOUNT
SLD	2,000	902916-10-5	U S A MEDICAL CORP (FWD SPLIT)	1,000.0

BUY-IN/FAIL TO DELIVER STOCK SOLD

PRICE	PRINCIPAL	INTEREST	COMMISSION	TAX	MISC.*	SEC FEE
.50	1000.00					
						TAX IDENT

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RECEIVED
JUL 11 1989

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION
OFFICE OF JUDGE
J. THOMAS GREENE

JOHNSON-BOWLES COMPANY, INC.,)

Plaintiff,)

v.)

U.S.A. MEDICAL CORPORATION, a)
Wyoming corporation, LUKE H.)
GLENN, TED W. HILLSTEAD, JUDY)
GLENN, MICHAEL W. STRAND,)
JAMES L. AVERETT, RICK)
HERMANSON, REED PETERSON, Utah)
residents, LEIGH STEWART, a)
California resident, MINGO)
OIL PRODUCERS, a Wyoming)
corporation, BAGLEY)
SECURITIES, a Utah corporation,)
WILLIAM V. FRANKEL, a New)
Jersey corporation, HUGHES)
SECURITIES, a Utah corporation,)
P. B. JAMESON, a Utah)
corporation, M. H. MEYERSON, a)
New Jersey corporation,)
PARAGON CAPITAL CORPORATION, a)
New York corporation, WASATCH)
STOCK TRADING, a Utah)
corporation, J. P. MICHAEL, a)
California corporation,)
PRUDENTIAL BACHE, a New York)
corporation, INTEGRATED)
RESOURCES EQUITY, a New York)
corporation, FIRST EAGLE, a)
Colorado corporation,)
LIVINGSTON, an Oregon)
corporation, R. A. JOHNSON, a)
Utah corporation, WILSON-DAVIS,)
a Utah corporation, OTRA)
FINANCIAL, a California)
corporation, SPEAR, LEEDS &)
KELLOG, a New York corporation,)
MIDWEST CLEARING CORPORATION,)
an Illinois corporation,)
FINANCIAL CLEARING SERVICES, a)
New York corporation, EMMETT)
A. LARKING COMPANY, INC., a)
California corporation, MERRILL)
LYNCH, a New York corporation,)
and JOHN and JANE DOES I-XXV,)
inclusive,)

FINDINGS OF FACT;
CONCLUSIONS OF LAW; AND
ORDER DENYING MOTION FOR
PRELIMINARY INJUNCTION AND
GRANTING MOTION TO STAY
ACTION AND COMPEL
ARBITRATION

Case No. 89-C-157-G

Judge J. Thomas Greene

RECEIVED
JUL 11 1989

A hearing having been held in the above-entitled Court on plaintiff's motion for entry of a preliminary injunction and defendant OTRA Financial's motion to stay action and compel arbitration on February 27, 1989 at 1:00 p.m., which was continued until February 28, 1989 at 9:30 a.m. Plaintiff, having been represented by Jay D. Gurmankin, Richard W. Casey and John Michael Coombs; defendant U.S.A. Medical having been represented by Richard J. Leedy; defendant Michael W. Strand having been represented by John T. Caine; defendant C. Reed Peterson having been represented by Mark O. Van Wagoner and Alexander H. Walker III; defendant Rick Hermanson having been represented by Robert J. Nielson; defendant P. B. Jameson having been represented by Steven R. Chambers; defendant OTRA Financial having been represented by Mark O. Van Wagoner and Alexander H. Walker III; defendant Midwest Clearing Corporation having been represented by Robin Omahana and Robert B. Lochhead; and the Court having permitted A. G. Edwards & Sons, Inc. to intervene at the hearing through its counsel James W. Stewart; the Court having heard the evidence presented and having considered evidence previously presented at the hearing on plaintiff's motion for a temporary restraining order which occurred on February 16 and 17, 1989, and good cause further appearing ruled as follows:

A. WITH REGARD TO THE MOTION OF OTRA TO STAY ACTION ON PLAINTIFF'S COMPLAINT AND REFER THE ISSUES TO ARBITRATION, THE COURT ENTERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

FINDINGS OF FACT

1. Plaintiff commenced the above-entitled action against defendant OTRA Financial, among others, on or about February 16, 1989. Plaintiff's Complaint alleges securities fraud and requests declaratory relief in connection with plaintiff's sale of stock in U.S.A. Medical, Inc., a Wyoming corporation.

2. Plaintiff is a member of the NASD.

3. As a member of the NASD, plaintiff has agreed to be bound by the rules and regulations of the NASD.

4. The rules of the NASD, inter alia, mandate the submission to arbitration "of any dispute, claim or controversy arising out of or in connection with the business of any member of the association, with the exception of disputes involving insurance business of any member which is also an insurance company: (1) between or among members; (2) between or among members and public customers, or others; and (3) between or

among members, registered clearing agencies with which the association has entered into an agreement to utilize the association's arbitration facilities and procedures, and participants, pledgees or other persons using the facilities of a registered clearing agency, as these terms are defined under the rules of such a registered clearing agency."

5. Defendant OTRA Financial has submitted an application to stay the proceedings in this action and compelling arbitration of plaintiff's claims in binding arbitration under the NASD rules.

6. The NASD rules regarding arbitration constitute a valid written agreement to arbitrate to which plaintiff is bound.

7. The claims plaintiff makes in its Complaint in this action fall within the scope of the arbitration provisions of the NASD rules.

8. Plaintiff has failed or has refused to arbitrate the issues raised in its Complaint.

CONCLUSIONS OF LAW

1. Arbitration of the claims raised in plaintiff's Complaint is mandated under the provisions of the rules of the NASD and under Title 9 U.S.C. § 3.

2. Defendant OTRA Financial is entitled to a stay of these proceedings and an order compelling arbitration of the claims raised in plaintiff's Complaint.

B. WITH REGARD TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION, THE COURT ENTERS THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. With respect to Midwest Clearing, the Court does find and rules that the temporary restraining order which dissolved by its terms and any further injunctive relief against Midwest Clearing, is denied. The Court finds that it likely would cause interference with the prompt and accurate clearance and settlement of securities transactions and would negatively affect the goals of Section 17(a) of the Act to continue injunctive relief and restrain from the clearing functions of Midwest Clearing.

2. The Court finds that the stock of U.S.A. Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

3. The stock of U.S.A. Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

4. The Court finds, however, that the plaintiff, Johnson-Bowles, knew or should have known about the alleged irregularities as to non-registration, non-exempt status and illegal trading of U.S.A. Medical stock, and that in fact Johnson-Bowles participated in trading in the stock after it became a market maker, and is charged with knowledge of these irregularities.

5. The Court finds that relative burden between Johnson-Bowles and other parties as well as damage to the public interest has not been shown by a preponderance of the evidence and that there is a failure of burden of proof to establish those elements.

ORDER

WHEREFORE, the Court enters the following Order:

1. It is ordered that the motion of defendant, OTRA Financial, for a stay of proceedings with respect to the claims raised in plaintiff's Complaint, and to compel arbitration is granted as to all members of NASD.

2. All proceedings in the above-entitled matter regarding the claims raised in plaintiff's Complaint are stayed as to members of NASD pending arbitration under the rules of NASD. This matter is hereby bifurcated. Those claims between plaintiff and parties not members of the NASD may continue and those proceedings are not stayed by this Order.

3. All parties who are members of NASD are ordered to submit their claims, whatever they may be against each other to the arbitration panel pursuant to the rules of NASD.

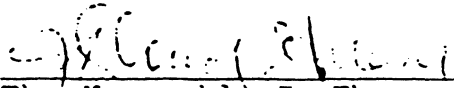
4. Injunctive relief in favor of the plaintiff is denied and the security lodged with the Court is ordered forthwith delivered to counsel for the plaintiff.

DATED: March 1, 1989.

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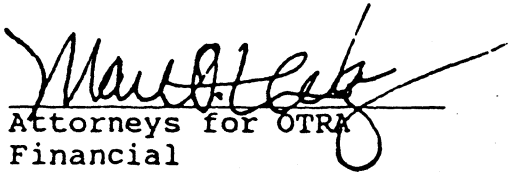
Gary F. Bendinger,
Richard J. Leedy, Esq.
Stephen G. Crockett, Esq.
Mark Van Wagoner, Esq.
W. Sterling Mason, Jr., Esq.
Ronald C. Barker, Esq.
James L. Averett
John Michael Coombs, Esq.
John T. Caine, Esq.
Alexander H. Walker, Jr., Esq.
Robert B. Lochhead, Esq.
Robin J. Omaha ~~APPROVED AS TO FORM~~ George T. Simon, Esq.

BY THE COURT:


The Honorable J. Thomas Greene
District Court Judge

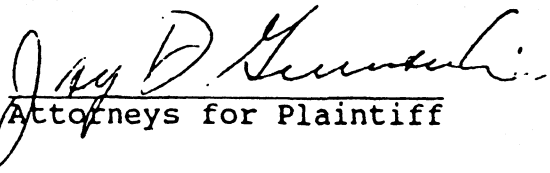
VAN WAGONER & STEVENS
Mark O. Van Wagoner
Alexander H. Walker III

By:


Attorneys for OTRA
Financial

JOHN MICHAEL COOMBS
JAY D. GURMANKIN
RICHARD W. CASEY

By:


Attorneys for Plaintiff

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

March 6, 1989

U.S.A. Medical Corporation

File No. 500-1

ORDER OF SUSPENSION OF TRADING

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of USA Medical Inc., and that questions have been raised about recent market activity in USA Medical, and about the adequacy and accuracy of publicly disseminated information concerning, among other things, the financial condition of the company, the identities of its shareholders, and the beneficial ownership and control of the company's shares. The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company, over-the-counter or otherwise, is suspended for the period from 9:30 a.m. EST, March 6, 1989 through 11:59 p.m. EST, on March 15, 1989.

By the Commission.

Jonathan G. Katz
Secretary

0001169

(JOHNSON - Recross by Griffin)

1 market survey, that the price at which you could have
2 purchased USA Medical at or about March 1 was at about
3 the price that Otra bought it; is that right?

4 A. I don't know what you mean.

5 Q. You testified on redirect examination that
6 your counsel told you you had to go buy that stock, and
7 you didn't go do it right away did you?

8 A. No, counsel said that I'm going to have to go
9 out and cover the contracts.

10 Q. Right, and you needed the orders of the state
11 and the orders of the S.E.C. to drive that stock down to
12 a price where you could afford to buy it?

13 A. That's not correct.

14 Q. That's not correct?

15 A. That's not correct.

16 Q. But you did wait a month and a half before you
17 started buying up substantial portions of the stock; is
18 that right?

19 A. I don't know the time frame, but whenever the
20 shares were available from people. Had there been
21 shares in the market place rather than in the hands of
22 ~~Mark~~ ^{Mike} Strand and his cronies; I would have bought it in
23 the streets if I could have.

24 MR. GRIFFIN: Let me show you these packets of
25 documents.

(JOHNSON - Recross by Griffin)

1 (A discussion was had off the record.)

2 THE COURT: Mr. Griffin?

3 Q. (BY MR. GRIFFIN) I'm now handing you a
4 document. As I say I do not have this marked, but I'm
5 going to ask if you recognize that document?

6 A. Yes, it's a stock receipt which I think goes
7 into my account which is USA Medical, and the date -- do
8 you want the date?

9 Q. That's fine; if you recognize it, that's good
10 enough for me. Give us the date of the transaction.

11 A. This appears to be April 11, 1989.

12 Q. Okay, here's another one. Is that Sheldon
13 Flateman's transactions?

14 A. Yes, this is 12,000 shares.

15 Q. Here's another one for Richard Sax; do you
16 want to look at that? Same document, right?

17 A. This is April 18.

18 Q. April 18; what's the amount of the shares?

19 A. Eighteen thousand shares, '89.

20 MR. GRIFFIN: I apologize for this; I hadn't
21 anticipated the witness not knowing the date of these
22 transactions.

23 Q. (BY MR. GRIFFIN) Okay, this last document I'm
24 going to show you represents the check from your firm;
25 is that correct?

(JOHNSON - Recross by Griffin)

1 A. Yes, April 18, 1989.

2 Q. To whom?

3 A. Mr. Paul Jones.

4 Q. You would have cut that check about the same
5 date that you engaged in the transaction with
6 Mr. Jones?

7 A. I don't know.

8 Q. How much was the purchase from Mr. Jones'
9 securities?

10 A. How much?

11 Q. How many shares?

12 A. Hundred thousand shares.

13 Q. Now do these documents refresh your
14 recollection about the dates that you actually executed
15 these transactions?

16 A. No, because sometimes a conversation -- the
17 date, the check, and the information were not the same.

18 Q. So are we talking about minor variances here,
19 or did you do these deals back on March 1?

20 A. I don't know. Mr. Flateman called me, and I
21 told him I would buy them. And as the date of -- some
22 of the money going to Mr. Flateman and some of the other
23 money going to Mr. Flateman, could have been different
24 dates. But I can certainly get the dates if you get
25 me --

(JOHNSON - Recross by Griffin)

1 Q. What about Paul Jones? He's right across
2 town.

3 A. I still don't know.

4 Q. You still don't know with any degree of
5 accuracy when you did these transactions?

6 A. It could have been a week variance, somewhere
7 in there; I don't know.

8 Q. Could it have been on March 1?

9 A. I doubt that.

10 Q. Yes, I doubt it too. So the best that you can
11 say is from these documents it looks like the
12 transactions were consummated in the middle of April?

13 A. That's what you're saying to me; yes, that's
14 correct.

15 Q. And that is a month and a half of the division
16 issuing its order; is that correct?

17 A. Yes.

18 Q. And you waited that long to do those
19 transactions because it took that long for the price to
20 get down to where you could buy it?

21 A. That's not accurate.

22 Q. Or where you wanted to buy it?

23 A. That's not accurate.

24 MR. GRIFFIN: No further questions.

25 THE COURT: Redirect?

(JOHNSON - Cross by Griffin)

1 It's attorney-client privilege, but I believe that he's
2 testified to it already; it's waived.

3 Q. (BY MR. GRIFFIN) Isn't it true that you
4 testified in a federal court proceeding, in the same
5 federal court proceeding we talked about, that you were
6 advised by legal counsel that you shouldn't trade any
7 shares if they weren't registered?

8 A. I don't recall; but if you have a document,
9 I'd like to see it.

10 Q. I do. This purports to be a transcript of
11 your direct examination during the same federal court
12 proceeding we have been talking about; volume two, page
13 219. I have highlighted a portion. The question I
14 believe reads: "Why didn't you just go out and buy the
15 shares?"

16 Would you please read your response?

17 A. "It was counsel's opinion if there was a
18 problem with the security and if there was not a
19 registration in effect on the registration of the
20 shares, that we wouldn't buy or sell the stock, period."

21 Q. All right. Now I have --

22 MR. GRIFFIN: A moment please, your Honor.

23 THE COURT: Yes.

24 MR. COOMBS: I object to this because
25 there's -- the transcript has already been admitted.

(JOHNSON - Cross by Griffin)

1 MR. GRIFFIN: I just had some copies made
2 of the transcript, since it is so voluminous.

3 THE COURT: I'll circulate the paper.

4 MR. GRIFFIN: If you would make the
5 appropriate annotation of the page that we're looking
6 at? Is there a way to mark that page with a Post-it or
7 something so that they can refer to it afterwards?

8 THE COURT: I have got a notation of which
9 page it is.

10 Q. (BY MR. GRIFFIN) So who was the legal counsel
11 that told you that you shouldn't buy the securities of
12 USA Medical, assuming --

13 MR. COOMBS: Same objection, that is a
14 different proceeding than this proceeding.

15 MR. GRIFFIN: Well, we have the entire
16 transcript; I just want to know who the legal counsel
17 was.

18 MR. COOMBS: What difference does it make?

19 MR. GRIFFIN: Makes a big difference, he might
20 be present in the room.

21 THE COURT: It goes to the state of mind; I'll
22 allow the question.

23 Q. (BY MR. GRIFFIN) Was that Gurmankin or the
24 law firm that he works for; who was that?

25 A. Giaugue, Williams, Wilcox & Bendinger?

(JOHNSON - Cross by Griffin)

1 Q. Thank you. Giaouque Williams, at the time?

2 A. Yes, sir.

3 Q. When did he make that representation to you?

4 A. I have no idea.

5 Q. Certainly the date of the federal court
6 proceeding is prior to the time that you purchased
7 securities to cover your short position?

8 A. That's possible.

9 Q. So you had legal advice that it was improper
10 for you to do so, and yet you did so; is that right?

11 A. That's correct.

12 Q. Do you have a retirement benefit pension plan
13 named January Corporation; is that right?

14 A. Yes.

15 Q. And are you the president of January
16 Corporation?

17 A. Yes.

18 Q. On March 20 of this year, 1990 -- and I
19 believe you testified about this transaction; I want to
20 go into it in a little bit more detail. But you
21 testified that you bought some securities in USA Medical
22 in March of this year; is that right?

23 A. Yes.

24 Q. And they were bought for the January
25 Corporation, weren't they?

1 Q And my question is, if there were not -- is there anything
2 unusual of your firm being short or long 500,000 shares where
3 there's a million shares being traded?

4 A If -- well, if it were a million shares, but if we were
5 short, we talk about the new basis where there are 10 million
6 shares.

7 Q I'm sorry. I meant 500,000 shares for 10 million shares.

8 A For 10 million shares trading and we were short a half a
9 million, I don't think we would be concerned at that point,
10 really. It wouldn't bother us a bit.

11 Q What is it about this situation that causes you to say
12 you're in danger of going out of business?

13 A Well, the stock exploded. You couldn't buy it, and it
14 seemed to move very, very rapidly. I mean, it moved so rapidly
15 that by the 8th or the 9th of February, we're talking about
16 stock that's trading on the offer side \$12, \$10 on the bid side,
17 six and a quarter, seven dollars, extremely rapid acceleration
18 of the stock.

19 Q At the old price?

20 A Yes.

21 Q Why didn't you just go out and buy shares?

22 A You couldn't find them, and I might add that when we got
23 more involved, it was Counsel's opinion if there was a problem
24 with the security and if there was a -- not a registration in
25 effect on the registration of the shares, that we shouldn't buy

1 or sell the stock, period.

2 Q Did you not engage in any transaction that would have
3 reduced your short position because of that advice?

4 A We engaged in several transactions that could have reduced
5 it and instead increased it.

6 Q So you would have been better off business-wise if you had
7 done that?

8 A I don't understand.

9 Q You would have been short less stock at less risk if you
10 had traded those shares you considered to be illegal?

11 A Yes, sir.

12 Q But you did not trade them?

13 A Yes, sir.

14 Q You testified that you are in danger of going out of
15 business. Explain what will happen if an injunction is not
16 entered that would put you out of business?

17 A There are buy-in orders by other broker-dealers where on
18 March, I believe, we've extended them -- excuse me. We extended
19 the buy-ins several times, and I've had conversations with
20 several of the broker-dealers.

21 And the 1st of March the extensions will elapse, and
22 we will be bought in on shares of U.S.A. Medical at whatever
23 prevailing prices are. Prevailing prices would be at this point
24 in time five dollars, six dollars; but if you can't find or buy
25 the stock, the stock would dramatically increase. So you don't

(MCGINLEY - Direct by Griffin)

1 specific reference to some others that he spoke to, or
2 was that the only one?

3 A. I can't recall any others.

4 Q. Did Mr. Johnson give you an overall
5 explanation as to why he engaged in these transactions?

6 A. He -- towards the end of our meeting I recall
7 what he said was that he knew it would be in
8 contravention of state -- of the state order. But he
9 had a choice of either doing what he did and staying in
10 business, or violating -- and taking his chances with
11 the state on what would happen, those were his words
12 "and taking my chances."

13 Q. Okay.

14 | A. Or not doing what he did and going bankrupt.

15 Q. All right. Do you recall -- let me go back.
16 What was your understanding as to the purpose of having
17 Toni Fightmaster there?

18 A. I didn't know she was coming until she was
19 there, so I don't know. I know that she, at the time, I
20 I believe was the compliance officer; that may not be
21 correct.

22 Q. Do you recall whether or not you discussed if
23 Johnson-Bowles made any profit on these transactions,
24 these short sales?

25 A. Yes, I did ask if Johnson-Bowles made any

1 discussed?

2 A. Yes.

3 MR. COOMBS: I object to that on the grounds
4 of hearsay, but I understand that hearsay is admissible.

5 MR. GRIFFIN: Not only that, she's an agent of
6 the securities division in this, and it's not hearsay
7 under the rules if we're going according to the rules of
8 evidence.

9 THE COURT: It's admitted.

10 MR. GRIFFIN: Your witness.

11 CROSS EXAMINATION

12 BY MR. COOMBS:

13 Q. I'm not sure I understand your testimony. Are
14 you saying that Mr. Johnson admitted that he knew he was
15 doing something wrong?

16 A. Yes.

17 Q. But this was after the fact -- I mean, how did
18 he -- how would he have admitted to you that he did
19 something wrong if the orders don't prohibit purchasing
20 stock?

21 A. I don't know how. I mean, you're going to
22 have to ask him that.

23 Q. I'm just trying to understand your testimony.

24 MR. GRIFFIN: I'll object to the question as
25 argumentative as well --

1 The whole issue here is whether or not he keeps his
2 license, and that's what this panel is for.

3 It's entirely prejudicial; we have no way of
4 checking. It's entirely hearsay and everything else.

5 MR. COOMBS: I don't understand why they're
6 trying to keep it out. If I was on the panel, I'd want
7 to know.

8 MR. GRIFFIN: Irrelevant.

9 THE COURT: I already indicated that I
10 questioned the weight of its relevance, but for whatever
11 weight it may have, I'll allow you to get it in.

12 Q. (BY MR. COOMBS) Okay, so the question is --

13 A. In other types of costs he paid a little over
14 78,000 in legal fees; 2,000 in accounting fees and
15 20,000 to the clearing corporation; a total of 110,000.
16 His loss through September of last year was a little shy
17 of \$104,000 dollars. And then he has the contingent
18 loss for the success of the NASD arbitration.

19 Q. With Otra?

20 A. With Otra, which is I guess a potential loss
21 of \$90,000.

22 Q. And is that Otra contract still open on the
23 books?

24 A. Yes.

25 Q. So excluding attorney's fees, accounting fees,

(SORENSEN - Cross by Griffith)

1 and clearing corporation fees and all that, what did he
2 actually make as a profit on the transaction in USA
3 Medical again?

4 A. Excuse me, you just want to know the
5 differences in the stock amounts that he made?

6 Q. Right.

7 A. \$6,538.

8 MR. COOMBS: Could I have just one second,
9 your Honor?

10 THE COURT: Sure.

11 MR. COOMBS: We have nothing further, your
12 Honor.

13 THE WITNESS: Can I clarify one thing? You
14 asked about whether the transaction with Otra is still
15 open on the books. The shares are shown as due; the
16 receivable balance has been allowed for as a bad debt.

17 Q. (BY MR. COOMBS) But it still shows that
18 they're owed the stock?

19 A. It shows that they're owed the stock.

20 MR. COOMBS: Thank you very much.

21 THE COURT: Cross examine?

22 CROSS EXAMINATION

23 BY MR. GRIFFIN:

24 Q. Good afternoon, Mr. Sorensen. You testified
25 basically a corporate dealer engaged in buying-in

1 So in other words see, the firm has long contracts
2 with the brokers that they owe stock to owe them money,
3 and those receivables are valid receivables for net
4 capital purposes. But if you get the stock no value on
5 that side, then the receivables would be unsecured and
6 therefore you couldn't count the receivables as net
7 capital.

8 And then if you reflect the stock value at higher
9 than what you sold it for, when this was considerably
10 higher than what they sold it for, then you would have
11 to take the corresponding loss for increase in value.
12 And at that point, they could not sustain those values.
13 But that was all arbitrary; none of us knew what the
14 value was.

15 Q. Do you remember a value that would have put
16 Johnson-Bowles out of business; a value on the stock?

17 A. That value, oh, zero value on the long side
18 and 50 cents on the short side gave them a deficit of
19 about \$104,000 for net capital purposes.

20 Q. Did you do a calculation if these out-of-state
21 broker/dealers had bought him in at 50 cents?

22 A. I think I did a calculation at like 70 cents,
23 and the effect of that was about a half a million
24 dollars.

25 Q. Half a million dollars loss for the firm?

1 A. Right, the sale price on the stock, what
2 Johnson-Bowles had sold it for, was an average price of
3 15 cents.

4 Q. So --

5 A. So if they bought the stock back at 70 cents,
6 then they would have a loss of 55 cents per share.

7 Q. Okay.

8 A. So that would be 55 cents times a half a
9 million; they would have lost \$250,000 on their
10 position. But on the buy-in side, they actually had
11 \$900,000 worth of receivable contracts that -- part of
12 their problem was they had to expect delivery from other
13 brokers to satisfy some of those contracts, plus they
14 had to cover their own short.

15 Q. Now if those broker/dealers and clearing
16 corporations to whom they owed stock, if they had bought
17 them in at 70 cents, would Johnson-Bowles have had the
18 money to pay them back?

19 A. No.

20 Q. How much would those people have lost? Can
21 you figure that out?

22 A. Well, the total fails to deliver long shares
23 as of the 20th of February was 921,000. So if they had
24 to buy that stock back at 70 cents that would be what,
25 600 and -- 600 plus thousand dollars.

John C. Baldwin, Director
Kathleen C. McGinley, Director of
Broker-Dealer Section
Securities Division
Utah Department of Commerce
160 East 300 South
Post Office Box 45802
Salt Lake City, Utah 84145-0802
Telephone: (801) 530-6600

RETURN OF SERVICE	
PERSON SERVED	<i>Marken Johnson</i>
LOCATION	<i>430 E. 400th</i>
DATE/TIME SERVED	<i>4/27/89 2:14PM</i>
BY	<i>M. Jay Smith</i>

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE	:	NOTICE OF AGENCY ACTION
REGISTRATION OF:	:	
Johnson-Bowles Inc.	:	
CRD NO. 07578	:	CASE NO. SD-89-46BD

The Securities Division of the Utah Department of Commerce ("Division") hereby notifies the party named herein of its intent to suspend or revoke the party's agent registration. This Notice of Agency Action is based upon the Petition of the Securities Division, attached hereto and made a part hereof.

The adjudicative proceeding designated herein is to be conducted on an informal basis. You must respond to this petition within twenty (20) calendar days from the date this Notice was mailed. Failure to respond may result in a Default Order being entered consistent with the terms of the Petition.

You may respond to the Petition by filing a written response but you are not required to do so. However, if you want a hearing, you must file a written request. No hearing will be held unless requested in writing by Respondent within twenty (20) calendar days

from the date this Notice was mailed. You may also attempt to negotiate a settlement of the action without proceeding to a hearing. If you so desire, please contact Kathleen C. McGinley , Director, Broker-Dealer Section. All verbal and written correspondence should be directed to Ms. McGinley at the Utah Securities Division, 160 East 300 South, Second Floor, P.O. Box 45802, Salt Lake City, Utah 84145-0801, telephone (801) 530-6600. Again, failure to respond may result in a Default Order being entered consistent with the terms of the Petition.

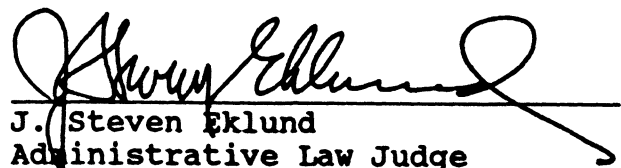
The presiding officer in this case is John C. Baldwin, Director, Securities Division, at the above address and telephone number. If a hearing is requested, it will be conducted by J. Steven Eklund, Administrative Law Judge for the Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84115-0802. At such hearing you may appear and be heard and present evidence on your behalf.

Throughout the pendency of this action, you may represent yourself or be represented by authorized legal counsel.

These proceedings are in accordance with the Utah Uniform Securities Act. (Section 61-1-1, et. seq., Utah Code Annotated, 1953, as amended), the Utah Administrative Procedures Act (Section 63-46b-1 et. seq., Utah Code Annotated, 1953, as amended), and the rules of the Division.

UTAH DEPT. OF COMMERCE
SECURITIES DIVISION

BY


J. Steven Eklund
Administrative Law Judge

John C. Baldwin, Director
Kathleen C. McGinley
Director of Broker-Dealer Section
Securities Division
Utah Department of Commerce
160 East 300 South
Post Office Box 45802
Salt Lake City, Utah 84145-0802
Telephone: (801) 530-6600

**BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF	:	
THE REGISTRATION OF	:	P E T I T I O N
JOHNSON BOWLES COMPANY, INC.	:	
	:	
CRD NUMBER 7578	:	CASE NUMBER SD-89-46BD

The Securities Division of the Department of Commerce of the State of Utah ("the Division"), by and through its Director, John C. Baldwin, upon knowledge and belief, hereby complains and alleges as follows:

PRELIMINARY STATEMENT

The cause of action was investigated by the Division upon complaints that Johnson Bowles Company, Inc. ("Johnson Bowles") has engaged in acts and practices which constitute violations of the Utah Uniform Securities Act (Title 61, Chapter 1, et seq., Utah Code Annotated, 1953, as amended) ("the Act").

JURISDICTION

1. Jurisdiction is vested in the Executive Director and the Securities Advisory Board of the Department of Commerce pursuant to § 61-1-6(1) of the Act.

2. Section 61-1-6(1) of the Act provides that the Executive Director, upon approval of a majority of the Securities Advisory Board, may by order deny, suspend, or revoke any broker-dealer registration if he finds that such order is in the public interest and the broker-dealer:

(b) Has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act;

(g) Has engaged in dishonest or unethical practices in the securities business.

3. Johnson Bowles is a securities broker dealer duly registered by the state of Utah under CRD registration 7578.

4. Marlen Vernon Johnson ("Johnson"), CRD registration 259888, is a registered securities agent and principal of Johnson Bowles and acted as such at all times relevant to this action.

STATEMENT OF FACTS

5. On or about January 1988, Johnson, acting as an agent and principal for Johnson Bowles began effecting and attempting to effect transactions in the securities of USA Medical Corporation, a Wyoming corporation ("USA Medical"), whose securities were offered and sold in the state of Utah.

6. On or about February 16, 1989, Johnson Bowles, by and through its agent Johnson, filed suit in federal district court to

obtain an injunction to prevent trading of in the securities of USA Medical.

7. On March 1, 1989, in the matter of Johnson-Bowles Company, Inc. v. USA Medical Corporation, et al., Case No. C89-157, (U.S. District Court, Central Division) the Court found:

. . . that the stock of USA Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

Further, that the stock of USA Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

8. On March 1, 1989, the Division issued a Summary Order, (Case Number SD-89-030) denying the availability of all transactional exemptions from registration for the securities of USA Medical pursuant to the authority granted to the Division in § 61-1-14(3) of the Act. A copy of the Summary Order was hand delivered to Johnson Bowles on March 1, 1989. The Order is and has been in effect continuously since its issuance on March 1, 1989. The Summary Order is attached hereto and made a part of these proceedings (Exhibit A).

9. On March 1, 1989, the Division commenced an administrative action to deny the availability of all transactional exemptions from registration pursuant to § 61-1-14(3) of the Act for the securities of USA Medical (Case Number SD-89-031). A copy of the Notice of Agency Action and Petition was mailed to Johnson Bowles on March 2, 1989.

10. Upon approval of the Securities Advisory Board, the Executive Director of the Department of Commerce accepted, confirmed and approved the Findings of Fact, Conclusions of Law and Default Order on March 27, 1989. The Default Order denied the availability of the transactional exemptions from registration contained in § 61-1-14(2) of the Act for the securities of USA Medical, any affiliate or successor to USA Medical or any entity subsequently organized by or on behalf of USA Medical. A copy of the Findings of Fact, Conclusions of Law and Default Order was mailed to Johnson Bowles on March 2, 1989.

11. On March 31, 1989, the Division caused a letter to be mailed to Johnson Bowles restating the findings of the federal district court and the Division's Summary Order and Default Order.

12. On or about April 3, 1989 through April 18, 1989, Johnson, acting in his capacity as an agent and principal for Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical as follows:

a. On or about April 3, 1989 and April 13, 1989, Johnson contacted Mr. John Dawson, a shareholder of USA Medical, to purchase shares of USA Medical owned by Mr. Dawson. Johnson informed Mr. Dawson that such arrangement would be a handwritten agreement between Mr. Dawson and a New York firm. Johnson offered Mr. Dawson \$.10 per share and instructed Mr. Dawson to deliver his stock certificate to Johnson Bowles whereupon a check for the shares of USA Medical would be given to him.

b. On or about April 6, 1989, Johnson purchased 12,000 shares of USA Medical for the sum of \$1,200.00 from Sheldon and Lois Flateman in Salt Lake County, State of Utah.

c. On or about April 14, 1989, Johnson purchased 18,000 shares of USA Medical for the sum of \$1,800.00 from Richard Sax in Salt Lake County, State of Utah.

d. On or about April 18, 1989, Johnson purchased 80,000 shares of USA Medical for the sum of \$8,000.00 from Paul Jones in Salt Lake County, State of Utah.

e. On or about April 18, 1989, Johnson purchased 69,500 shares of USA Medical for the sum of \$6,950.00 from Nick Julian in Salt Lake County, State of Utah.

f. On information and belief, the Division believes Johnson has purchased approximately 226,500 additional shares of USA Medical since March 1, 1989.

COUNT I

13. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 12 as specifically set out herein.

14. Section 61-1-6(1) of the Act provides that a securities registration for a broker-dealer may be suspended or revoked if the registrant:

(b) Has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act.

15. The Division issued its Summary Order on March 1, 1989 and Default Order on March 27, 1989, denying all transactional exemptions from registration. Such orders have been in effect continuously since their issuance. Johnson Bowles, through its agent and principal, Johnson had knowledge of the federal district court findings and the Division's Summary Order and Default Order.

16. On or about April 3, 1989 through April 18, 1989, Johnson, acting on behalf of Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical.

17. The above actions by Johnson Bowles constitute violations of § 61-1-6(1)(b) of the Utah Uniform Securities Act.

COUNT II

18. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 17 as if specifically set out herein.

19. Section 61-1-6(1) of the Act provides that the Division may issue an order suspending or revoking the registration of a broker-dealer if it finds that such order is in the public interest and the broker-dealer:

(g) Has engaged in dishonest or unethical practices in the securities business.

20. The Division issued a Summary Order on March 1, 1989 and a Default Order on March 27, 1989 denying all transactional exemptions from registration. The Summary Order and Default Order have been in effect continuously since their issuance.

21. On or about April 3, 1989 through April 18, 1989, Johnson, acting on behalf of Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical.

22. The above actions by Johnson Bowles constitute violations of § 61-1-6(1)(g) of the Utah Uniform Securities Act.

COUNT III

23. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 22 as specifically set out herein.

24. Section 61-1-6(1)(g) of the Act provides that the Division may issue an order suspending or revoking the registration of a broker-dealer if it finds that such order is in the public interest and that the broker-dealer "has engaged in dishonest or unethical practices in the securities business."

25. Rule R177-6-1g(a)(3) of the Division, promulgated under the authority of § 61-1-6(1)(g) of the Act, establishes that the following acts and practices when performed by broker-dealers are considered contrary to that section and constitute grounds for suspension or revocation of registration:

(3) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

26. Johnson, acting on behalf of Johnson Bowles, solicited or effected transactions in the securities of USA Medical from the sellers after the Division issued its Summary Order dated March 1,

1989 and Default Order dated March 27, 1989 denying the availability of all transactional exemptions from registration in the securities of USA Medical.

27. The above actions by Johnson Bowles constitute violations of § 61-1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division.

REQUEST FOR RELIEF

WHEREFORE, the Division requests the following relief:

1. A finding that Johnson Bowles Company, Inc., engaged in the acts and practices alleged above;
2. That by engaging in the above acts and practices, Johnson Bowles Company, Inc. be adjudged and decreed to be found in violation of § 61-1-6(1)(b) and § 61-1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division;
3. That the registration of Johnson Bowles Company, Inc. to act as a securities broker-dealer be suspended or revoked accordingly.

Dated this 27th day of April, 1989.

**SECURITIES DIVISION
UTAH DEPARTMENT OF COMMERCE
JOHN C. BALDWIN, DIRECTOR**

Kathleen C. McGinley by phm
**Kathleen C. McGinley
Director of Broker-Dealer Section**

John C. Baldwin, Director
Kathleen C. McGinley, Director of
Broker-Dealer Section
Securities Division
Utah Department of Commerce
160 East 300 South
Post Office Box 45802
Salt Lake City, Utah 84145-0802
Telephone: (801) 530-6600

RETURN OF SERVICE	
PERSON SERVED	<i>Marlen Johnson</i>
LOCATION	<i>430 E 400 S</i>
DATE/TIME SERVED	<i>4/27/89 2:14 PM</i>
BY	<i>M. Jay Smith</i>

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE
REGISTRATION OF:
Marlen Vernon Johnson

: NOTICE OF AGENCY ACTION
:
:
:
:
: CASE NO. SD-89-47AG

CRD NO. 259888

The Securities Division of the Utah Department of Commerce ("Division") hereby notifies the party named herein of its intent to suspend or revoke the party's agent registration. This Notice of Agency Action is based upon the Petition of the Securities Division, attached hereto and made a part hereof.

The adjudicative proceeding designated herein is to be conducted on an informal basis. You must respond to this petition within twenty (20) calendar days from the date this Notice was mailed. Failure to respond may result in a Default Order being entered consistent with the terms of the Petition.

You may respond to the Petition by filing a written response but you are not required to do so. However, if you want a hearing, you must file a written request. No hearing will be held unless requested in writing by Respondent within twenty (20) calendar days

from the date this Notice was mailed. You may also attempt to negotiate a settlement of the action without proceeding to a hearing. If you so desire, please contact Kathleen C. McGinley , Director, Broker-Dealer Section. All verbal and written correspondence should be directed to Ms. McGinley at the Utah Securities Division, 160 East 300 South, Second Floor, P.O. Box 45802, Salt Lake City, Utah 84145-0801, telephone (801) 530-6600. Again, failure to respond may result in a Default Order being entered consistent with the terms of the Petition.

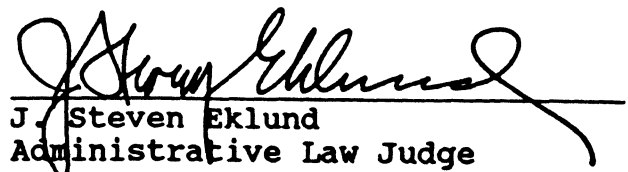
The presiding officer in this case is John C. Baldwin, Director, Securities Division, at the above address and telephone number. If a hearing is requested, it will be conducted by J. Steven Eklund, Administrative Law Judge for the Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84115-0802. At such hearing you may appear and be heard and present evidence on your behalf.

Throughout the pendency of this action, you may represent yourself or be represented by authorized legal counsel.

These proceedings are in accordance with the Utah Uniform Securities Act. (Section 61-1-1, et. seq., Utah Code Annotated, 1953, as amended), the Utah Administrative Procedures Act (Section 63-46b-1 et. seq., Utah Code Annotated, 1953, as amended), and the rules of the Division.

UTAH DEPT. OF COMMERCE
SECURITIES DIVISION

BY


J. Steven Eklund
Administrative Law Judge

000326-1

John C. Baldwin, Director
Kathleen C. McGinley
Director of Broker-Dealer Section
Securities Division
Utah Department of Commerce
160 East 300 South
Post Office Box 45802
Salt Lake City, Utah 84145-0801
Telephone: (801) 530-6600

**BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF THE	:	
REGISTRATION OF	:	P E T I T I O N
MARLEN VERNON JOHNSON	:	
	:	
CRD NUMBER 259888	:	CASE NUMBER SD-89-047AG

The Securities Division of the Department of Commerce of the State of Utah ("the Division"), by and through its Director, John C. Baldwin, upon knowledge and belief, hereby complains and alleges as follows:

PRELIMINARY STATEMENT

The cause of action was investigated by the Division upon complaints that Marlen Vernon Johnson ("Johnson") has engaged in acts and practices which constitute violations of the Utah Uniform Securities Act (Title 61, Chapter 1, et seq., Utah Code Annotated, 1953, as amended) ("the Act").

JURISDICTION

1. Jurisdiction is vested in the Executive Director and the Securities Advisory Board of the Department of Commerce pursuant to § 61-1-6(1) of the Act.

2. Section 61-1-6(1) of the Act provides that the Executive Director, upon approval of a majority of the Securities Advisory Board, may by order deny, suspend, or revoke any agent registration if he finds that such order is in the public interest and the agent:

(b) Has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act;

(g) Has engaged in dishonest or unethical practices in the securities business.

3. Johnson is a securities agent duly registered by the state of Utah under CRD registration 259888.

STATEMENT OF FACTS

4. Johnson was the principal of, and acted as agent for, Johnson Bowles Company, Inc. ("Johnson Bowles") during all times relevant to this action. Johnson Bowles is a securities broker dealer duly registered by the state of Utah under CRD registration 7578.

5. On or about January 1988, Johnson, acting as an agent and principal for Johnson Bowles began effecting and attempting to effect transactions in the securities of USA Medical Corporation, a Wyoming corporation ("USA Medical"), whose securities were offered and sold in the state of Utah.

6. On or about February 16, 1989, Johnson, acting as agent and principal for Johnson Bowles, filed suit in federal district court to obtain an injunction to prevent trading of in the securities of USA Medical.

7. On March 1, 1989, in the matter of Johnson-Bowles Company, Inc. v. USA Medical Corporation, et al, Case No. C89-157, (U.S. District Court, Central Division) the Court found:

. . . that the stock of USA Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

Further, that the stock of USA Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

8. On March 1, 1989, the Division issued a Summary Order, (Case Number SD-89-030) denying the availability of all transactional exemptions from registration for the securities of USA Medical pursuant to the authority granted to the Division in § 61-1-14(3) of the Act. A copy of the Summary Order was hand delivered to Johnson Bowles on March 1, 1989. The Order is and has been in effect continuously since its issuance on March 1, 1989. The Summary Order is attached hereto and made a part of these proceedings (Exhibit A).

9. On March 1, 1989, the Division commenced an administrative action to deny the availability of all transactional exemptions from registration pursuant to § 61-1-14(3) of the Act for the securities of USA Medical (Case Number SD-89-031). A copy of the

Notice of Agency Action and Petition was mailed to Johnson Bowles on March 2, 1989.

10. Upon approval of the Securities Advisory Board, the Executive Director of the Department of Commerce accepted, confirmed and approved the Findings of Fact, Conclusions of Law and Default Order on March 27, 1989. The Default Order denied the availability of the transactional exemptions from registration contained in § 61-1-14(2) of the Act for the securities of USA Medical, any affiliate or successor to USA Medical or any entity subsequently organized by or on behalf of USA Medical. A copy of the Findings of Fact, Conclusions of Law and Default Order was mailed to Johnson Bowles on March 2, 1989.

11. On March 31, 1989, the Division caused a letter to be mailed to Johnson Bowles restating the findings of the federal district court and the Division's Summary Order and Default Order.

12. On or about April 3, 1989 through April 18, 1989, Johnson, acting in his capacity as an agent and principal for Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical as follows:

a. On or about April 3, 1989 and April 13, 1989, Johnson contacted Mr. John Dawson, a shareholder of USA Medical, to purchase shares of USA Medical owned by Mr. Dawson. Johnson informed Mr. Dawson that such arrangement would be a handwritten agreement between Mr. Dawson and a New York firm. Johnson offered Mr. Dawson \$.10 per share and instructed Mr. Dawson to deliver his stock certificate to Johnson Bowles

whereupon a check for the shares of USA Medical would be given to him.

b. On or about April 6, 1989, Johnson purchased 12,000 shares of USA Medical for the sum of \$1,200.00 from Sheldon and Lois Flateman in Salt Lake County, State of Utah.

c. On or about April 14, 1989, Johnson purchased 18,000 shares of USA Medical for the sum of \$1,800.00 from Richard Sax in Salt Lake County, State of Utah.

d. On or about April 18, 1989, Johnson purchased 80,000 shares of USA Medical for the sum of \$8,000.00 from Paul Jones in Salt Lake County, State of Utah.

e. On or about April 18, 1989, Johnson purchased 69,500 shares of USA Medical for the sum of \$6,950.00 from Nick Julian in Salt Lake County, State of Utah.

f. On information and belief, the Division believes Johnson has purchased approximately 226,500 additional shares of USA Medical since March 1, 1989.

COUNT I

13. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 12 as specifically set out herein.

14. Section 61-1-6(1) of the Act provides that a securities registration for an agent may be suspended or revoked if the agent:

(b) Has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor act or any rule or order under this chapter or a predecessor act.

15. The Division issued its Summary Order on March 1, 1989 and Default Order on March 27, 1989, denying all transactional exemptions from registration. Such orders have been in effect continuously since their issuance. Johnson had knowledge of the federal district court findings and the Division's Summary Order and Default Order.

16. On or about April 3, 1989 through April 18, 1989, Johnson, acting on behalf of Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical.

17. The above actions by Johnson constitute violations of § 61-1-6(1)(b) of the Utah Uniform Securities Act.

COUNT II

18. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 17 as if specifically set out herein.

19. Section 61-1-6(1) of the Act provides that the Division may issue an order suspending or revoking the registration of an agent if it finds that such order is in the public interest and the agent:

(g) Has engaged in dishonest or unethical practices in the securities business.

20. The Division issued a Summary Order on March 1, 1989 and a Default Order on March 27, 1989 denying all transactional exemptions from registration. The Summary Order and Default Order have been in effect continuously since their issuance.

21. On or about April 3, 1989 through April 18, 1989, Johnson, acting on behalf of Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical.

22. The above actions by Johnson constitute violations of § 61-1-6(1)(g) of the Utah Uniform Securities Act.

COUNT III

23. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 22 as specifically set out herein.

24. Section 61-1-6(1)(g) of the Act provides that the Division may issue an order suspending or revoking the registration of an agent if it finds that such order is in the public interest and the agent "has engaged in dishonest or unethical practices in the securities business."

25. Rule R177-6-1g(b)(6) of the Division, promulgated under the authority of § 61-1-6(1)(g) of the Act, establishes that engaging in conduct specified in subsection (a)(3) of Rule R177-6-1g of the Division when performed by agents are considered contrary to that section and constitute grounds for suspension or revocation of registration. Subsection (a)(3) provides as follows:

(3) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

26. Rule R177-6-1g(b)(3) of the Division, promulgated under the authority of § 61-1-1 of the Act, establishes that the

following acts and practices, when performed by an agent, are considered contrary to that section and constitute grounds for suspension or revocation of registration:

(3) Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.

27. Johnson, acting on behalf of Johnson Bowles, solicited or effected transactions in the securities of USA Medical from the sellers after the Division issued its Summary Order dated March 1, 1989 and Default Order dated March 27, 1989 denying the availability of all transactional exemptions from registration in the securities of USA Medical.

28. The above actions by Johnson constitute violations of § 61-1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g(b)(3) and (6) of the Division.

REQUEST FOR RELIEF

WHEREFORE, the Division requests the following relief:

1. A finding that Marlen Vernon Johnson engaged in the acts and practices alleged above;
2. That by engaging in the above acts and practices, Marlen Vernon Johnson be adjudged and decreed to be found in violation of § 61-1-6(1)(b) and § 61-1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division;
3. That the registration of Marlen Vernon Johnson to act as a securities agent and principal be suspended or revoked accordingly.

Dated this 27th day of April, 1989.

SECURITIES DIVISION
UTAH DEPARTMENT OF COMMERCE
JOHN C. BALDWIN, DIRECTOR

Kathleen C. McGinley by power
Kathleen C. McGinley
Director of Broker-Dealer Section

R. Paul Van Dam
Attorney General
Mark J. Griffin 4329
Assistant Attorney General
115 State Capital
Salt Lake City, Utah 84114
(801) 538-1331
KAYCEE MCGINLEY 2187
Securities Division
160 East 300 South
Salt Lake City, Utah 84110

BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF	:	
THE REGISTRATION OF	:	A M E N D E D P E T I T I O N
JOHNSON-BOWLES COMPANY, INC.	:	
	:	
CRD NUMBER 7578	:	CASE NUMBER SD-89-46BD

IN THE MATTER OF	:	
THE REGISTRATION OF	:	A M E N D E D P E T I T I O N
MARLEN JOHNSON	:	
	:	
CRD NUMBER 259888	:	CASE NUMBER SD-89-47AG

The Securities Division of the Department of Commerce of the State of Utah ("the Division"), by and through its Director, John C. Baldwin, upon knowledge and belief, hereby complains and alleges as follows:

PRELIMINARY STATEMENT

The cause of action was investigated by the Division upon complaints that Marlen Johnson and Johnson Bowles Company, Inc.

("Johnson Bowles") have engaged in acts and practices which constitute violations of the Utah Uniform Securities Act (Title 61, Chapter 1, et seq., Utah Code Annotated, 1953, as amended) ("the Act").

JURISDICTION

1. Jurisdiction is vested in the Executive Director and the Securities Advisory Board of the Department of Commerce pursuant to § 61-1-6(1) of the Act.

2. Section 61-1-6(1) of the Act provides that the Executive Director, upon approval of a majority of the Securities Advisory Board, may by order deny, suspend, or revoke any agent or broker-dealer registration if he finds that such order is in the public interest and the agent or broker-dealer:

(g) Has engaged in dishonest or unethical practices in the securities business.

3. Johnson Bowles is a securities broker dealer duly registered by the state of Utah under CRD registration 7578.

4. Marlen Vernon Johnson ("Johnson"), CRD registration 259888, is a registered securities agent by the state of Utah and principal of Johnson Bowles and acted as such at all times relevant to this action.

STATEMENT OF FACTS

5. On or about January 1988, Johnson, acting as an agent and principal for Johnson Bowles began effecting and attempting to effect transactions in the securities of USA Medical Corporation, a Wyoming corporation ("USA Medical"), whose securities were

offered and sold in the state of Utah.

6. On or about February 16, 1989, Johnson Bowles, by and through its agent Johnson, filed suit in federal district court to obtain an injunction to prevent trading of in the securities of USA Medical.

7. On March 1, 1989, in the matter of Johnson-Bowles Company, Inc. v. USA Medical Corporation, et al., Case No. C89-157, (U.S. District Court, Central Division) the Court found:

. . . that the stock of USA Medical was unlawfully issued, has never been registered with any proper regulatory authority, is not exempt from such requisite registration and has been and is continuing to be traded illegally.

Further, that the stock of USA Medical has been and continues to be traded as part of a fraudulent scheme and device to manipulate and artificially inflate the price of that stock in violation of the securities laws.

8. On March 1, 1989, the Division issued a Summary Order, (Case Number SD-89-030) denying the availability of all transactional exemptions from registration for the securities of USA Medical pursuant to the authority granted to the Division in § 61-1-14(3) of the Act. A copy of the Summary Order was hand delivered to Johnson Bowles on March 1, 1989. The Order is and has been in effect continuously since its issuance on March 1, 1989. The Summary Order is attached hereto and made a part of these proceedings (Exhibit A).

9. On March 1, 1989, the Division commenced an administrative action to deny the availability of all transactional exemptions from registration pursuant to § 61-1-14(3) of the Act for the

securities of USA Medical (Case Number SD-89-031). A copy of the Notice of Agency Action and Petition was mailed to Johnson Bowles on March 2, 1989.

10. Upon approval of the Securities Advisory Board, the Executive Director of the Department of Commerce accepted, confirmed and approved the Findings of Fact, Conclusions of Law and Default Order on March 27, 1989. The Default Order denied the availability of the transactional exemptions from registration contained in § 61-1-14(2) of the Act for the securities of USA Medical, any affiliate or successor to USA Medical or any entity subsequently organized by or on behalf of USA Medical. A copy of the Findings of Fact, Conclusions of Law and Default Order was mailed to Johnson Bowles on March 27, 1989.

11. On March 31, 1989, the Division caused a letter to be mailed to Johnson Bowles restating the findings of the federal district court and the Division's Summary Order and Default Order.

12. On or about April 3, 1989 through April 18, 1989, Johnson, acting in his capacity as an agent and principal for Johnson Bowles, attempted to effect or effected transactions in the securities of USA Medical as follows:

a. On or about April 3, 1989 and April 13, 1989, Johnson contacted Mr. John Dawson, a shareholder of USA Medical, to purchase shares of USA Medical owned by Mr. Dawson. Johnson informed Mr. Dawson that such arrangement would be a handwritten agreement between Mr. Dawson and a New York firm. Johnson offered Mr. Dawson \$.10 per share and instructed Mr.

Dawson to deliver his stock certificate to Johnson Bowles whereupon a check for the shares of USA Medical would be given to him.

b. On or about April 6, 1989, Johnson purchased 12,000 shares of USA Medical for the sum of \$1,200.00 from Sheldon and Lois Flateman in Salt Lake County, State of Utah.

c. On or about April 14, 1989, Johnson purchased 18,000 shares of USA Medical for the sum of \$1,800.00 from Richard Sax in Salt Lake County, State of Utah.

d. On or about April 18, 1989, Johnson purchased 80,000 shares of USA Medical for the sum of \$8,000.00 from Paul Jones in Salt Lake County, State of Utah.

e. On or about April 18, 1989, Johnson purchased 69,500 shares of USA Medical for the sum of \$6,950.00 from Nick Julian in Salt Lake County, State of Utah.

f. On information and belief, the Division believes Johnson has purchased approximately 226,500 additional shares of USA Medical since March 1, 1989.

COUNT I

13. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 12 as specifically set out herein.

14. Section 61-1-6(1) of the Act provides that the Division may issue an order suspending or revoking the registration of a broker-dealer if it finds that such order is in the public interest and the broker-dealer:

(g) Has engaged in dishonest or unethical practices in the securities business.

15. The above described sales of USA Medical shares were sales effected without registration or exemption in violation of Section 61-1-7 of the Act.

16. The actions of Johnson, in soliciting and/or purchasing the USA Medical shares during the pendency of the Division's order, encouraged or otherwise aided in the violation of Section 61-1-7 of the Act.

17. The above actions of Johnson, acting on behalf of Johnson-Bowles, in soliciting, encouraging or aiding the violation of the Division's Order constitute violations of § 61-1-6(1)(g) of the Utah Uniform Securities Act.

COUNT II

23. The Division realleges and incorporates by reference its allegations set forth in paragraphs 1 through 22 as specifically set out herein.

24. Section 61-1-6(1)(g) of the Act provides that the Division may issue an order suspending or revoking the registration of a broker-dealer if it finds that such order is in the public interest and that the broker-dealer "has engaged in dishonest or unethical practices in the securities business."

25. Rule R177-6-1g(a)(3) of the Division, promulgated under the authority of § 61-1-6(1)(g) of the Act, establishes that the

following acts and practices by broker-dealers constitute grounds for suspension or revocation of registration:

"(3) Recommending to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that such transaction or recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer."

26. Johnson and Johnson-Bowles, as described above, recommended, solicited or effected for customers the sales of securities of USA Medical which sales would necessarily involve a violation of Section 61-1-7 of the Act.

27. The above actions by Johnson Bowles constitute dishonest and unethical practices within the meaning of Section 61-1-6(1)(g) of the Act and Division Rule R177-6-1g in that transactions which involve a violation of the Act are not suitable.

REQUEST FOR RELIEF

WHEREFORE, the Division requests the following relief:

1. A finding that Johnson Bowles Company, Inc., engaged in the acts and practices alleged above;

2. A finding that Marlen Johnson engaged in the acts and practices alleged above;

3. That by engaging in the above acts and practices, Johnson Bowles Company, Inc. be adjudged and decreed to be found in violation of § 61-1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division;

4. That by engaging in the above acts and practices, Marlen Johnson be adjudged and decreed to be found in violation of § 61-

1-6(1)(g) of the Utah Uniform Securities Act and Rule R177-6-1g of the Division;

5. That the registration of Johnson Bowles Company, Inc. to act as a securities broker-dealer be suspended or revoked accordingly.

6. That the registration of Johnson Bowles Company, Inc. to act as a securities broker-dealer be suspended or revoked accordingly.

Dated this 19th day of July, 1989.

R. Paul Van Dam
Attorney General



Mark J. Griffin
Assistant Attorney General

CERTIFICATE OF MAILING

I have this day served the foregoing document upon Johnson Bowles Inc. and Marlen Johnson by mailing a copy thereof, properly addressed, with postage prepaid, to Marlen Johnson, Johnson Bowles Company, Inc. 430 East 400 South, Utah 84111.

A copy of the foregoing document has been mailed this day prepaid to J. Michael Coombs, attorney for Marlen Johnson and Johnson Bowles, at 72 East 400 South, Suite 220, Salt Lake City, Utah 84111.

Dated at Salt Lake City, Utah this 19 day of July, 1989.

Wayne Richards

**BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH**

IN THE MATTER OF
THE REGISTRATION OF:
JOHNSON-BOWLES COMPANY, INC.

:
:
: ORDER ON REVIEW
:
: CASE NO. SD-89-46BD
:

IN THE MATTER OF
THE REGISTRATION
OF: MARLEN VERNON JOHNSON

:
:
: CASE NO. SD-89-47AG
:
:

INTRODUCTION

1. Orders for Which this Review is Sought

a. Final Order

By order of the Securities Advisory Board dated August 10, 1990, and approved by the Director of the Securities Division (the "Division") on August 13, 1990, the registration of Respondent Johnson-Bowles Company, Inc. ("Johnson Bowles") and the registration of Respondent Marlen Vernon Johnson ("Johnson") were suspended for one year. (This order is hereinafter referred to as the "Final Order".) Both Respondents also were ordered placed on probation for two years following the suspension, with certain conditions.

In summary, Respondents were sanctioned for violating the terms of a Division order, dated March 1, 1989, and made permanent on March 29, 1989 (the "March 1 Order"). This March 1 Order suspended all exemptions available under Section 14(2) of the Utah

Uniform Securities Act relative to trading in the stock of a company known as U.S.A. Medical Corporation.

b. Other Orders

The following interim orders were entered during the pendency of this matter:

- i. Order Granting Division's Motion to Convert;
- ii. Order Denying Respondents' Rule 12(b)(1) Motion (lack of jurisdiction);
- iii. Order Denying Respondents' 12(b)(6) Motion (failure to state a claim);
- iv. Order Granting the Division's Motion to Dismiss Respondents' Counterclaim; and
- v. Order Denying Respondents' Motion for Summary Judgement.

2. Request for Agency Review

Respondents filed a "Request for Agency Review of Entire Record and Supporting Brief" (hereinafter, the "Request for Review") on August 23, 1990. This Request for Review requests agency review (or, in this case, review by a superior agency) of the Final Order and the interim orders described above.

Counsel for Respondents submitted a letter dated September 10, 1990, to the Executive Director of the Department of Commerce, who is issuing this Order on Review. This letter has been treated as a memo supplementing the Request for Review. The Division did not file a written response to the letter.

In support of its request that each of the above-named orders

be reversed and that the proceedings be dismissed and vacated, Respondents have referenced the various motions, memoranda, and affidavits which support each particular order. The Request for Review requests in general fashion that the reviewing officer review all of these pleadings, as well as the audio tapes of oral argument and the hearing transcript, to determine grounds for reversal. The reviewing officer also is requested to address all issues presented in all of the documents.

Counsel for Respondents was invited by letter dated October 9, 1990, to supplement the Request for Review with a statement more particularly stating the grounds for review. Counsel requested and received permission to file such a statement within thirty days; he thereafter declined the invitation and filed no more memoranda. The attachments to the Request for Review and the documents incorporated by reference were reviewed in connection with this Order on Review for purposes of clarification and explanation but were not extensively mined to supply arguments or issues or grounds which Respondents declined to specify in the Request for Review.

3. Statutes or Rules Permitting or Requiring Review

The review of this matter is being conducted by the Executive Director of the Department of Commerce pursuant to Section 61-1-23 of the Utah Uniform Securities Act (the "Act"). Rule 151-46b-12 of the Department also allows for filing a request for agency review. By letter dated August 29, 1990, counsel was advised that no oral argument would be heard. The Division did not file any written

response to Respondent's Request for Review.

STATEMENT OF THE ISSUES REVIEWED

As previously noted, Respondents' Request for Review did not clearly enumerate each separate issue on appeal, but appeared to be an attempt re-argue all motions previously made. Where particular grounds for review were alleged in the Request for Review, they are set forth below. The relief requested is assumed to be a reversal of each contested order.

1. The Final Order:

- a. Whether the Order is supported by the evidence, the record, and the Findings of Fact and the Conclusions of Law;
- b. Whether the Conclusions of Law follow from the Findings of Fact;
- c. Whether there should be no findings of fact nor conclusions of law, simply a verdict and sanction;

2. Order Granting Division's Motion to Convert:

- a. Whether the Division waived any right or ability to convert the proceeding from an informal proceeding to a formal one;
- b. Whether the order granting the Division's motion to convert to formal proceedings is erroneous;

3. Order Denying Respondents' Rule 12(b)(1) Motion:

Whether the 12(b)(1) order was supported by the Findings of Fact and the Conclusions of Law;

4. Order Denying Respondents' 12(b)(6) Motion:

Whether denial of the 12(b)(6) motion was supported by the Findings of Fact and the Conclusions of Law;

5. Order Granting the Division's Motion to Dismiss Respondents' Counterclaim:

Whether the order dismissing Respondents' Counterclaim was supported by the Findings of Fact and the Conclusions of Law;

6. Order Denying Respondents' Motion for Summary Judgement:

Whether the order denying Respondent's Motion for Summary Judgement was supported by the Findings of Fact and Conclusions of law.

The Final Order

FINDINGS OF FACT

1. The Division presented evidence in the hearing through the testimony of Kathleen McGinley, Director of Licensing for the Division. For Respondents, Respondent Marlen Johnson testified; as did Don Sorenson, a Certified Public Accountant who performed some accounting services for Respondent; and David King, who offered testimony as an expert regarding "dishonest or unethical practices" under the Utah Uniform Securities Act. Also entered into evidence were certain stipulations of fact; an order issued by the Federal District Court for the District of Utah which went to some of the issues herein; correspondence regarding the USA Medical stock; and other documents reflecting the transactions complained of herein.

2. All of the Findings of Fact in the Final Order were supported by sufficient and credible testimony and evidence presented at the hearing.

CONCLUSIONS OF LAW

3. It appears that there is no basis to modify or overturn the Conclusions of Law in the Final Order, for the following reasons: the findings are supported by substantial and credible evidence; no evidence supporting a contrary finding was presented by Respondents' counsel; the Board and the Director did not misinterpret applicable law or rules, and the conclusions do not reflect an abuse of discretion by the Board and the Director.

Order Granting Division's Motion to Convert to Formal Proceedings:

FINDINGS OF FACT

4. Division rules designate all proceedings as informal. Although Respondents argue that the Division waived any right it had to convert the proceedings from informal to formal, nothing in the record indicates that the Division waived this right. In their original objection to the Division's motion to convert, Respondents argue that simply by the act of filing the petition, the Division waived its right to convert. However, this act by itself does not indicate that the Division wished to waive conversion, especially since there is no way for an agency to convert proceedings before they have even commenced. Both Division and Department rules are silent as to the ability to convert proceedings from formal to informal; the Utah Administrative Procedures Act does allow

conversion where it is in the public interest and does not unfairly prejudice a party's rights.

CONCLUSIONS OF LAW

5. The order allowing the proceedings to be converted from formal to informal did not constitute an abuse of discretion.

6. The Administrative Law Judge's ruling that conversion was in the public interest was not improper because the significant and complicated issues in this case could be more fully and competently disposed of with the expertise of the Board, pursuant to the greater discovery and other rights granted under formal proceedings, and because conversion would allow for this matter to be disposed of with one full and fair hearing at the administrative level. One of the most important issues in this case was whether Respondents' behavior constituted unethical and dishonest conduct. These issues could better and more properly be explored within the context of a formal proceeding.

7. Conversion did not unfairly prejudice Respondents' rights. Respondents are not harmed merely because they receive only one full hearing, at the administrative level, rather than two hearings -- one in the administrative forum, one in the judicial.

8. Respondents argue that the order granting conversion was erroneous but assigned no grounds for error. Based on a review of the record, and for the reasons noted above, I find that conversion was not erroneous.

Order Denying Respondents' Rule 12(b)(1) Motion:

FINDINGS OF FACT

9. Respondents' Request for Review assigns no grounds for error or issues on appeal of the Administrative Law Judge's denial of Respondent's motion to dismiss based on the Division's lack of jurisdiction.

10. Respondents were licensed by the Division at all times relevant to these proceedings. As are most other licensees licensed by the Division, Respondents are subject to additional regulation by the federal Securities and Exchange Commission, and self-regulatory organizations such as the NASD which are under SEC oversight.

11. Respondents were charged in the Amended Petition with violating Utah law and Division rules.

CONCLUSIONS OF LAW

12. Concurrent regulation in these circumstances is not improper or illegal and any applicable federal law or rules did not supersede Utah law and rules.

13. The Administrative Law Judge could reasonably conclude, based on the facts before him at the time, that the Division had subject matter jurisdiction over Respondents based on their license and their alleged violation of Utah law and rules, and therefore did not improperly decline to dismiss the Petition.

Order Denying Respondents' Rule 12 (b)(6) Motion:

FINDINGS OF FACT

14. Respondents' Motion to Dismiss based on failure to state a claim was denied. Respondents' Request for Review alleges no particular grounds for error or issues on appeal.

15. The Amended Petition indicated that Respondents purchased securities of USA Medical Corporation during a time when all transactional exemptions from registration for that stock were suspended; that Respondents purchased the securities within Utah, from Utah residents; that Respondents knew of the order suspending exemptions; and that Respondents knew that the USA stock in fact had been unlawfully issued, had never been registered and had no exemption from registration and was traded illegally; and that Respondents may have solicited shareholders of USA Medical to sell their stock to Respondents.

CONCLUSIONS OF LAW

16. The Amended Petition and other documents in the record at the time Respondents filed their motion to dismiss based on failure to state a claim indicated that there were disputed issues of material fact. Specifically, Respondent denied soliciting any of the sales, and disputed the amount of profits from the sales; also, questions of fact remained to be resolved regarding whether the transactions by Respondents' customers were "unsuitable". Finally, based on the pleadings, it did not appear as a matter of law that the Division could not recover under the theories alleged (aiding and abetting and unsuitability).

Order Granting Division's Motion to Dismiss Counterclaim:

FINDINGS OF FACT

17. Respondents' Counterclaim alleges various wrongdoings by the Division and concludes with a request for an award of costs, attorney's fees and expenses, alleging in support of the request that the Division's petition is in violation of Rule 11 of the Utah Rules of Civil Procedure and Section 78-27-56 of the Utah Code Ann.; and that an award is proper under the federal Equal Access to Justice Act (no citation given).

18. The Administrative Law Judge granted the Division's motion to dismiss the counterclaim, holding that Section 63-46b-7(1) does not authorize filing of a counterclaim in these proceedings, hence that there was no subject matter jurisdiction over Respondents' counterclaim. Thus, the Administrative Law Judge did not address whether Section 78-27-56 or Rule 11 applied.

CONCLUSIONS OF LAW

19. Section 63-46b-7(1) does not clearly bar Respondents' counterclaim. It refers to the "claims or defenses" of parties and read expansively, could be meant to refer to counterclaims. Moreover, Section 63-46b-6 requires that a response be filed, which must include a statement of the relief sought. Again, read expansively, "response" and "relief" could be extended to cover a request for costs and attorney's fees. However, it is noted that nowhere does the Utah Administrative Procedures Act incorporate Rule 11 or the Rules of Civil Procedure, except those relating to discovery.

20. Furthermore, Section 63-46b-6 states that the presiding officer or the agency by rule "may" permit pleadings in addition to the notice and response. Nowhere does the record reflect that the presiding officer permitted this counterclaim. Neither Department nor Division rules permit the counterclaim. Department Rules do not "expressly" adopt Rule 11; Respondents' assertion in its counterclaim that it did is patently incorrect. Department Rule 151-46b-7 only partially quotes a passage from Rule 11 (that signing pleadings constitutes certification that good grounds exist) and does not quote the portion regarding award of fees, costs or expenses. Therefore, Respondents' counterclaim was not permitted Department rules.

21. The proper forum for raising a Rule 11 claim, if at all, would be upon motion, not through a counterclaim. Regardless, Respondents did not prevail below and therefore a Rule 11 claim is moot. Finally, the Division's actions -- the signing of any pleadings by its employees or by the Assistant Attorney General -- did not violate Rule 11 because each allegation was substantiated through documentary evidence or testimony of witnesses, or by stipulation.

Order Denying Respondents' Motion for Summary Judgement:

FINDINGS OF FACT

22. The Administrative Law Judge denied Respondents' Motion for Summary Judgement, finding that sufficient factual issues remained for resolution.

23. The various motions filed -- both before and after disposition of the Motion for Summary Judgement -- as well as testimony at the hearing bear this out. Several important factual issues were in dispute. Specifically, the parties did not agree on whether Respondents knew of the precise terms of the Division's March 1 order when they purchased the USA Medical Securities; or, if they did, on whether the order extended to Respondents and the transactions complained of in the Petition; and on whether Respondents may have solicited shareholders of USA Medical to sell their stock to Respondents. In addition, although some of the unresolved issues perhaps may be better characterized as legal issues rather than factual disputes, refusal to grant summary judgement was not improper where the Administrative Law Judge wished to allow the Board to hear the evidence and lend their expertise in determining whether Respondents' actions did constitute violations of the Division's law and rules.

CONCLUSIONS OF LAW

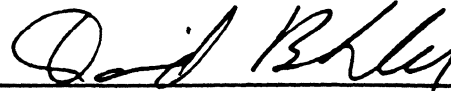
24. A review of the record indicates that there were sufficient disputed issues that denial of the motion for summary judgement was not erroneous.

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ORDER

IT IS ORDERED THAT the Final Order dated August 13, 1990, be affirmed in its entirety.

Dated this 29 day of October, 1990



David L. Buhler, Executive Director
Department of Commerce

NOTICE OF RIGHT OF JUDICIAL REVIEW

Judicial review of this Order may be obtained by filing a Petition for Review within thirty (30) days after the issuance of this Order. Any Petition for such Review shall comply with the requirements set forth in Section 63-46b-14 and Section 63-46b-16.

CERTIFICATE OF MAILING

I certify that on the 29th day of October, 1990, I caused to be mailed (except as otherwise noted) a true and correct copy of the foregoing Order on Review, properly addressed, postage prepaid, to:

Marlen Johnson
Johnson-Bowles Co., Inc.
430 East 400 South
Salt Lake City, Utah 84111

John Michael Coombs
72 East 400 South
Suite 220
Salt Lake City, Utah 84111

Earl S. Maeser, Director
Utah Securities Division
P.O. Box 45802
Salt Lake City, Utah 84145
(HAND DELIVERED)

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