

1992

Johnson-Bowles v. Division of Securities : Petition for Writ of Certiorari

Utah Supreme Court

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DOCKET NO.

BRIEF

92014/5

ORIGINAL PROCEEDING
IN AND BEFORE
THE UTAH SUPREME COURT

JOHNSON-BOWLES COMPANY, INC., and
MARLEN VERNON JOHNSON,

Petitioners,

v.

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

Respondents.

• • • • •

APPENDIX TO PETITION FOR
WRIT OF CERTIORARI

Case No.

Rule 29(a)(13) priority

Petition for Review of an Amended Decision of the Utah Court
of Appeals Issued on February 19, 1992, Case No. 900558-CA

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ATTORNEYS FOR RESPONDENTS

FILED

MAR 20 1992

CLERK SUPREME COURT
UTAH

JOHNSON-BOWLES COMPANY, INC., and
MARLEN VERNON JOHNSON,

 Petitioners,

 v.

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

 Respondents.

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ATTORNEYS FOR RESPONDENTS

Petitioners Johnson-Bowles Company, Inc., and Marlen V. Johnson submit this Appendix in support of their Petition for Writ of Certiorari. Exhibit "1" is the Amended Opinion of the Court of Appeals from which review is sought. The following are the contents of this Appendix:

COURT OF APPEALS 2/19/92 AMENDED OPINION	EXHIBIT "1"
COURT OF APPEALS 11/29/91 OPINION	EXHIBIT "2"
OCTOBER 29, 1990, FINAL AGENCY ACTION OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF COMMERCE	EXHIBIT "3"
THE AUGUST 10, 1990, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE SECURITIES ADVISORY BOARD, APPROVED ON AUGUST 13, BY THE DIRECTOR OF DIVISION	EXHIBIT "4"
THE STIPULATION OF FACTS FOR PURPOSES OF HEARING (WITH SUPPORTING EXHIBITS)	EXHIBIT "5"
DIVISION'S MARCH 1, 1989, SUMMARY ORDER	EXHIBIT "6"
DIVISION'S MARCH 27, 1989, "PERMANENT ORDER BY DEFAULT"	EXHIBIT "7"
DIVISION'S AMENDED PETITIONS DATED JULY 19, 1989	EXHIBIT "8"
THE JOHNSONS' AMENDED ANSWER AND COUNTERCLAIM	EXHIBIT "9"
<u>UTAH CODE ANN.</u> §61-1-6(1)(g) effective 1989	EXHIBIT "10"
DIVISION RULE R177-6-1g effective 1989	EXHIBIT "11"
SECTIONS 1401-1404 OF THE NATIONAL ASSOCIATION OF THE SECURITIES ADMINISTRATORS ASSOCIATION ("NASAA") GUIDELINES (CCH)	EXHIBIT "12"
<u>UTAH CODE ANN.</u> §61-1-14(2) and (3) effective 1989	EXHIBIT "13"

UTAH CODE ANN. §61-1-24 and §61-1-27

EXHIBIT "14"

UTAH CODE ANN. §61-1-26(3) effective 1989

EXHIBIT "15"

SECTIONS 12(j) and (k), 15A, 19(g)(1) and (h)(2),
and 27, of the SECURITIES EXCHANGE ACT OF 1934

EXHIBIT "16"

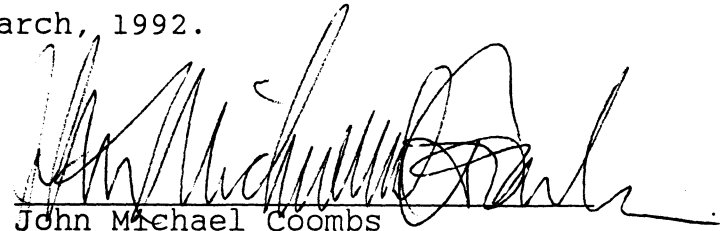
SECURITIES EXCHANGE ACT RELEASE NO. 34-7920,
JULY 19, 1966, 31 F.R. 10076

EXHIBIT "17"

UNCIVIL RITES, THE NEW REPUBLIC,
DECEMBER 16, 1991, at p. 9 (ISSUE 4,013)

EXHIBIT "18"

Dated this 20th day of March, 1992.



John Michael Coombs
Attorney for the Johnsons

COURT OF APPEALS 2/19/92 AMENDED OPINION

EXHIBIT "1"

IN THE UTAH COURT OF APPEALS

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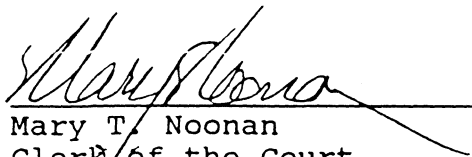
Johnson-Bowles Company, Inc.,)	
and Marlen Vernon Johnson,)	
)	
Petitioner,)	ORDER
)	
v.)	Case No. 900558-CA
)	
The Division of Securities and)	
Utah Department of Commerce;)	
State of Utah,)	
)	
Respondents.)	

This matter is before the court upon petitioners' Petition for Rehearing, filed 13 December 1991 and respondents' Response to the Petition, filed 21 January 1992.

Now therefore, IT IS HEREBY ORDERED that the Petition for Rehearing is granted. The court shall consider the matter without argument on the Petition.

Dated this 19th day of February 1992.

FOR THE COURT:



Mary T. Noonan
Clerk of the Court

FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

FEB 19 1992

Mary T. Noonan
Mary T. Noonan
Clerk of the Court
Utah Court of Appeals

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Johnson-Bowles Company, Inc.,)	AMENDED OPINION ¹
and Marlen Vernon Johnson,)	(For Publication)
)	
Petitioners,)	
)	Case No. 900558-CA
v.)	
)	
Division of Securities of the)	F I L E D
Department of Commerce of the)	(February 19, 1992)
State of Utah,)	
)	
Respondent.)	

Original Proceeding in this Court

Attorneys: John M. Coombs and Craig F. McCullough, Salt Lake
City, for Petitioners
R. Paul Van Dam and David Sonnenrich, Salt Lake City,
for Respondent

Before Judges Jackson, Orme, and Russon.

RUSSON, Judge:

Petitioners Johnson-Bowles Company, Inc., and Marlen Vernon Johnson (collectively, the Johnsons) appeal from a final agency order of the Division of Securities of the Utah Department of Commerce (Division), suspending the Johnsons' registration for one year and placing both on two years probation subsequent to their suspension. We affirm.

I. FACTS

On August 10, 1990, following a formal hearing, the Securities Advisory Board of the Division of Securities issued an order suspending Johnson-Bowles's registration as a broker-dealer

1. This opinion replaces the opinion of the same name issued November 29, 1991 (175 Utah Adv. Rep. 29).

and Mr. Johnson's registration as an agent for one year, and placed both on an additional two years probation.

Prior to January 22, 1989, the Johnsons were involved in the practice of selling short² certain shares of U.S.A. Medical Corporation (U.S.A. Medical). As of January 22, 1989, the Johnsons were short 53,500 shares of U.S.A. Medical. On January 23, 1989, U.S.A. Medical effected a ten for one forward split³ of its securities, thus increasing the Johnsons' short position from 53,500 to 535,000 shares. Shortly after the split, the price of U.S.A. Medical's stock increased ten-fold to approximately one dollar per share, roughly the same price per share as before the split.

On February 6, 1989, the Johnsons received notice of a buy-in⁴ from Otra Clearing Corporation (Otra) of 150,000 shares of U.S.A. Medical securities, giving the Johnsons until February 15 to effect delivery. At the same time, the Johnsons began to furnish the Division of Securities with information regarding alleged problems with U.S.A. Medical and its securities. On February 15, the Johnsons informed Otra in writing that they would not honor the buy-in notice, claiming that they considered U.S.A. Medical's common stock to be unregistered securities and, as such, refused to "engage or participate in an unlawful distribution of unregistered securities."

On February 16, 1989, Johnson-Bowles filed a 10b-5 securities fraud action in federal court, seeking a preliminary injunction and declaration that Johnson-Bowles's outstanding

2. A short sale, a common practice in the securities industry, is "a contract for sale of shares of stock which the seller does not own, or certificates that are not within his control, so as to be available for delivery at the time when under rules of the Exchange, delivery must be made." Provost v. United States, 269 U.S. 443, 450-51, 46 S. Ct. 152, 153 (1926). The goal of the broker-dealer is to purchase stocks for delivery at a reduced price compared to the outstanding contracts.

3. The purpose of a stock split is to increase the amount of outstanding shares while the amount of capital remains the same. It is common for the price of the stock after a split to be divided by the factor of the split. For example, in a ten-to-one split, the price of each stock after the split would be one-tenth of the price before the split.

4. A buy-in occurs when party "A" fails to deliver stock it owes to party "B" within a given period of time. Party "B" may then initiate a buy-in by purchasing the stock from another source and charging "A" the difference between the actual purchase price and what "A" had agreed to sell for

contracts and obligations to certain brokerage firms and clearing corporations to whom Johnson-Bowles owed shares of U.S.A. Medical were void for illegality. On February 17, the court granted the temporary restraining order as to Midwest Clearing Corporation, a corporation upon which many broker-dealers rely for their own securities clearing activities and apparently the entity that concerned Johnson-Bowles the most, thus preventing Midwest from effecting any buy-ins against the Johnsons for ten days.

On March 1, 1989, following a hearing on the Johnsons' motion for a preliminary injunction, the federal district court made numerous findings of fact, including the following:

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 in the stock after it became a market maker, and it is charged with knowledge of these irregularities.

5. The Court finds that the 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.

The court then entered an order denying the Johnsons' motion.

On the same date, the Utah State Division of Securities issued an order denying the availability of all transactional exemptions for U.S.A. Medical securities, pursuant to Utah Code Ann. § 61-1-14(3) (1989) of the Utah Uniform Securities Act, which order was made permanent on March 27, 1989. In addition, on March 6, the United States Securities and Exchange Commission (SEC) suspended trading in the securities of U.S.A. Medical for ten days, which order lapsed after the SEC did not renew it.

Also on March 1, the Johnsons received notice from Otra that it had effected its buy-in of 150,000 shares of U.S.A. Medical stock and that, pursuant to buy-in procedures, the Johnsons were responsible for the purchase price of that stock. On March 21, the Johnsons notified the National Association of Securities Dealers (NASD), of the notice from Otra. The letter from the Johnsons to the NASD stated in relevant part:

On March 1, 1989 at 2:00 p.m. (M.S.T.), 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).

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 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 law.

Sometime after the Division's March 1 order suspending exemptions for U.S.A. Medical securities, the Johnsons purchased a total of 397,900 shares of U.S.A. Medical securities from six Utah residents and one New York resident. The Johnsons stated that they purchased the U.S.A. Medical securities to satisfy outstanding contracts for the delivery of those securities to several broker-dealers and clearing corporations. Additionally, on March 20, 1990, the Johnsons purchased 54,000 shares of U.S.A. Medical from another source. Mr. Johnson testified that he made this purchase as a possible means to satisfy a pending NASD arbitration proceeding between Johnson-Bowles and Otra regarding the latter's buy-in. Mr. Johnson further testified that he later used the 54,000 shares as security for an outstanding accounting

debt. As a result of the Johnsons' purchase of U.S.A. Medical securities, the Utah State Division of Securities determined that the Johnsons had engaged in dishonest and unethical conduct violative of the Division's March 1, 1989 order and other provisions of the law, and initiated an agency action against the Johnsons.

II. PROCEDURAL HISTORY

On April 27, 1989, the Division initiated an agency action against both Mr. Johnson and Johnson-Bowles, naming each in a separate petition containing three counts. Count I alleged willful violation or willful noncompliance with agency rules. Count II alleged that Johnson and Johnson-Bowles had engaged in dishonest or unethical practices in the securities business. Count III alleged that Johnson and Johnson-Bowles had, in violation of Division rules, recommended 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." The Division subsequently amended its petitions, removing Count I and re-alleging Counts II and III of the original petitions.

On May 24, 1989, the Division brought a motion to convert the proceedings from informal to formal. Over the Johnsons' objection, the said motion was granted on July 14.

On July 3, 1989, the Johnsons brought a motion pursuant to Rule 12(b)(1) of the Utah Rules of Civil Procedure to dismiss the Division's proceedings against them, arguing that the Division lacked subject matter jurisdiction to discipline them. The Johnsons asserted that they had purchased the stock in order to comply with NASD rules, which carry the full force and effect of federal law, and therefore necessarily take precedence over state law. After a hearing, the motion was denied by an Administrative Law Judge (ALJ). Pursuant to Utah Code Ann. § 63-46b-12 (1989) and applicable Department of Commerce rules, the Johnsons filed for agency review of the denial of their 12(b)(1) motion by the ALJ, which request was denied by the Division director.

On September 27, 1989, the Johnsons filed a motion to dismiss the Division's amended petition for failure to state a claim. The Johnsons' motion was granted as to Count II of the amended petitions, but denied as to Count I, leaving the "dishonest and unethical practices" cause of action intact.

On November 28, 1989, the Johnsons filed a motion for summary judgment on the Division's amended petitions on several

grounds. The Division filed a cross-motion for summary judgment. Both motions were denied by the ALJ. The Johnsons filed a request for agency review of the ALJ's denial of their motion for summary judgment, which request was denied.

On July 16, 1990, a hearing was held on the Division's amended petitions. On August 10, 1990, the Securities Advisory Board issued an order suspending the Johnsons' registration for one year and placing them on an additional two years probation. The Division director reviewed and approved the board's order, which action was affirmed by the director of the Department of Commerce.

III. ISSUES

The following issues are raised on appeal: (1) Was the Division's March 1, 1989 order suspending exemptions for U.S.A. Medical securities valid at the time the Johnsons purchased the U.S.A. Medical securities? (2) Did an unconstitutional conflict exist between the Division's enforcement of its March 1 order and the Johnsons' obligations to complete such transactions under NASD rules? (3) Did the March 1 order impermissibly interfere with interstate commerce? (4) Did the Division's enforcement of its March 1 order violate the Johnsons' due process rights? (5) Was there sufficient evidence to support the Division's August 10, 1990 order? (6) Did the Division properly apply the law to the facts of this case in its August 10 order? (7) Was the sanction imposed by the Division unreasonable in light of the facts and the Division's past practices? (8) Were procedural errors made with regard to the Johnsons' numerous motions?

IV. STANDARDS OF REVIEW

A. Findings of Fact

We review an agency's findings of fact under a "substantial evidence" test, and will not disturb such findings unless they are not "supported by substantial evidence when viewed in light of the whole record before the court." Grace Drilling v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989) (quoting Utah Code Ann. § 63-46(b)-16(4)(g) (1988)). Substantial evidence is something less than the weight of the evidence, but more than a mere scintilla of evidence, id. at 68, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (quoting Idaho State Ins. Fund v. Hunnicutt, 110 Idaho 257, 715 P.2d 927, 930 (1985)). The burden lies with the Johnsons as the complaining party to "marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by

substantial evidence." Id. (citations omitted) (emphasis in original).

B. Application of Law to Facts

Prior to the adoption of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-16(4) (1989), our review of issues other than findings of fact turned on whether an issue was characterized as a conclusion of law or a mixed question of law and fact. See Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 585 (Utah 1991). However, in Morton, the Utah Supreme Court readdressed the standard of review issue and concluded that:

it is not the characterization of an issue as a mixed question of fact and law or the characterization of the issue as a question of general law that is dispositive of the determination of the appropriate level of judicial review. Rather, what has developed as the dispositive factor is whether the agency, by virtue of its experience and expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved.

Id. at 586. The court stated that this type of analysis would not significantly impact upon review of agency interpretation and application of their own statutes because "[i]n many cases where we would summarily grant agency deference on the basis of its expertise, it is also appropriate to grant agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute." Id. at 588. Therefore, in order for us to determine the appropriate standard of review for the various issues raised by the Johnsons, we must first determine if the statutes involved grant the type of discretion to the Division that the Morton court described.

Deference to an agency's statutory construction should be given "when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." Id. at 589. In such cases, "we will not disturb the [agency's] application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality." Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 442 (Utah App. 1989); see also Tasters Ltd., Inc. v. Department of Employment Sec., 172 Utah Adv. Rep. 17, 19 (Utah App. 1991). On the other hand, "absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation of a statutory term." Morton, 814 P.2d at 588; see also Mor-Flo Indus. v. Board of Review, 817 P.2d 328, 330 (Utah App. 1991).

V. ANALYSIS

A. Validity of the Division's March 1 Order

The Johnsons claim that the Division's March 1, 1989 order suspending exemptions for U.S.A. Medical securities was not valid at the time they purchased the U.S.A. Medical securities. They assert that since the order was not renewed within ten days, it lapsed at that time. The Division responds that the March 1 order remained in effect and was made permanent at the discretion of the executive director on March 27, 1989.

In order to determine the proper standard of review to apply to the validity of the Division's March 1 order, we must first examine the statute in question to determine the amount of discretion that the legislature granted to the Division in making its orders permanent. See Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 588-89 (Utah 1991). Utah Code Ann. § 61-1-14(3) (1989) grants the executive director blanket authority to "deny or revoke any exemption specified in Subsection (1)(h) or (1)(j) or in Subsection (2) [of section 61-1-14] with respect to: (a) a specific security, transaction, or series of transactions" U.S.A. Medical securities fall within section 61-1-14(2), and therefore, the exemptions for such securities may be denied or revoked by the executive director. In addition, section 61-1-14(3) states: "If no hearing is requested and none is ordered by the executive director or division, the order shall remain in effect until it is modified or vacated by the executive director." Id. By its plain language, the statute grants broad discretionary powers to the executive director to either call for a hearing, modify or leave in effect the order that has been entered. Thus, we will not disturb the agency's decision unless it "exceeds the bounds of reasonableness and rationality." Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 442 (Utah App. 1989); see also Morton, 814 P.2d at 587; Tasters Ltd., Inc. v. Department of Employment Sec., 172 Utah Adv. Rep. 17, 19 (Utah App. 1991).

According to the record, the Johnsons did not request a hearing on the March 1, 1989 order within the fifteen day period required by the statute, nor at any time thereafter. Further, the record indicates that there was no change in the status of U.S.A. Medical securities that would have allowed such securities to be traded legally. Thus, the executive director had the option of either continuing the order in effect, modifying or vacating it. The executive director chose in his discretion to continue the order in force. Such a decision was well within the agency's statutory authority and discretion, and thus, we conclude that it did not exceed the bounds of reasonableness.

B. Preemption

In the alternative, the Johnsons argue that the Division's order suspending all exemptions for U.S.A. Medical securities was never valid because it unconstitutionally conflicted with federal law, as embodied in the rules of the NASD. The Johnsons contend that their obligations as NASD members preempt any state law that would interfere with such obligations, and that since the NASD is governed by SEC rules, the rules of the NASD carry the full force and effect of federal law and necessarily preempt the operation of any state laws that may interfere with the operation of NASD rules. The Division responds that the Johnsons have not shown that there was any conflict between the Division's order and NASD rules, and even if such a conflict existed, the Johnsons have failed to show that such conflict would have to be resolved in favor of the NASD.

We need not address the Johnsons' argument that the NASD's rules carry the full force and effect of federal law because it is clear that Congress did not intend the creation and continued supervision of the SEC to preempt the states' abilities to regulate fraudulent securities schemes. "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 2129 (1981) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)). The United States Supreme Court has stated that:

where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when . . . state law "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress."

Federal Deposit Ins. Corp. v. Bank of Boulder, 911 F.2d 1466, 1472 (10th Cir. 1990) (quoting Pacific Gas & Elec. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722 (1983)), cert. denied, ___ U.S. ___, 111 S. Ct. 1183 (1991). A state statute will therefore be held to be void to the extent to which it conflicts with a federal statute if, for example, "compliance with both federal and state regulations is a physical impossibility." Maryland v. Louisiana, 451 U.S. at 747, 101 S. Ct. at 2129 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18 (1963)). Further, the state law will also be found to be void where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quoting Hines v. Davidowitz, 321 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).

That a federal statute should preempt state law in a specific area may be evidenced in several ways. For example, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplant it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947) (citing Pennsylvania R. Co. v. Public Serv. Comm'n, 250 U.S. 566, 569, 40 S. Ct. 36, 37 (1919)); see also Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156-60, 62 S. Ct. 491, 496-98 (1942). Further evidence of preemption may be found if an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice, 331 U.S. at 230, 67 S. Ct. at 1152 (citing Hines, 321 U.S. at 66, 61 S. Ct. at 404 (1941)). Also, evidence of preemption may be found by examining the "object sought to be obtained by federal law and the character of the obligations imposed by [the law]." Id. (citing Southern R. Co. v. Railroad Comm'n, 236 U.S. 439, 35 S. Ct. 304, 305 (1915)). Finally, the state policy may simply "produce a result inconsistent with the objective of the federal statute." Id. (citing Hill v. Florida, 325 U.S. 538, 549, 65 S. Ct. 1373, 1378 (1945)).

As to whether state law is preempted in the case at bar, Section 78bb(a) of the Securities Exchange Act of 1934 states in pertinent part:

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 of any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

15 U.S.C. § 78bb(a) (Supp. 1991). The Securities Act of 1933 contains similar language:

Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) or any State or Territory of the United States, or the District of Columbia, over any security of any person.

15 U.S.C. § 77r (1981). Moreover, "[s]tate securities laws operate in conjunction with federal laws; federal laws do not supersede state laws." E.F. Hutton & Co. v. Rousseff, 537 So. 2d 978, 980 (Fla. 1989). Thus, section 78bb(a) can only be interpreted as an explicit indication by Congress that it expressly did not intend to control securities regulation to the exclusion of state law. To the contrary, Congress expressly

granted power to the states to regulate securities. As further evidence that Utah's enabling statute, and the Division's order, did not in any way compromise the integrity of any federal laws, on March 6, 1989, the SEC also issued an order suspending any trading of U.S.A. Medical securities. Since both the Division and the SEC were acting in concert toward the same goal of preventing the fraudulent trading of securities, Utah's regulatory scheme in no way conflicted with federal law.

In summary, it is clear that Congress did not intend the Securities Exchange Act of 1934 to displace state law in the same area. It is also clear that Congress expressly gave the states the authority to regulate securities, especially securities that are being traded in a fraudulent manner. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983). Therefore, it is untenable to argue that the SEC would require the trading of a particular stock that a state has determined to have been traded in a fraudulent manner. Thus, compliance with both the federal and state law could not be a physical impossibility. The State law is designed to further the same objectives that Congress envisioned in creating the SEC. It cannot be said that Utah's regulation of a fraudulent security does not at the same time fulfill the purposes and objectives of federal law. It is therefore apparent that the Division's March 1 order did not conflict with federal law, but instead helped to further the very objectives of Congress in promulgating the federal law. Accordingly, if the SEC does not preempt the operation of Utah's securities laws, a voluntary, self-regulatory organization such as the NASD that is governed by the SEC similarly cannot preempt Utah's securities laws. Therefore, we conclude that the Johnsons' assertion that the operation of the securities laws of the state of Utah are preempted is without merit.⁵

C. Commerce Clause

The Johnsons also contend that the Division's order suspending all exemptions for U.S.A. Medical securities was invalid because it impermissibly affected interstate commerce, in

5. Additionally, the Johnsons raise several procedural attacks on the Division and the ALJ that are premised on the argument that NASD rules preempt state law. These include: (1) the ALJ's denial of the Johnsons' motion pursuant to Rule 12(b)(1) of the Utah Rules of Civil Procedure, (2) the denial of the Johnsons' request for agency review of the ALJ's denial of their 12(b)(1) motion, (3) the ALJ's denial of the Johnsons' Rule 56 motion under the Utah Rules of Civil Procedure, and (4) the Johnsons' request for agency review of the ALJ's denial of their Rule 56 motion. Having determined that NASD rules do not preempt state law, these procedural arguments also fail.

violation of the Commerce Clause of the United States Constitution, which provides that Congress shall have the power to "regulate commerce with foreign nations, and among the several states" U.S. Const. art. I, § 8. The Johnsons argue that the Division attempted to extend its order to NASD members outside of Utah, that the out-of-state NASD members affected by the Division's order do not conduct any business in the state of Utah, and that, as such, the Division has attempted to give its order unlawful extra-territorial effect. We disagree.

It is clear that Utah may apply its securities laws to operations that are conducted within this state, even if those laws affect, or are aimed at non-residents. Lintz v. Carey Manor Ltd., 613 F. Supp. 543, 551 (D.C.Va. 1985) (citing Enntex Oil & Gas Co. v. Texas, 560 S.W.2d 494, 497 (Tex. Civ. App. 1977)). With regard to a state statute's effect on interstate commerce, the proper inquiry is whether "the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Enntex Oil, 560 S.W.2d at 497 (citing Pike v. Bruce Church, 397 U.S. 137, 142-43, 90 S. Ct. 844, 847-48 (1970); and Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443, 80 S. Ct. 813, 815-16 (1960)); see also North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983). Further, "[a] state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders." Enntex Oil, 560 S.W.2d at 497 (citing Rio Grande Oil Co. v. State, 539 S.W.2d 917, 921-22 (Tex. Civ. App. 1976)). Finally, it is not uncommon for state securities laws to cross state boundaries and have some ancillary effect on other states, and consequently raise potential issues related to the Commerce Clause.⁶ Such laws are designed to serve two distinct public purposes:

First, the laws protect resident purchasers of securities, without regard to the origin of the security. Second, the laws protect legitimate resident issuers by exposing illegitimate resident issuers to liability without regard to the markets of the issuer. "The states' efforts to advance these interests will always overlap when securities transactions cross state lines. The states' interests can be protected without preventing

6. Such state securities laws are referred to as Blue Sky laws, and have consistently been upheld by both federal and state courts. See, e.g., Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543 (M.D.N.C. 1988); Arizona Corp. Comm'n v. Media Prods., Inc., 763 P.2d 527 (Ariz. App. 1988).

other states from protecting their own interests."

Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 545 (M.D.N.C. 1988) (quoting McClard, The Applicability of Local Securities Acts to Multi-State Securities Transactions, 20 U. Rich. L. Rev. 139, 141 (1985)).

Any interference with interstate commerce by the Division's March 1, 1989 order is merely incidental to the local benefit of preventing the trading of fraudulent stocks, or the trading of otherwise legal stocks in a fraudulent manner. Accordingly, any contention that the order as it applies to the Johnsons violates the Commerce Clause of the United States Constitution is without merit.

D. Due Process Violations

The Johnsons contend that the Division improperly interpreted its March 1, 1989 order as not only suspending exemptions for U.S.A. Medical securities, but also as prohibiting the purchase of such securities. The Johnsons further argue that "nothing in the Order, the Utah Uniform Securities Act, or [their] industry training and education" put them on notice that the mere purchase of U.S.A. Medical securities subsequent to the entry of the March 1 order would be interpreted as a violation of that order. The Johnsons contend that such a lack of notice violated their due process rights.

However, the Johnsons' argument misses the mark. The Division did not sanction the Johnsons for a direct violation of the March 1 order. Instead, the Johnsons were sanctioned for dishonest and unethical activities in light of the intent, scope, and purpose of the Division's order. The Division found that the Johnsons' activities "frustrated the Division's appropriate efforts to preclude trading in those securities and thus partially emasculated the effect of the March 1, 1989 Order." The Division found that such activities constituted a "dishonest and unethical practice" within the meaning of Utah Code Ann. § 61-1-6(1)(g) (1989), thus warranting entry of disciplinary sanctions. Accordingly, in order to determine whether there has been a due process violation here, we must decide whether the statutes, rules, general practices of the securities industry, or other facts provided the Johnsons with adequate notice that their conduct might be considered dishonest and unethical. See Heinecke v. Department of Commerce, 810 P.2d 459, 465 (Utah App. 1991).

Section 61-1-6(1)(g), under which the Division initiated its action against the Johnsons, authorizes the Division to suspend or revoke the registration of a broker-dealer if it finds that such an order is "in the public interest" and that the broker-

dealer has "engaged in dishonest or unethical practices in the securities business." Admittedly, the phrases "in the public interest" and "dishonest and unethical practices in the securities business" are broadly phrased standards, which may not have "a ready and precise meaning to those outside of the profession." Heinecke, 810 P.2d at 465. However, a general statutory standard governing professional conduct is acceptable for three reasons: "(1) The subject of professional performance is too comprehensive to be codified in detail. (2) Members of a profession can properly be held to understand its standards of performance. (3) Standards of performance will be interpreted by members of the same profession in the process of administrative adjudication." Id. (quoting Vance v. Fordham, 671 P.2d 124, 129 (Utah 1983)). Further, there is not a constitutional violation in the use of broad standards governing professional conduct, since such standards are not subject to "objections of vagueness that apply to penal laws[.]" Vance, 671 P.2d at 128. As we stated in Heinecke:

In contrast to the unfairness in imposing criminal liability on a run-of-the-mill citizen under a statute which does not clearly proscribe the conduct complained of, as a result of their training, testing, and licensure, members of a profession are properly charged with knowledge of what conduct is inconsistent with their responsibilities as professionals notwithstanding some lack of precision or comprehensiveness in the statutes and rules governing their licensure.

Heinecke, 810 P.2d at 466.

Under the facts of the present case, it appears somewhat disingenuous for the Johnsons to argue that they were not on notice that the continued purchase of U.S.A. Medical securities subsequent to the March 1 order might be interpreted by the Division to be "dishonest and unethical." Beginning with the Division's March 1 order, the Johnsons were put on notice that the Division concluded that U.S.A. Medical securities had been traded as part of a "device, scheme or artifice," to defraud investors. The Division then ordered that the availability of any and all transactional exemptions be denied. In light of the great efforts and pains that the Johnsons went to in order to bring into effect the Division's order, the Johnsons must be charged with the knowledge that purchases made subsequent to the order might be construed as dishonest and unethical.

Also on March 1, 1989, in response to Johnson-Bowles's motion for a preliminary injunction, the federal district court

issued its findings of fact, conclusions of law, and order which stated in relevant part:

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 in the stock after it became a market maker, and it is charged with knowledge of these irregularities.

(Emphasis added). Moreover, there is evidence in the record from the federal district court hearing that, prior to the Division's proceedings, the Johnsons' legal counsel advised them to not buy or sell any shares of U.S.A. Medical securities if there was a suspected problem with the security's exemption.

Additionally, on March 21, 1989, the Johnsons themselves issued a letter to the NASD which stated in relevant part:

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 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 law.

(Emphasis added). This letter plainly exhibits the Johnsons' knowledge that, subsequent to the entry of the Division's March 1 order, any transaction involving U.S.A. Medical securities, including the purchase of such securities, might be considered dishonest and unethical.

It is also significant to note that prior to the present appeal, the Johnsons argued to any forum willing to listen that U.S.A. Medical securities were being traded in a fraudulent scheme and that they could not be the subject of any legal transaction. For the Johnsons to now argue that they were not on notice that their purchases of U.S.A. Medical securities might be interpreted as dishonest and unethical is untenable. Therefore, we conclude that the Johnsons' due process arguments are without merit.

E. Sufficiency of the Evidence

The Johnsons contend that the Division's findings of fact are unsupported by substantial evidence, and therefore clearly erroneous. As noted above, we will not disturb such findings unless they are not "supported by substantial evidence when viewed in light of the whole record before the court." Grace Drilling v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989) (quoting Utah Code Ann. § 63-46(b)-16(4)(g) (1988)). Moreover, the Johnsons have the burden of marshaling all of the evidence supporting the findings and showing that, despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. See id.

The majority of the Division's findings are merely a summation of a stipulation entered into by the parties. Aside from finding of fact fourteen, those few findings that are not directly supported by the stipulation are amply supported by testimony from the hearing on July 16, 1990. Thus, our discussion focuses on the Johnsons' argument with respect to the Division's finding of fact fourteen. That paragraph states:

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 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 54,000 shares to a firm known as Sorenson, Chiddo & May.

After marshaling the evidence in support of this finding, the Johnsons argue that the following testimony is sufficient to refute the facts set forth in finding of fact number fourteen, and that therefore such finding is clearly erroneous: (1) Mr. Johnson testified at the hearing that the 54,000 shares of U.S.A. Medical were purchased during March 1990, to be used, if necessary, in an NASD arbitration dispute between themselves and Otra; and (2) Mr. Johnson further testified that he later used the 54,000 shares as a security interest for an outstanding accounting debt, and that such a transfer for security purposes only in no way harmed the public. The Johnsons' objection centers on the fact that, according to Mr. Johnson's testimony, the 54,000 shares were merely transferred as a security interest for an outstanding accounting debt, and finding of fact number fourteen states that the Johnsons sold the 54,000 shares to an accounting firm. However, the Johnsons' objection to finding of fact number fourteen, while well-taken in a technical sense, misses the relevancy of that finding. The Johnsons are not being sanctioned for what they did with the 54,000 shares after purchasing them, although that in itself may be sanctionable. As discussed above, they are being sanctioned for dishonest and unethical conduct in the purchase of those shares, as well as the purchase of another 397,900 shares on various dates subsequent to the Division's March 1 order, and while that order was in force. What the Johnsons subsequently decided to do with the stock is inconsequential to the Division's determination that purchasing the stock was dishonest and unethical conduct violative of the Division's order. Even if we were to eliminate the objected-to portion of finding of fact fourteen from consideration, the Johnsons could clearly still be sanctioned by the Division for dishonest and unethical conduct in the purchase of those securities. Therefore, we conclude that whether the shares were sold or merely used as a security interest does not affect the outcome of the action and is, therefore, irrelevant.

F. The Division's Application of the Law to the Facts

Having found that the Division's findings of fact are supported by substantial evidence, we next examine the accuracy of the Division's application of the law to the facts of this case, Saunders, 806 P.2d at 199 (citing Grayson Roper Ltd. v. Finlaison, 782 P.2d 467, 470 (Utah 1989); and Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)), which the Johnsons also dispute.

As required by Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581 (Utah 1991), we first examine the statute in question to determine the appropriate standard of review. Id. at 588-89. Under Utah Code Ann. § 61-1-6(1) (1989), the executive director of the Division "may issue an order denying, suspending, or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest" and that "[the defendant has] engaged in dishonest or unethical practices in the securities business." Id. (emphasis added). We view the words "if he finds that" as granting to the Division significant latitude and deference. The Division is in a much better position than the legislature or this court to supervise the ongoing operation of the securities industry and determine what is in the public interest and which practices are dishonest and unethical. Therefore, we hold that such statutory language "bespeak[s] a legislative intent to delegate the interpretation of what constitutes dishonest and unethical practices in the securities industry to the Division. Morton, 814 P.2d at 588 (footnote omitted); see also Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 615-16 (Utah 1983) (agency's determination as to whether something is in the public interest is reviewed for reasonableness); Salt Lake City Corp. v. Department of Employment Sec., 657 P.2d 1312, 1316-17 (Utah 1982) (agency granted discretion to determine what is "contrary to equity and good conscience"); Tasters Ltd., Inc. v. Department of Employment Sec., 172 Utah Adv. Rep. 17, 19 (Utah App. 1991) (the words "as determined by the [agency]" indicate a grant of discretion). We further conclude that the statutes in question grant to the division the type of deference envisioned in Morton, and accordingly we will not disturb the Division's decision unless it "exceeds the bounds of reasonableness and rationality." Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 442 (Utah App. 1989).

The Division's March 1, 1989 order stated in relevant part:

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.

In its findings supporting the March 1, 1989 order, the Division found that U.S.A. Medical was not registered with the State of Utah, and that it failed to qualify for any transactional exemptions. Thus, the Division stated in its August 10, 1990 order suspending the Johnsons registration:

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.

Accordingly, the Division held that the Johnsons' actions "frustrated the Division's appropriate efforts to preclude trading in those securities and thus partially emasculated the effect of the March 1, 1989 Order" and clearly "constituted a 'dishonest or unethical practice' within the meaning of Section 61-1-6(1)(g)" Because the Division sanctioned the Johnsons for dishonest and unethical conduct in light of the intent, scope and purpose of the Division's order, a matter clearly within the Division's discretion, we conclude that the Division's determination that the Johnsons' actions subsequent to the issuance of the March 1 order constituted dishonest and unethical activities was reasonable and therefore we will not disturb the Division's determination as such. See generally Heinecke v. Department of Commerce, 810 P.2d 459, 465-66 (Utah App. 1991) (the application of broadly phrased ethical standards is properly left to the discretion of an agency).

The Johnsons argue, however, that an act cannot be dishonest or unethical unless it is also illegal. However, the scope of what constitutes dishonest or unethical conduct is much broader than that which is merely illegal. As we stated in Heinecke:

In contrast to the unfairness in imposing criminal liability on a run-of-the-mill citizen under a statute which does not clearly proscribe the conduct complained of, as a result of their training, testing, and licensure, members of a profession are properly charged with knowledge of what conduct is inconsistent with their responsibilities as professionals notwithstanding some lack of precision or comprehensiveness in the statutes and rules governing their licensure.

Id. at 466. Therefore, the Division was within its discretion in concluding that the Johnsons' actions were dishonest and unethical. The Division's determination is reasonable and rational, and as such, we will not disturb this determination.

G. Sanctions Imposed on the Johnsons by the Division

In addition, the Johnsons contend that suspending their license for one year and placing them on an additional two years probation was "arbitrary and ridiculous in comparison to the alleged violation." In response, the Division argues that such sanctions were reasonable, and that it did not abuse its discretion in imposing such sanctions.

Again, we examine the statute granting the Division the authority to impose sanctions under a Morton analysis in order to determine the appropriate standard of review. Utah Code Ann. § 61-1-6(1) (1989) states in relevant part:

Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue an order denying, suspending, or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest and that the applicant or registrant or, in 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:

. . . .

(b) 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) engaged in dishonest or unethical practices in the securities business[.]

Id. (emphasis added). As noted above, this statute clearly gives the Division broad discretionary powers to either deny, suspend or revoke an agent's or broker-dealer's registration. Thus, the reasonableness of the sanctions imposed on the Johnsons by the Division is similarly a matter of agency discretion, and this

court will not disturb the agency's decision unless it is clearly unreasonable or otherwise an abuse of that discretion. Utah Code Ann. § 63-46b-16(4)(h)(i) (1989).

The Division's sanctions were well within the agency's discretion and are appropriate in light of the willful nature of the Johnsons' violations. It would be difficult to imagine a more willful violation of the intent, scope and purpose of an order than that presented in this case. The Johnsons sought relief in federal district court, and when such relief was not forthcoming, they went to the Division of Securities to seek such relief. Having been granted the relief they sought from the Division, in the form of the March 1 order suspending all exemptions for U.S.A. Medical securities, they immediately turned around and began violating the intent, scope and purpose of the very order for which in large part they were responsible. As the Securities Advisory Board and the Division director stated in the Division's August 10, 1990 order:

entry of a disciplinary sanction in this proceeding is in the public interest and clearly warranted due to the [Johnsons'] 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 [the Johnsons'] dishonest and unethical conduct was driven by a desire to realize monetary gain and/or avoid financial loss and that [the Johnsons'] willingness to engage in trading the securities shifted over time, depending on whatever would promote [their] 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 [the Johnsons'] misconduct, an appropriately severe sanction should be entered.

Further, at the Johnson's request that we take judicial notice of past disciplinary practices of the Division, we have reviewed these practices with regard to the suspension and revocation of registrations, and conclude that the suspension of the Johnsons' registration is well within the established practices of the Division. Thus, the sanctions imposed on the Johnsons by the Division are reasonable in light of the willful nature of the violations, and in conformance to past policies and practices of the Division.

H. Conversion of the Proceedings from Informal to Formal

The Johnsons contend that the Division improperly converted the proceedings from informal to formal, thereby prejudicing their case. Our review of the Johnsons' argument reveals that the Johnsons have failed to comply with Rule 24(a)(9) of the Utah Rules of Appellate Procedure, which states that "[t]he 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." Id. See also English v. Standard Optical, 814 P.2d 613, 618-19 (Utah App. 1991); Christensen v. Munns, 812 P.2d 69, 72-73 (Utah App. 1991); Demetropoulos v. Vreeken, 754 P.2d 960, 965 (Utah App.) (Jackson, J., concurring), cert. denied, 765 P.2d 1278 (Utah 1988); Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182, 1184-85 (Utah App. 1987).

In sole support of this argument, the Johnsons cite Utah Code Ann. § 63-46b-4(3) (1989), which provides:

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.

However, this statute does not validate the Johnsons' argument, but rather it supports the action taken by the ALJ. Section 63-46b-4(3) grants discretion to the presiding officer to convert the proceedings from informal to formal if he or she believes the conversion to be in the public interest and that such conversion would not unfairly prejudice the rights of any party.⁷ The Johnsons do not cite any authority or any portion of the record that would indicate that the Division abused its discretion in taking action under this section to convert the proceedings from informal to formal. Therefore, the Johnsons' appeal of this issue is disregarded for failure to comply with the court's briefing rules.

7. Given the additional procedural safeguards that attend a formal proceeding, Utah Code Ann. § 63-46b-6 to -10 (1989), it would be an unusual case indeed where conversion to a formal proceeding would prejudice a party sought to be sanctioned by an administrative agency.

We have reviewed the remaining issues raised by the Johnsons with regard to their various motions before the Division and find them to be without merit. Nephi City v. Hansen, 779 P.2d 673, 676 (Utah 1989).

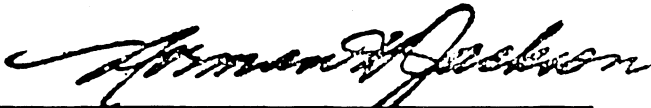
VII. CONCLUSION

The Johnsons' claims on appeal are without merit. Accordingly, we affirm the Division's final agency order suspending the Johnsons' registration for one year and placing the Johnsons on two years probation subsequent to their suspension.



Leonard H. Russon, Judge

WE CONCUR:



Norman H. Jackson, Judge



Gregory K. Orme, Judge

COURT OF APPEALS 11/29/91 OPINION

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FILED

This opinion is subject to revision before
publication in the Pacific Reporter.

IN THE UTAH COURT OF APPEALS

NOV 29 1991

Mary Noonan
Mary J. Noonan
Clerk of the Court
Utah Court of Appeals

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Johnson-Bowles Company, Inc.,)	OPINION
and Marlen Vernon Johnson,)	(For Publication)
)	
Petitioners,)	
)	Case No. 900558-CA
v.)	
)	
Department of Commerce,)	F I L E D
Division of Securities,)	(November 29, 1991)
)	
Respondent.)	

Original Proceeding in this Court

Attorneys: John M. Coombs and Craig F. McCullough, Salt Lake
City, for Petitioners
R. Paul Van Dam and David Sonnenrich, Salt Lake City,
for Respondent

Before Judges Jackson, Orme, and Russon.

RUSSON, Judge:

Petitioners Johnson-Bowles Company, Inc., and Marlen Vernon Johnson (collectively, the Johnsons) appeal from a final agency order of the Division of Securities of the Utah Department of Commerce (Division), suspending the Johnsons' registration for one year and placing both on two years probation subsequent to their suspension. We affirm.

I. FACTS

On August 10, 1990, following a formal hearing, the Securities Advisory Board of the Division of Securities issued an order suspending Johnson-Bowles's registration as a broker-dealer and Mr. Johnson's registration as an agent for one year, and placed both on an additional two years probation.

Prior to January 22, 1989, the Johnsons were involved in the practice of selling short¹ certain shares of U.S.A. Medical Corporation (U.S.A. Medical). As of January 22, 1989, the Johnsons were short 53,500 shares of U.S.A. Medical. On January 23, 1991, U.S.A. Medical effected a ten for one forward split² of its securities, thus increasing the Johnsons' short position from 53,500 to 535,000 shares. Shortly after the split, the price of U.S.A. Medical's stock increased ten-fold to approximately one dollar per share, roughly the same price per share as before the split.

On February 6, 1989, the Johnsons received notice of a buy-in³ from Otra Clearing Corporation (Otra) of 150,000 shares of U.S.A. Medical securities at \$.10 per share, giving the Johnsons until February 15 to effect delivery. At the same time, the Johnsons began to furnish the Division of Securities with information regarding alleged problems with U.S.A. Medical and its securities. On February 15, the Johnsons informed Otra in writing that they would not honor the buy-in notice, claiming that they considered U.S.A. Medical's common stock to be unregistered securities and, as such, refused to "engage or participate in an unlawful distribution of unregistered securities."

On February 16, the Johnsons filed a 10b-5 securities fraud action in federal court, seeking a preliminary injunction and declaration that the Johnsons' outstanding contracts and obligations to certain brokerage firms and clearing corporations to whom the Johnsons owed shares of U.S.A. Medical were void for illegality. On February 17, the court granted the temporary

1. A short sale is "a contract for sale of shares of stock which the seller does not own, or certificates that are not within his control, so as to be available for delivery at the time when under rules of the Exchange, delivery must be made." Provost v. United States, 269 U.S. 443, 450-51, 46 S. Ct. 152, 153 (1926). The goal of the broker-dealer is to purchase stocks for delivery at a reduced price compared to the outstanding contracts.

2. The purpose of a stock split is to increase the amount of outstanding shares while the amount of capital remains the same. It is common for the price of the stock after a split to be divided by the factor of the split. For example, in a ten-to-one split, the price of each stock after the split would be one-tenth of the price before the split.

3. A buy-in occurs when party "A" fails to deliver stock it owes to party "B" within a given period of time. Party "B" may then initiate a buy-in by purchasing the stock from another source and charging "A" the difference between the actual purchase price and what "A" had agreed to sell for.

restraining order as to Midwest Clearing Corporation, a corporation upon which many broker-dealers rely for their own securities clearing activities and apparently the entity that concerned the Johnsons the most, thus preventing Midwest from effecting any buy-ins against the Johnsons for ten days.

On March 1, 1989, following a hearing on the Johnsons' motion for a preliminary injunction, the federal district court made numerous findings of fact, including the following:

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 in the stock after it became a market maker, and it is charged with knowledge of these irregularities.

5. The Court finds that the 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.

The court then entered an order denying the Johnsons' motion.

On the same date, the Utah State Division of Securities issued a stop trading order, suspending all exemptions under the Utah Uniform Securities Act relative to U.S.A. Medical securities, which order was made permanent on March 27, 1989. In addition, on March 6, the United States Securities and Exchange Commission (SEC) suspended trading in the securities of U.S.A. Medical for ten days, which order lapsed after the SEC did not renew it.

Also on March 1, the Johnsons received notice from Otra that

stock and that, pursuant to buy-in procedures, the Johnsons were responsible for the purchase price of that stock. On March 21, the Johnsons notified the National Association of Securities Dealers (NASD), of the notice from Otra in an attempt to initiate an NASD arbitration proceeding between themselves and Otra regarding a dispute over the legality of the buy-in. The letter from the Johnsons to the NASD stated in relevant part:

On March 1, 1989 at 2:00 p.m. (M.S.T.), 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).

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 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 law.

Sometime after the Division's March 1 stop trading order, the Johnsons purchased a total of 397,000 shares of U.S.A. Medical securities from six Utah residents and one New York resident. The Johnsons stated that they purchased the U.S.A. Medical securities to satisfy outstanding contracts for the delivery of those securities to several broker-dealers and clearing corporations. Additionally, on March 20, the Johnsons purchased 54,000 shares of U.S.A. Medical from another source. Mr. Johnson testified that he made this purchase as a possible means to satisfy a pending NASD arbitration proceeding between Johnson-Bowles and Otra regarding the latter's buy-in. Mr. Johnson later used the 54,000 shares to satisfy an outstanding accounting debt. Consequently, the Utah State Division of

Securities determined that the Johnsons were in violation of the stop trading order and other provisions of the law and initiated an agency action against the Johnsons.

II. PROCEDURAL HISTORY

On April 27, 1989, the Division initiated an agency action against both Mr. Johnson and Johnson-Bowles, naming each in a separate petition containing three counts. Count I alleged willful violation or willful noncompliance with agency rules. Count II alleged that Johnson and Johnson-Bowles had engaged in dishonest or unethical practices in the securities business. Count III alleged that Johnson and Johnson-Bowles had, in violation of Division rules, recommended 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." The Division subsequently amended its petitions, removing Count I and re-alleging Counts II and III of the original petitions.

On May 24, 1991, the Division brought a motion to convert the proceedings from informal to formal. Over the Johnsons' objection, the said motion was granted on July 14.

On July 3, 1989, the Johnsons brought a motion pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure to dismiss the Division's proceedings against them, arguing that the Division lacked subject matter jurisdiction to discipline them. The Johnsons asserted that they had purchased the stock in order to comply with NASD rules, which carry the full force and effect of federal law, and therefore necessarily take precedence over state law. After a hearing, the motion was denied by an Administrative Law Judge (ALJ). Pursuant to Utah Code Ann. § 63-46b-12 (1989) and applicable Department of Commerce rules, the Johnsons filed for agency review of the denial of their 12(b)(1) motion by the ALJ, which request was denied by the Division director.

On September 27, 1989, the Johnsons filed a motion to dismiss the Division's amended petition for failure to state a claim. The Johnsons' motion was granted as to Count II of the amended petitions, but denied as to Count I, leaving the "dishonest and unethical practices" cause of action intact.

On November 28, 1989, the Johnsons filed a motion for summary judgment on the Division's amended petitions on several grounds. The Division filed a cross-motion for summary judgment. Both motions were denied by the ALJ. The Johnsons filed a

request for agency review of the ALJ's denial of their motion for summary judgment, which request was denied.

On August 10, 1990, following a hearing on the Division's amended petitions, the Securities Advisory Board issued an order suspending the Johnsons' registration for one year and placing them on an additional two years probation. The Division director reviewed and approved the board's order, which action was affirmed by the director of the Department of Commerce.

III. ISSUES

The following issues are raised on appeal: (1) Was the Division's March 1, 1989 stop trading order valid at the time the Johnsons purchased the U.S.A. Medical securities? (2) Did an unconstitutional conflict exist between the Division's enforcement of its March 1 stop trading order and the Johnsons' obligations to complete such transactions under NASD rules? (3) Did the March 1 stop trading order impermissibly interfere with interstate commerce? (4) Was there sufficient evidence to support the Division's August 10, 1990 order? (5) Did the Division properly apply the law to the facts of this case in its August 10 order? (6) Was the sanction imposed by the Division unreasonable in light of the facts and the Division's past practices? (7) Were procedural errors made with regard to the Johnsons' numerous motions?

IV. STANDARDS OF REVIEW

A. Findings of Fact

We review an agency's findings of fact under a "substantial evidence" test, and will not disturb such findings unless they are not "supported by substantial evidence when viewed in light of the whole record before the court." Grace Drilling v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989) (quoting Utah Code Ann. § 63-46(b)-16(4)(g) (1988)). Substantial evidence is something less than the weight of the evidence, but more than a mere scintilla of evidence, id. at 68, and is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. (quoting Idaho State Ins. Fund v. Hunnicutt, 110 Idaho 257, 715 P.2d 927, 930 (1985)). The burden lies with the Johnsons as the complaining party to "marshall all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." Id. (citations omitted) (emphasis in original).

B. Application of Law to Facts

Prior to the adoption of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. § 63-46b-16(4) (1989), our review of issues other than findings of fact turned on whether an issue was characterized as a conclusion of law or a mixed question of law and fact. See Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 585 (Utah 1991). However, in Morton, the Utah Supreme Court readdressed the standard of review issue and concluded that:

it is not the characterization of an issue as a mixed question of fact and law or the characterization of the issue as a question of general law that is dispositive of the determination of the appropriate level of judicial review. Rather, what has developed as the dispositive factor is whether the agency, by virtue of its experience and expertise, is in a better position than the courts to give effect to the regulatory objective to be achieved.

Id. at 586. The court stated that this type of analysis would not significantly impact upon review of agency interpretation and application of their own statutes because "[i]n many cases where we would summarily grant agency deference on the basis of its expertise, it is also appropriate to grant agency deference on the basis of an explicit or implicit grant of discretion contained in the governing statute." Id. at 588. Therefore, in order for us to determine the appropriate standard of review for the various issues raised by the Johnsons, we must first determine if the statutes involved grant the type of discretion to the Division that the Morton court described.

Deference to an agency's statutory construction should be given "when there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language." Id. at 589. In such cases, "we will not disturb the [agency's] application of its factual findings to the law unless its determination exceeds the bounds of reasonableness and rationality." Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 442 (Utah App. 1989); see also Tasters Ltd., Inc. v. Department of Employment Sec., 172 Utah Adv. Rep. 17, 19 (Utah App. 1991). On the other hand, "absent a grant of discretion, a correction-of-error standard is used in reviewing an agency's interpretation of a statutory term." Morton, 814 P.2d at 588; see also Mor-Flo Ind. v. Board of Review, 817 P.2d 328, 330 (Utah App. 1991).

V. ANALYSIS

A. Validity of the Division's Stop Trading Order

The Johnsons claim that the Division's March 1, 1989 stop trading order was not valid at the time they purchased the U.S.A. Medical securities. They assert that since the order was not renewed within ten days, it lapsed at that time. The Division responds that the stop trading order remained in effect and was made permanent at the discretion of the executive director on March 27, 1989.

In order to determine the proper standard of review to apply to the validity of the Division's stop trading order, we must first examine the statute in question to determine the amount of discretion that the legislature granted to the Division in making its stop trading orders permanent. See Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581, 588-89 (Utah 1991). Utah Code Ann. § 61-1-12 (1989) grants the executive director blanket authority to issue a stop order in several enumerated circumstances. In addition, Utah Code Ann. § 61-1-12(2)(c)(i) (1989) states: "If no hearing is requested and none is ordered by the division or executive director, the order shall remain in effect until it is modified or vacated by the executive director." Id. By its plain language, the statute grants broad discretionary powers to the executive director to either call for a hearing, modify or leave in effect the stop trading order that has been entered. Thus, we will not disturb the agency's decision unless it "exceeds the bounds of reasonableness and rationality." Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 442 (Utah App. 1989); see also Morton, 814 P.2d at 587; Tasters Ltd., Inc. v. Department of Employment Sec., 172 Utah Adv. Rep. 17, 19 (Utah App. 1991).

According to the record, the Johnsons did not request a hearing on the March 1, 1989 order within the fifteen day period required by the statute, nor at any time thereafter. Further, the record indicates that there was no change in the status of U.S.A. Medical securities that would have allowed such securities to be traded legally. Thus, the executive director had the option of either continuing the order in effect, modifying or vacating it. The executive director chose in his discretion to continue the order in force. Such a decision was well within the agency's statutory authority and discretion, and thus, we conclude that it did not exceed the bounds of reasonableness.

B. Preemption

In the alternative, the Johnsons argue that the Division's stop trading order was never valid because it unconstitutionally conflicted with federal law, as embodied in the rules of the NASD. The Johnsons contend that their obligations as NASD

members preempt any state law that would interfere with such obligations, and that since the NASD is governed by SEC rules, the rules of the NASD carry the full force and effect of federal law and necessarily preempt the operation of any state laws that may interfere with the operation of NASD rules. The Division responds that the Johnsons have not shown that there was any conflict between the Division's order and NASD rules, and even if such a conflict existed, the Johnsons have failed to show that such conflict would have to be resolved in favor of the NASD.

We need not address the Johnsons' argument that the NASD's rules carry the full force and effect of federal law because it is clear that Congress did not intend the creation and continued supervision of the SEC to preempt the states' abilities to regulate fraudulent securities schemes. "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746, 101 S. Ct. 2114, 2129 (1981) (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947)). The United States Supreme Court has stated that:

where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when . . . state law "stands as an obstacle to the accomplishment of the full purpose and objectives of Congress."

Federal Deposit Ins. Corp. v. Bank of Boulder, 911 F.2d 1466, 1472 (10th Cir. 1990) (quoting Pacific Gas & Elec. v. State Energy Resources Conserv. & Dev. Comm'n, 461 U.S. 190, 204, 103 S. Ct. 1713, 1722 (1983)), cert. denied, ___ U.S. ___, 111 S. Ct. 1183 (1991). A state statute will therefore be held to be void to the extent to which it conflicts with a federal statute if, for example, "compliance with both federal and state regulations is a physical impossibility." Maryland v. Louisiana, 451 U.S. at 747, 101 S. Ct. at 2129 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 1217-18 (1963)). Further, the state law will also be found to be void where it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quoting Hines v. Davidowitz, 321 U.S. 52, 67, 61 S. Ct. 399, 404 (1941)).

That a federal statute should preempt state law in a specific area may be evidenced in several ways. For example, "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplant it." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 67 S. Ct. 1146, 1152 (1947) (citing Pennsylvania Comm'n on Nat'l Resources v. Pennsylvania, 350 U.S. 566, 569, 40 S. Ct. 36,

37 (1919)); see also Cloverleaf Butter Co. v. Patterson, 315 U.S. 148, 156-60, 62 S. Ct. 491, 496-98 (1942). Further evidence of preemption may be found if an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Rice, 331 U.S. at 230, 67 S. Ct. at 1152 (citing Hines, 321 U.S. at 66, 61 S. Ct. at 404 (1941)). Also, evidence of preemption may be found by examining the "object sought to be obtained by federal law and the character of the obligations imposed by [the law]." Id. (citing Southern R. Co. v. Railroad Comm'n, 236 U.S. 439, 35 S. Ct. 304, 305 (1915)). Finally, the state policy may simply "produce a result inconsistent with the objective of the federal statute." Id. (citing Hill v. Florida, 325 U.S. 538, 549, 65 S. Ct. 1373, 1378 (1945)).

As to whether state law is preempted in the case at bar, Section 78bb(a) of the Securities Exchange Act of 1934 states in pertinent part:

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 of any person insofar as it does not conflict with the provisions of this chapter or the rules and regulations thereunder.

15 U.S.C. § 78bb(a) (Supp. 1991). The Securities Act of 1933 contains similar language:

Nothing in this subchapter shall affect the jurisdiction of the securities commission (or any agency or office performing like functions) or any State or Territory of the United States, or the District of Columbia, over any security of any person.

15 U.S.C. § 77r (1981). Moreover, "[s]tate securities laws operate in conjunction with federal laws; federal laws do not supersede state laws." E.F. Hutton & Co. v. Rousseff, 537 So. 2d 978, 980 (Fla. 1989). Thus, section 78bb(a) can only be interpreted as an explicit indication by Congress that it expressly did not intend to control securities regulation to the exclusion of state law. To the contrary, Congress expressly granted power to the states to regulate securities. As further evidence that Utah's enabling statute, and the Division's order, did not in any way compromise the integrity of any federal laws, on March 6, 1989, the SEC also issued an order suspending any trading of U.S.A. Medical securities. Since both the Division and the SEC were acting in concert toward the same goal of

preventing the fraudulent trading of securities, Utah's regulatory scheme in no way conflicted with federal law.

In summary, it is clear that Congress did not intend the Securities Exchange Act of 1934 to displace state law in the same area. It is also clear that Congress expressly gave the states the authority to regulate securities, especially securities that are being traded in a fraudulent manner. North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983). Therefore, it is untenable to argue that the SEC would require the trading of a particular stock that a state has determined to have been traded in a fraudulent manner. Thus, compliance with both the federal and state law could not be a physical impossibility. The State law is designed to further the same objectives that Congress envisioned in creating the SEC. It cannot be said that Utah's regulation of a fraudulent security does not at the same time fulfill the purposes and objectives of federal law. It is therefore apparent that the Division's March 1 order did not conflict with federal law, but instead helped to further the very objectives of Congress in promulgating the federal law. Accordingly, if the SEC does not preempt the operation of Utah's securities laws, a voluntary, self-regulatory organization such as the NASD that is governed by the SEC similarly cannot preempt Utah's securities laws. Therefore, we conclude that the Johnsons' assertion that the operation of the securities laws of the state of Utah are preempted is without merit.⁴

C. Commerce Clause

The Johnsons also contend that the Division's stop trading order was invalid because it impermissibly affected interstate commerce, in violation of the Commerce Clause of the United States Constitution, which provides that Congress shall have the power to "regulate commerce with foreign nations, and among the several states" U.S. Const. art. I, § 8. The Johnsons argue that the Division attempted to extend its stop trading order to NASD members outside of Utah, that the out-of-state NASD members affected by the Division's order do not conduct any

4. Additionally, the Johnsons raise several procedural attacks on the Division and the ALJ that are premised on the argument that NASD rules preempt state law. These include: (1) the ALJ's denial of the Johnsons' motion pursuant to Rule 12(b)(1) of the Utah Rules of Civil Procedure, (2) the denial of the Johnsons' request for agency review of the ALJ's denial of their 12(b)(1) motion, (3) the ALJ's denial of the Johnsons' Rule 56 motion under the Utah Rules of Civil Procedure, and (4) the Johnsons' request for agency review of the ALJ's denial of their Rule 56 motion. Having determined that NASD rules do not preempt state

business in the state of Utah, and that, as such, the Division has attempted to give its order unlawful extra-territorial effect. We disagree.

It is clear that Utah may apply its securities laws to operations that are conducted within this state, even if those laws affect, or are aimed at non-residents. Lintz v. Carey Manor Ltd., 613 F. Supp. 543, 551 (D.C.Va. 1985) (citing Enntex Oil & Gas Co. v. Texas, 560 S.W.2d 494, 497 (Tex. Civ. App. 1977)). With regard to a state statute's effect on interstate commerce, the proper inquiry is whether "the statute regulates evenhandedly to effectuate a legitimate local public interest and its effects on interstate commerce are incidental unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Enntex Oil, 560 S.W.2d at 497 (citing Pike v. Bruce Church, 397 U.S. 137, 142-43, 90 S. Ct. 844, 847-48 (1970); and Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443, 80 S. Ct. 813, 815-16 (1960)); see also North Star Int'l v. Arizona Corp. Comm'n, 720 F.2d 578, 583 (9th Cir. 1983). Further, "[a] state is damaged if its citizens are permitted to engage in fraudulent practices even though those injured are outside its borders." Enntex Oil, 560 S.W.2d at 497 (citing Rio Grande Oil Co. v. State, 539 S.W.2d 917, 921-22 (Tex. Civ. App. 1976)). Finally, it is not uncommon for state securities laws to cross state boundaries and have some ancillary effect on other states, and consequently raise potential issues related to the Commerce Clause.⁵ Such laws are designed to serve two distinct public purposes:

First, the laws protect resident purchasers of securities, without regard to the origin of the security. Second, the laws protect legitimate resident issuers by exposing illegitimate resident issuers to liability without regard to the markets of the issuer. "The states' efforts to advance these interests will always overlap when securities transactions cross state lines. The states' interests can be protected without preventing other states from protecting their own interests."

Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543, 545 (M.D.N.C. 1988) (quoting McClard, The Applicability of Local

5. Such state securities laws are referred to as Blue Sky laws, and have consistently been upheld by both federal and state courts. See, e.g., Simms Inv. Co. v. E.F. Hutton & Co., 699 F. Supp. 543 (M.D.N.C. 1988); Arizona Corp. Comm'n v. Media Prods., Inc., 763 P.2d 527 (Ariz. App. 1988).

Securities Acts to Multi-State Securities Transactions, 20 U. Rich. L. Rev. 139, 141 (1985)).

Any interference with interstate commerce by the Division's March 1, 1989, order is merely incidental to the local benefit of preventing the trading of fraudulent stocks, or the trading of otherwise legal stocks in a fraudulent manner. Accordingly, any contention that the stop trading order, as it applies to the Johnsons, violates the Commerce Clause of the United States Constitution is without merit.

D. Sufficiency of the Evidence

The Johnsons contend that all the Division's findings of fact are unsupported by substantial evidence, and therefore clearly erroneous. As noted above, we will not disturb such findings unless they are not "supported by substantial evidence when viewed in light of the whole record before the court." Grace Drilling v. Board of Review, 776 P.2d 63, 67 (Utah App. 1989) (quoting Utah Code Ann. § 63-46(b)-16(4)(g) (1988)). Moreover, the Johnsons have the burden of marshaling all of the evidence supporting the findings and showing that, despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. See id. If the appellant fails to marshal the evidence, we assume that the record supports the findings and proceed to a review of the accuracy of the agency's conclusions of law and the application of that law in the case. Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991) (per curiam). With the exception of the Division's finding of fact number fourteen, which is addressed below, the Johnsons have neither marshaled the evidence in support of the agency's findings nor demonstrated that such findings are clearly erroneous. Such is plainly insufficient to meet the marshaling requirements of appellate courts in this state.⁶

As to the Division's finding of fact number fourteen, we conclude that it is supported by substantial evidence and therefore is not clearly erroneous. Paragraph number fourteen of the Division's findings of fact states:

6. Moreover, even had Johnsons properly marshaled the evidence, our cursory review of the record suggests that the Division's findings are overwhelmingly supported by the evidence. In fact, the majority of the Division's findings are merely a summation of a stipulation entered into by the parties. Those few findings that are not directly supported by the stipulation would appear to be amply supported by testimony from the hearing on July 16,

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 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 54,000 shares to a firm known as Sorenson, Chiddo & May.

After marshaling the evidence in support of this finding, the Johnsons argue that the following testimony is sufficient to refute the facts set forth in paragraph fourteen, and that therefore such finding is clearly erroneous: (1) Mr. Johnson testified at the hearing that the 54,000 shares of U.S.A. Medical were purchased during March 1989, to be used, if necessary, in a NASD arbitration dispute between themselves and Otra; and (2) Mr. Johnson further testified that he later used the 54,000 shares as a security interest for an outstanding accounting debt, and that such a transfer for security purposes only in no way harmed the public. However, the Johnsons' argument misses the mark. The March 1, 1989 order mandated that all transactional exemptions for U.S.A. Medical stock be denied, stating:

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.

Since the stock was unregistered and was not eligible for any exemptions to registration, it could not lawfully be the subject of any transaction. Moreover, the letter that the Johnsons sent to the NASD on March 21, 1989, notifying the NASD about Otra's attempted buy-in, evidenced that the Johnsons were aware of such fact:

On March 1, 1989 at 2:00 p.m. (M.S.T.), 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).

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 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 law.

It is uncontroverted that the Johnsons purchased the 54,000 shares subsequent to the Division's March 1 order, and while the order was in force. What the Johnsons subsequently chose to do with the stock is inconsequential and does not in any way diminish the fact that they purchased the stock in violation of the order. In light of the whole record before us, we conclude that finding of fact number fourteen is adequately supported by the evidence, and therefore not clearly erroneous.

E. The Division's Application of the Law to the Facts

Having found that the Division's findings of fact are supported by substantial evidence, we next examine the accuracy of the Division's application of the law to the facts of this case, Saunders, 806 P.2d at 199 (citing Grayson Roper Ltd. v. Finlaison, 782 P.2d 467, 470 (Utah 1989); and Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah 1985)), which the Johnsons also dispute.

As required by Morton Int'l v. Auditing Div. of the Utah State Tax Comm'n, 814 P.2d 581 (Utah 1991), we first examine the statute in question to determine the appropriate standard of review. Id. at 588-89. The Division relies upon two statutes as authority for its suspension of the Johnsons' registration. First, Utah Code Ann. § 61-1-7 (1989) states that "[i]t 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." Id. Secondly, under Utah Code Ann. § 61-1-6(1) (1989), the executive

director of the Division "may issue an order denying, suspending, or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest" and that "[the defendant has] engaged in dishonest or unethical practices in the securities business." Id. (emphasis added). We view the words "if he finds that" as granting to the Division significant latitude and deference. The Division is in a much better position than the legislature or this court to supervise the ongoing operation of the securities industry and determine what is in the public interest and which practices are dishonest and unethical. We hold that such statutory language "bespeak[s] a legislative intent to delegate their interpretation to the responsible agency," in this case, the Division. Morton, 814 P.2d at 588 (footnote omitted); see also Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 615-16 (Utah 1983) (agency's determination as to whether something is in the public interest is reviewed for reasonableness); Salt Lake City Corp. v. Department of Employment Sec., 657 P.2d 1312, 1316-17 (Utah 1982) (agency granted discretion to determine what is "contrary to equity and good conscience"); Tasters Ltd., Inc. v. Department of Employment Sec., 172 Utah Adv. Rep. 17, 19 (Utah App. 1991) (the words "as determined by the [agency]" indicate a grant of discretion). Therefore, we conclude that the statutes in question grant to the division the type of deference envisioned in Morton, and accordingly we will not disturb the Division's decision unless it "exceeds the bounds of reasonableness and rationality." Pro-Benefit Staffing v. Board of Review, 775 P.2d 439, 442 (Utah App. 1989).

The Division's March 1, 1989 order stated in relevant part:

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.

In its findings supporting the order, the Division found that U.S.A. Medical was not registered with the State of Utah, and that it failed to qualify for any transactional exemptions. Upon issuance of the Division's order, there was an absolute preclusion of any trading of U.S.A. Medical securities. Nonetheless, it is uncontroverted that the Johnsons continued to purchase U.S.A. Medical securities subsequent to the March 1, 1989 order. The Division held that such action by the Johnsons clearly "constitutes a 'dishonest or unethical practice' within the meaning of Section 61-1-6(1)(g)" We find that such a determination by the Division was reasonable and therefore will not disturb the Division's determination as such. See generally Heinecke v. Department of Commerce, 810 P.2d 459, 465-66 (Utah

App. 1991) (the application of broadly phrased ethical standards is properly left to the discretion of an agency).

F. Sanctions Imposed on the Johnsons by the Division

In addition, the Johnsons contend that suspending their license for one year and placing them on an additional two years probation was "arbitrary and ridiculous in comparison to the alleged violation." In response, the Division argues that such sanctions were reasonable, and that it did not abuse its discretion in imposing such sanctions.

Again, we examine the statute granting the Division the authority to impose sanctions under a Morton analysis in order to determine the appropriate standard of review. Utah Code Ann. § 61-1-6(1) (1989) states in relevant part:

Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue an order denying, suspending, or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest and that the applicant or registrant or, in 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:

. . .

(b) 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) engaged in dishonest or unethical practices in the securities business[.]

Id. (emphasis added). As noted above, this statute clearly gives the Division broad discretionary powers to either deny, suspend or revoke an agent's or broker-dealer's registration. Thus, the reasonableness of the sanctions imposed on the Johnsons by the Division is similarly a matter of agency discretion, and this court will not disturb the agency's decision unless it is clearly

unreasonable or otherwise an abuse of that discretion. Utah Code Ann. § 63-46b-16(4)(h)(i) (1989).

The Division's sanctions were well within the agency's discretion and are appropriate in light of the willful nature of the Johnsons' violations. It would be difficult to imagine a more willful violation of an order than that presented in this case. The Johnsons sought relief in federal district court, and when such relief was not forthcoming, they went to the Division of Securities to seek such relief. Having been granted the relief they sought from the Division, in the form of the stop trading order, they immediately turned around and began violating the very order for which in large part they were responsible. As the Securities Advisory Board and the Division director stated in the Division's August 10, 1990 order:

entry of a disciplinary sanction in this proceeding is in the public interest and clearly warranted due to the [Johnsons'] 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 [the Johnsons'] dishonest and unethical conduct was driven by a desire to realize monetary gain and/or avoid financial loss and that [the Johnsons'] willingness to engage in trading the securities shifted over time, depending on whatever would promote [their] 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 [the Johnsons'] misconduct, an appropriately severe sanction should be entered.

Further, at the Johnson's request that we take judicial notice of past disciplinary practices of the Division, we have reviewed these practices with regard to the suspension and revocation of registrations, and conclude that the suspension of the Johnsons' registration is well within the established practices of the Division. Thus, the sanctions imposed on the Johnsons by the Division are reasonable in light of the willful nature of the violations, and in conformance to past policies and practices of the Division.

G. Conversion of the Proceedings from Informal to Formal

The Johnsons contend that the Division improperly converted the proceedings from informal to formal, thereby prejudicing

their case. Our review of the Johnsons' argument reveals that the Johnsons have failed to comply with Rule 24(a)(9) of the Utah Rules of Appellate Procedure, which states that "[t]he 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." Id. See also English v. Standard Optical, 814 P.2d 613, 618-19 (Utah App. 1991); Christensen v. Munns, 812 P.2d 69, 72-73 (Utah App. 1991); Demetropoulos v. Vreeken, 754 P.2d 960, 965 (Utah App.) (Jackson, J., concurring), cert. denied, 765 P.2d 1278 (Utah 1988); Koulis v. Standard Oil Co. of Cal., 746 P.2d 1182, 1184-85 (Utah App. 1987).

In sole support of this argument, the Johnsons cite Utah Code Ann. § 63-46b-4(3) (1989), which provides:

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.

However, this statute does not validate the Johnsons' argument, but rather it supports the action taken by the ALJ. Section 63-46b-4(3) grants discretion to the presiding officer to convert the proceedings from informal to formal if he or she believes the conversion to be in the public interest and that such conversion would not unfairly prejudice the rights of any party.⁷ The Johnsons do not cite any authority or any portion of the record that would indicate that the Division abused its discretion in taking action under this section to convert the proceedings from informal to formal. Therefore, the Johnsons' appeal of this issue is disregarded for failure to comply with the court's briefing rules.

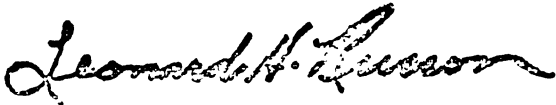
We have reviewed the remaining issues raised by the Johnsons with regard to their various motions before the Division and find

7. Given the additional procedural safeguards that attend a formal proceeding, Utah Code Ann. § 63-46b-6 to -10 (1989), it would be an unusual case indeed where conversion to a formal proceeding would prejudice a party sought to be sanctioned by an

them to be without merit. Nephi City v. Hansen, 779 P.2d 673, 676 (Utah 1989).

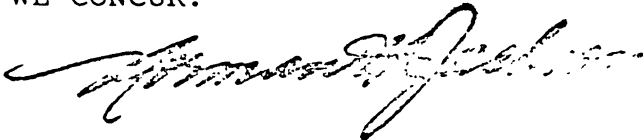
VII. CONCLUSION

The Johnsons' claims on appeal are without merit. Accordingly, we affirm the Division's final agency order suspending the Johnsons' registration for one year and placing the Johnsons on two years probation subsequent to their suspension.

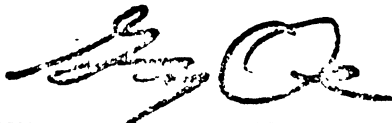


Leonard H. Russon, Judge

WE CONCUR:



Norman H. Jackson, Judge



Gregory K. Orme, Judge

OCTOBER 29, 1990, FINAL AGENCY ACTION OF
THE EXECUTIVE DIRECTOR OF THE DEPARTMENT
OF COMMERCE

EXHIBIT "3"

BEFORE THE
DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF
THE REGISTRATION OF:
JOHNSON-BOWLES COMPANY, INC.

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ORDER ON REVIEW

CASE NO. SD-89-46BD

IN THE MATTER OF
THE REGISTRATION
OF: MARLEN VERNON JOHNSON

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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.

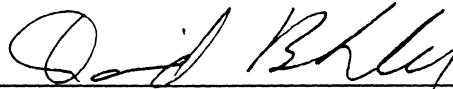
CONCLUSIONS OF LAW

24. A review of the record indicates that there were sufficient disputed issues that denial of the motion for summary judgement was not erroneous.

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)

Mark Griffin, Assistant A.G.
115 State Capitol
Salt Lake City, Utah 84114
(BUILDING MAIL)

Craig S. McCullough
Callister, Duncan & Nebeker
Kennecott Building
8th Floor
10 East South Temple
Salt Lake City, Utah 84133



THE AUGUST 10, 1990, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER OF THE
SECURITIES ADVISORY BOARD SIGNED BY THE
DIRECTOR OF DIVISION

EXHIBIT "4"

**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.

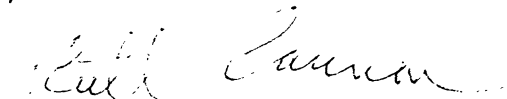
ORDER

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.

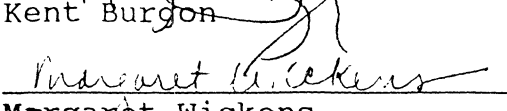
Dated this 10th day of August, 1990.



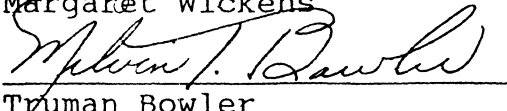
Keith Cannon



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

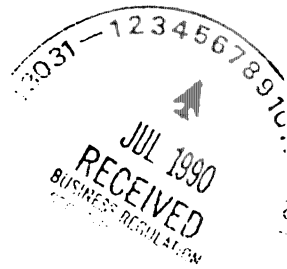
Administrative Review of this Order may be obtained by filing a Request for Review within thirty (30) days after the issuance of this Order. Any request for a review shall comply with the requirements set forth in Sections 61-1-23, 63-46b-12(1) and the departmental rules which govern agency review.

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.

THE STIPULATION OF FACTS FOR PURPOSES
OF HEARING (WITH SUPPORTING AFFIDAVITS)

EXHIBIT "5"

JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
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.

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.

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

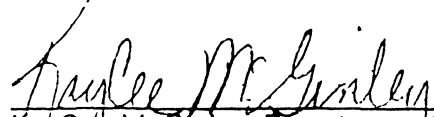
resident Paul Jones. Such individuals were also aware of Judge Greene's ruling and the Division's March 1989 Orders. Further, both individuals are registered representatives with the National Association of Securities Dealers, Inc., ("NASD") and prior to the Division's March 1, 1989, order, Paul Jones, 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.

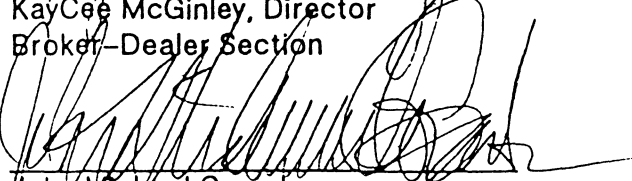
15. During April, 1989, respondent Marlen V. Johnson was informed by one Karl Smith that a Mr. John Dawson had stock of U.S.A. Medical that Smith thought Dawson was desirous of selling. Based on Mr. Johnson's conversation with Mr. Smith, Mr. Johnson contacted Mr. Dawson to determine if he was interested 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>

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.

NOV 1989
RECEIVED
BUSINESS REGULATION
SECURITIES DIVISION
STATE OF UTAH

IN THE MATTER OF THE REGISTRATION OF:	:	AFFIDAVIT OF LEO PAVICH
	:	
	:	
JOHNSON-BOWLES COMPANY, INC.	:	
	:	
	:	
CRD NO. 07678	:	Case No. SD-89-46BD
	:	
<hr/>		
IN THE MATTER OF THE REGISTRATION OF:	:	
	:	
	:	
	:	
MARLEN VERNON JOHNSON	:	Case No. SD-89-47AG
	:	
	:	
CRD NO. 2598888	:	
	:	

Leo Pavich on his oath deposes and says as follows:

2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

- 1 -

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve involve the payment of a commission to anyone.

3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

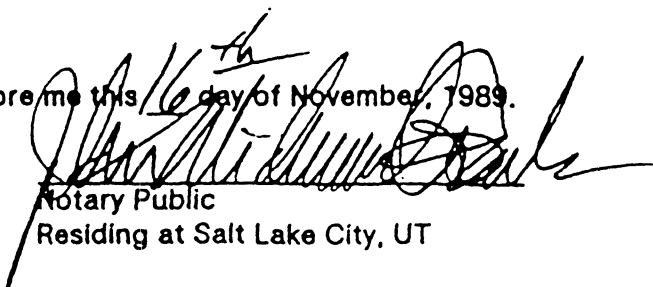
DATED this 16 day of November, 1989.



Leo Pavitch

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson, Case
Nos. SD-89-46BD and SD-89-47AG
AFFIDAVIT OF LEO PAVICH

SUBSCRIBED and SWORN to before me this 16th day of November, 1989.


Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.10

20 June 1989

To Whom It May Concern:

RE: 67,500 shares U.S.A. Medical Corp., .145¢ per share, \$9,787.50

my

LEO PAUICH

I, , sold U.S.A. Medical Corp. shares to Marlen Johnson. I was aware of Judge J. Thomas Greene's court ruling concerning U.S.A. Medical dated February 28, 1989; as well as being aware of the State of Utah's pending actions against Marlen Johnson and Johnson-Bowles Co., Inc.

Sincerely yours,

my

Leo Pauich
LEO PAUICH

JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
Attorney for Respondents



BEFORE THE SECURITIES DIVISION
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF THE REGISTRATION	:	AFFIDAVIT OF RICHARD SAX
OF:	:	
	:	
JOHNSON-BOWLES COMPANY, INC.	:	
	:	
CRD NO. 07678	:	Case No. SD-89-46BD
	:	

IN THE MATTER OF THE REGISTRATION	:	
OF:	:	
	:	
MARLEN VERNON JOHNSON	:	Case No. SD-89-47AG
	:	
CRD NO. 2598888	:	
	:	

STATE OF UTAH)
)ss.
SALT LAKE COUNTY)

Richard Sax on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.

2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

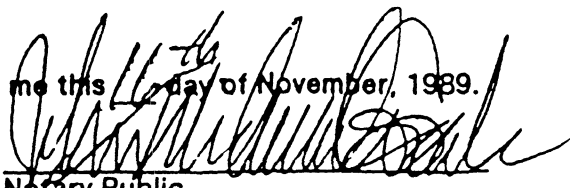
DATED this 16TH day of November, 1989.



Richard Sax

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson
Case Nos. SD-89-46BD and SD-89-47AG
AFFIDAVIT OF RICHARD SAX

SUBSCRIBED and SWORN to before me this 16th day of November, 1989.



Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.2

May 16, 1989

To Whom It May Concern:

I, Richard Sax, offered to sell my U.S.A. Medical stock to Marlen Johnson. At no time, did Marlen Johnson solicit me to sell him my stock.

Very truly yours,

Richard Sax

Richard Sax

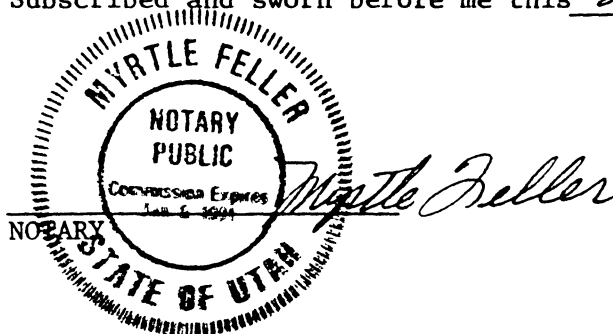
Blaine Jettas

Witness

5/23/89

Date

Subscribed and sworn before me this 23 day of May 1989.



6/18/89

TO WHOM IT MAY CONCERN.

RE U.S.A. MEDICAL CORP.

500 SHARES @ 12¢ \$600.00

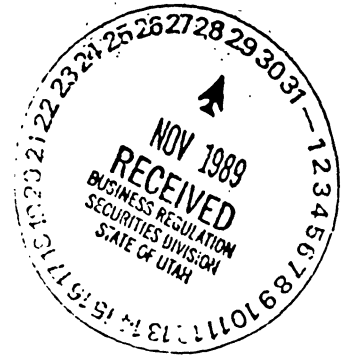
I RICHARD SAX SOLD U.S.A. MEDICAL CORP. SHARES TO
MARLEN JOHNSON.

I WAS AWARE OF JUDGE J. THOMAS GREEN'S COURT
RULING CONCERNING U.S.A. MEDICAL DATED FEB 28, 1989,
AS WELL AS BEING AWARE OF THE STATE OF UTAH'S
PENDING ACTIONS AGAINST MARLEN JOHNSON + JOHNSON-
BOWLES COMPANY, INC.

SINCERELY yours

Richard Sax

JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
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

AFFIDAVIT OF NICK JULIAN

Case No. SD-89-46BD

IN THE MATTER OF THE REGISTRATION
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

STATE OF UTAH)
)ss.
SALT LAKE COUNTY)

Nick Julian on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.

2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

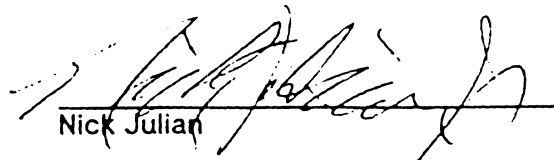
3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

FURTHER SAITH AFFIANT NAUGHT.

DATED this 14 day of November, 1989.


Nick Julian

0901189

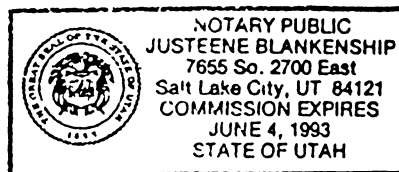
In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson
Case Nos. SD-89-46BD and SD-89-47AG
AFFIDAVIT OF NICK JULIAN

SUBSCRIBED and SWORN to before me this 16th day of November, 1989.

Justeene Blankenship
Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

J:AFDVT.9



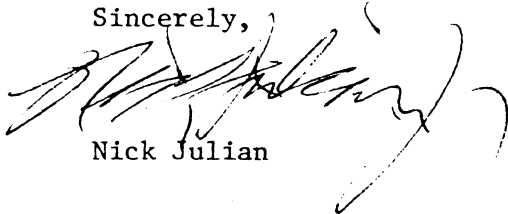
0001181

May 16, 1989

To Whom It May Concern:

I, Nick Julian, called Marlen Johnson to ask him if he would be interested in buying my USA Medical stock. I told him I wanted to sell 69,500 shares at .10¢ per share or \$6,950.00. I also told him that I was aware of the rulings of the State of Utah and Judge Greene's findings.

Sincerely,


Nick Julian

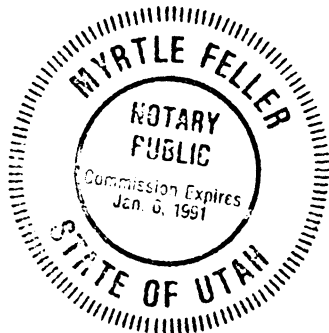
Jana Garsen
Witnessed by

5/23/89
Dated

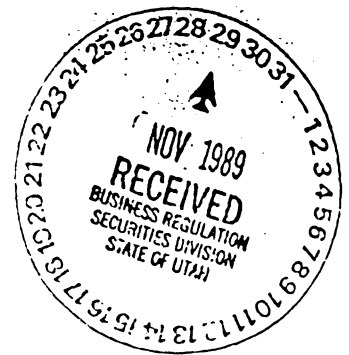
Subscribed and sworn to before me _____

on this 23 day of May 1989.

By Myrtle Feller



JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
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

AFFIDAVIT OF PHILLIP TANZINI

Case No. SD-89-46BD

IN THE MATTER OF THE REGISTRATION
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

STATE OF UTAH)
)ss.
SALT LAKE COUNTY)

Phillip Tanzini on his oath deposes and says as follows:

1. That the representation letter or letters I furnished Mr. Marlen V. Johnson
when I sold him stock of U.S.A. Medical is true and correct and it bears my signature.

2. That I was not "encouraged", "aided", "commanded", "counseled", or
"solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I

in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

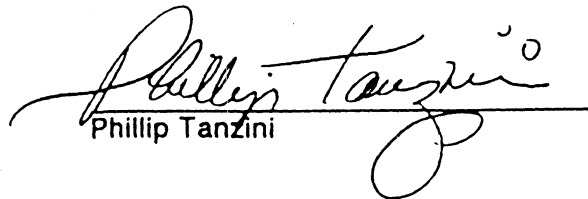
3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

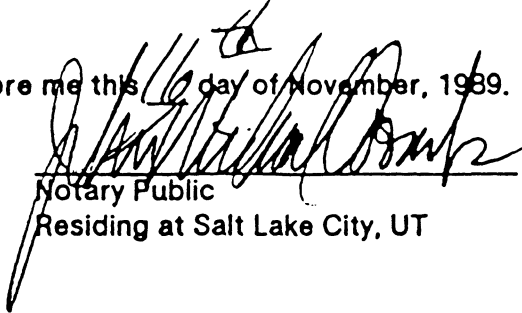
FURTHER SAITH AFFIANT NAUGHT.

DATED this 16 day of November, 1989.


Phillip Tanzini

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson,
Case Nos. SD-89-46BD and SD-89-47AG
AFFIDAVIT OF PHILLIP TANZINI

SUBSCRIBED and SWORN to before me this 16th day of November, 1989.



Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.11

7 June 1989

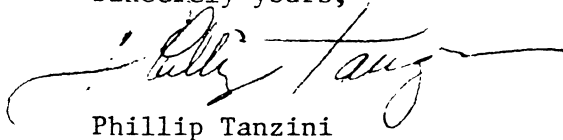
To Whom It May Concern:

RE: 20,000 shares U.S.A. Medical Corp. .30¢ per share

I, Phillip Tanzini, sold U.S.A. Medical Corp. shares to Marlen Johnson. I was aware of Judge J. Thomas Greene's court ruling concerning USA Medical dated February 28, 1989; as well as being aware of the State of Utah's action dated March 1, 1989.

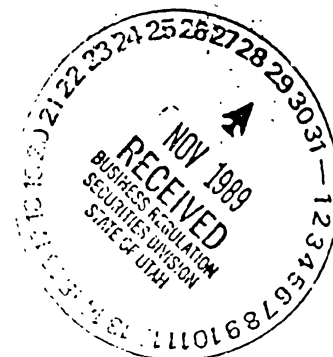
Marlen Johnson did not solicit me for shares. I contacted him and asked him if there was interest to buy shares of U.S.A. Medical stock to close open contracts with other broker-dealers.

Sincerely yours,

A handwritten signature in cursive script, appearing to read "Phillip Tanzini", with a long horizontal flourish extending to the right.

Phillip Tanzini

JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
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

AFFIDAVIT OF JIM COLEMAN

Case No. SD-89-46BD

IN THE MATTER OF THE REGISTRATION
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

Case No. SD-89-47AG

STATE OF UTAH)
)ss.
SALT LAKE COUNTY)

Jim Coleman on his oath deposes and says as follows:

1. That the representation letter I furnished Mr. Marlen V. Johnson when I sold him stock of U.S.A. Medical, is attached hereto and incorporated by reference and it is true and correct.

2. That I was not "encouraged", "aided", "commanded", "counseled", or "solicited" by Mr. Johnson or anyone else to sell the stock which I did in fact sell him. That I in fact sold such stock on my own initiative without any pressure from anyone. I also do not consider myself to have been a "customer" of Mr. Johnson or Johnson-Bowles, even if I previously had an account with Johnson-Bowles, as I consider the transaction to have been entirely private. This is also because the isolated transaction did not involve the payment of a commission to anyone.

3. That I purchased the U.S.A. Medical stock which I sold to Mr. Johnson without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and I paid valuable consideration at the time I purchased it. For this reason, I consider myself to have been a bona fide purchaser of such stock (giving me the right to sell it when I wanted and to whomever I wanted) and I was not acting by or on behalf of anyone else other than myself when I either purchased or when I sold such stock. I am also not affiliated nor have I ever been affiliated with U.S.A. Medical Corporation.

4. At the time I sold the stock in question to Mr. Johnson, such transaction was "suitable" to my investment or financial needs and objectives.

5. I have not received any additional compensation from Mr. Johnson or anyone else for my execution of this affidavit.

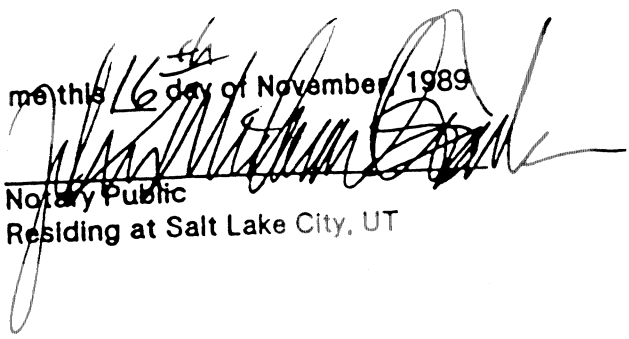
FURTHER SAITH AFFIANT NAUGHT.

DATED this 16 day of November, 1989.


Jim Coleman

In re: In the matter of Johnson-Bowles Company, Inc., and Marlen V. Johnson, Case
Nos. SD-89-46BD and SD-89-47AG
AFFIDAVIT OF JIM COLEMAN

SUBSCRIBED and SWORN to before me this 16th day of November, 1989



Notary Public
Residing at Salt Lake City, UT

My Commission Expires:

1/6/91

J:AFDVT.12

May 16, 1989

To Whom It May Concern:

RE: 30,000 shares U.S.A. Medical Corp/\$3,000.00

I, James Coleman, sold U.S.A. Medical Corp shares to Marlen Johnson. I was aware of Judge J. Thomas Greene's court ruling concerning U.S.A. Medical dated February 29, 1989 as well as being aware of the State of Utah's action dated March 1, 1989.

Marlen Johnson did not solicit me for shares. I contacted him and asked him if there was interest to buy shares of U.S.A. Medical stock to close open contracts with other broker-dealers.

Sincerely,

James Coleman

DIVISION'S MARCH 1, 1989, SUMMARY ORDER

EXHIBIT "6"

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

DIVISION'S MARCH 27, 1989, "PERMANENT
ORDER BY DEFAULT"

EXHIBIT "7"

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.

FN00432.21

Entity	333417
Person	

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

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

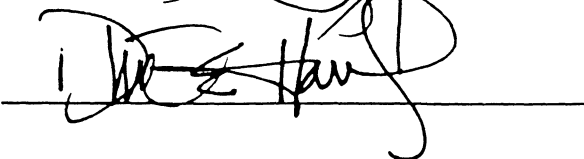
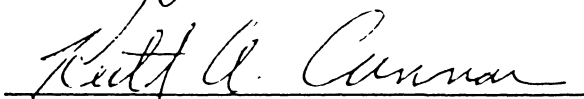
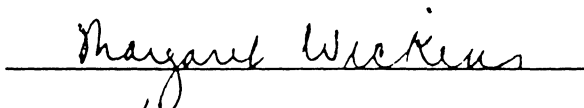


**DAVID L. BUHLER
EXECUTIVE DIRECTOR**

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.



DIVISION'S AMENDED PETITIONS DATED
JULY 19, 1989

EXHIBIT "8"

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

THE JOHNSONS' AMENDED ANSWER AND COUNTERCLAIM
EXHIBIT "9"

JOHN MICHAEL COOMBS, ESQ., No. 3639
72 East 400 South, Ste. 220
Salt Lake City, UT 84111
Telephone: (801) 359-0833
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

:
:
:
:
:
:
:

AMENDED ANSWER AND
COUNTERCLAIM

Case No. SD-89-46BD

IN THE MATTER OF THE REGISTRATION
OF:

MARLEN VERNON JOHNSON

CRD NO. 2598888

:
:
:
:
:
:
:

Case No. SD-89-47AG

Respondents herewith respond to the amended petitions in the above matters,
affirmatively allege, and counterclaim against the Division as follows.

ANSWER

1. Respondents deny ¶1 of the amended petitions in that the Division does not
have any jurisdiction over these proceedings.

2. Respondents admit ¶2 as a blanket statement of the law taken out of
context but allege that §61-1-6(1)(g), Utah Code Ann., and the rules promulgated

thereunder based on NASD rules and NASAA Guidelines, are inapplicable to these proceedings and the conduct of Respondents.

3. Respondents admit ¶13 of the amended petitions. Respondents deny ¶14 to the extent that Respondent Marlen V. Johnson was acting at all times relevant to this action as an individual and not as either a securities principal or agent.

4. Respondents deny ¶15 in that Respondent Johnson-Bowles was effecting transactions in the securities of U.S.A. Medical in January, 1989, not 1988.

5. Respondents deny ¶16 of the amended petitions to the extent that such was the sole purpose of Respondents' filing of a federal lawsuit ultimately assigned to Judge J. Thomas Greene. On the contrary, the primary reason Respondent Johnson-Bowles filed the federal action was to have a U.S. District Court declare Respondents' outstanding Exchange Act contracts void for illegality -- something the Court ultimately declined to do on February 28, 1989.

6. Respondents admit ¶17 of the amended petitions but allege that such is not the full extent of Judge Greene's ruling in Case No. C-89-157-G and ¶17 is thus misleading to the extent that it is taken out of context. What Judge Greene essentially ruled relative to these proceedings was that Respondents' outstanding Exchange Act contracts were neither "void" nor "voidable" and therefore, Respondents would be required by law to purchase enough U.S.A. Medical stock, as they ultimately did, to complete such interstate contracts previously entered into in the course of their Exchange Act business.

7. Respondents admit ¶18 of the amended petitions to the extent that the Division's Order of March 1, 1989, revoked the availability of exemptions in Utah only for the offer and sale of U.S.A. Medical stock. The Order, however, either legally, or by its own

terms, is irrelevant to and otherwise has no effect whatsoever on purchases of U.S.A. Medical stock by anyone as a matter of law. Respondents do not recall whether the Order was "hand-delivered" to them or not on March 1, and whether it was or not, such Order, by its own unambiguous terms, does not and did not put Respondents on either actual or constructive notice that their subsequent purchase of U.S.A. Medical stock to fulfill Exchange Act obligations would, or could, result in the instant proceedings. As to whether the March 1, Order has been in effect continuously since its issuance, this is debatable and therefore denied.

8. Respondents have no personal knowledge of that contained in ¶9 of the amended petitions and therefore, they deny the same. They also have no recollection of whether a Notice of Agency Action and Petition was mailed to them by the Division on either March 2, 1989, or at all.

9. Respondents have no personal knowledge of that contained in ¶'s 10 and 11 and therefore, on that ground, deny the same.

10. Relative to ¶12a, Respondent Johnson admits that he called John Dawson but such only occurred after he was informed by one Karl Smith that Dawson was anxious to sell his "worthless" U.S.A. Medical stock to anyone who wanted to buy it. The remainder of ¶12a is inaccurate and irrelevant to these proceedings as a matter of law and therefore, the same is denied.

11. Respondents deny ¶'s 12b–12f of the amended petitions insofar as they are inconsistent with various Representation Letters furnished Respondents by each of their sellers, true and correct copies of which were similarly furnished the Division and the Administrative Law Judge at the hearing on Respondents' Rule 12(b)(1) Motion to Dismiss.

Such Representation Letters and their respective contents are incorporated herein by reference. In particular, however, Respondents deny the applicability and relevance of all of ¶12 to these proceedings.

12. Paragraphs 13 and 23 of the amended petitions do not call for a response.

13. Respondents admit ¶14 of the amended petitions to the extent such an order would be "in the public interest" but deny that any part or portion of these proceedings are either "in the public interest" or in the interests of public policy. Respondents thus deny this allegation and allege that these entire proceedings are against both "the public interest" and public policy.

14. Respondents deny ¶15 of the amended petitions in that it is an inaccurate and misleading statement of the law relative to the facts of this case. Whether the "sales" to Respondents were unlawful or not in and of themselves is irrelevant to whether or not Respondents, as purchasers, have any legal liability or otherwise did anything wrong or remotely improper in their capacities as broker-dealers and agents.

15. Respondents deny ¶'s 16 and 17 of the amended petitions.

16. There are no ¶'s 18–22, inclusive, in the amended petitions calling for an answer or response.

17. Respondents admit ¶'s 24 and 25 of the amended petitions as blanket statements of the law taken out of context, but deny their applicability in any respect to the instant proceedings.

18. Respondents deny ¶'s 26 and 27 of the amended petitions.

WHEREFORE, Respondents pray for an "adversary adjudication" as contemplated in the Equal Access to Justice Act and an order of no cause in their favor on

both Counts I and II of the amended petitions. Respondents further pray for an award of all costs, expenses, and attorney's fees in accordance with Rule 11, §78-27-56, Utah Code Ann., as amended, and as otherwise fully contemplated in the Equal Access to Justice Act.

AFFIRMATIVE DEFENSES

1. The Division lacks subject-matter jurisdiction over these proceedings and as otherwise contemplated in Rule 12(b)(1), Utah Rules of Civil Procedure.

2. The amended petitions fail to state any claim on which relief may be granted and as otherwise contemplated in Rule 12(b)(6), Utah Rules of Civil Procedure.

3. The amended petitions fail to state a claim and are otherwise barred for each and every reason conceivably contemplated in and by any and all pleadings heretofore filed by Respondents in these proceedings, the contents of which are each and all incorporated herein by reference.

4. The amended petitions are barred by the doctrines of waiver and estoppel.

5. The amended petitions are barred by their own unlawfulness and illegality.

6. The amended petitions are barred by the illegal conduct, bad faith, and overall malicious and improper motives of employees of the Division.

7. The amended petitions are barred in that they have unlawfully damaged Respondents in their business and reputations. Such amended petitions have further deprived Respondents of liberty and property by individuals acting under color and power of state law based upon powers granted to them as a result of their employment by the state.

8. The amended petitions fail to state a claim and are otherwise barred by virtue of a No-Action Letter of the Division relative to U.S.A. Medical addressed to Utah securities agent Susan Slattery and Utah broker-dealer P.B. Jameson dated August 9, 1989,

a true and correct copy of which is attached hereto and incorporated by reference as Exhibit "A". Such Letter completely undermines the Division's March 1989, Orders in that it creates an "unsolicited order" or trading exemption in the securities of U.S.A. Medical for a Utah broker-dealer and agent. Such Letter is further inconsistent as a matter of law with the instant amended petitions in that such Letter authorizes the very same conduct that is proscribed and attributed to Respondents in the amended petitions. Such Letter -- a policy statement of the Division directed solely to certain privileged individuals -- is thus further evidence that the amended petitions violate various constitutional rights guaranteed Respondents and as otherwise set forth in their Memorandum in Support of their Rule 12(b)(6) Motion to Dismiss on file herein.

In addition, the foregoing No-Action Letter, Exhibit "A" hereto, ironically puts the Division in the untenable and precarious position of aiding and abetting the so-called "U.S.A. Medical Co-Conspirators" identified in the Judge Greene litigation. This is because Susan Slattery has been named as a co-defendant in the class action securities fraud, racketeering, and insider trading case identified as Arena Land & Investment Co., Inc., et al. v. Petty, Strand, Global Oil, Slattery, et al., U.S. District Court Case No. 89-C-144-S, a true and correct copy of which is attached hereto and incorporated by reference as Exhibit "B". In such case, Susan Slattery is an alleged co-conspirator in the U.S.A. Medical stock fraud and market manipulation. See ¶48, page 23 and ¶280, page 85 of Exhibit "B" hereto. Reference is also made to Respondents' Memorandum of Law in Support of their Rule 12(b)(6) Motion dated September 27, 1989, pages 16 and 17 thereof, which makes reference to P.B. Jameson and its alleged participation in the U.S.A. Medical fraud, even after March 1. Thanks to the Division's secret No-Action Letter (which Respondents only discovered on

September 29, by accident), Slattery, P.B. Jameson, convicted felon Michael William Strand, and any and all other U.S.A. Medical Co-Conspirators have been given a state license to engage in "dishonest and unethical practices" by distributing its "unsuitable" stock out-of-state in obvious furtherance of the U.S.A. Medical fraudulent scheme. The foregoing is significant in that it demonstrates not only that the Division does not know what "in the public interest" means but that it is otherwise discriminating against Respondents in violation of 42 U.S.C. §1983 and otherwise.

9. The amended petitions fail to state a claim and are otherwise barred in that Respondents have now completed their Exchange Act contracts and there is no showing that the conduct complained of will or may occur in the future or, that it is otherwise capable of being repeated by Respondents. Therefore, the entire case is moot. This defense is consistent with the weight of authority which holds that the SEC cannot obtain an injunction or issue a cease and desist order without an adequate showing of not only irreparable harm but a substantial showing that the conduct complained of is highly likely to occur in the future. Since revocation is on the nature of an injunction, the same principles apply in these proceedings.

10. The amended petitions fail to state a claim and are otherwise barred in that Respondents did not need the protection of the securities laws in purchasing U.S.A. Medical stock from certain individuals who arguably lacked exemptions. SEC v. Ralston Purina Co., 346 U.S. 119 (1953)(holding that securities laws are inapplicable to a person who does not need the protection afforded by them).

11. The amended petitions are violative of or otherwise invoke Rule 11 of the Utah Rules of Civil Procedure, Section §78-27-56, Utah Code Ann., and the Equal Access to

Justice Act ("EAJA"), 5 U.S.C. §504, "Costs and Fees of Parties", Fed. Sec. L. Rep., Vol. 5, ¶60,104, as amended, effective August 5, 1985, Sec. 1, Public Law 99-80, 99 Stat. 183.

Based on the violation or applicability of the authority referred to in this paragraph, Respondents are entitled to reimbursement of all costs, expenses, and attorney's fees incurred in connection with these unlawful proceedings.

12. The Division's amended petitions fail to state a claim upon which relief may be granted because the Division has no power or authority to summarily suspend all exemptions from registration under §61-1-14(2), Utah Code Ann., particularly when not even the U.S. Securities and Exchange Commission has such power or authority to suspend all exemptions under the Securities Act of 1933. In the alternative, it is an abuse of agency discretion under the circumstances for the Division to have suspended all §14(2) exemptions, even if the Division had such power or authority, which it does not. Further, the Division's findings of fact relative to their March, 1989 Orders do not support the wholesale and ruthless suspension of all §14(2) exemptions from registration under the Utah Uniform Securities Act.

13. The Division's amended petitions fail to state a claim because Respondents' sellers had "exemptions" regardless of the Division's March, 1989, Orders. This is because such sellers were "bona fide purchasers" who acquired their U.S.A. Medical stock in good faith, without notice of any "adverse claims" as contemplated in Article 8 of the Uniform Commercial Code and otherwise, they paid value. The Division thus cannot prohibit the sale of such stock to Respondents and this exemplifies the Division's regulatory overreaching with respect to its March 1989 Orders. The burden is also on the Division in these proceedings to prove that Respondents' sellers were not "bona fide purchasers" of

the U.S.A. Medical stock in issue or that Respondents themselves were not "bona fide purchasers".

COUNTERCLAIM

1. Respondents incorporate each and every allegation hereinabove as if each were set forth more fully hereafter verbatim.

2. The original and amended petitions have been brought and filed in violation of Rule 11 of the Utah Rules of Civil Procedure and §78-27-56, Utah Code Ann.

3. These proceedings have been brought for an improper purpose and are based on personal, malicious, vindictive, and retaliatory motives on the part of Division employees and personnel.

4. Respondents have been deprived of liberty and property as a result of the instant proceedings.

5. Respondents have been substantially damaged in their business and reputations by the initiation of the instant proceedings.

6. Respondents have incurred substantial unwarranted and unnecessary attorney's fees, expenses, and costs in being required to defend the instant proceedings.

7. As a direct and proximate result of these proceedings, Respondents have been substantially damaged as aforesaid.

8. Neither the Division nor any of its personnel, including the Utah Attorney General, has statutory immunity or any lawful exemption from the operation of either Rule 11, §78-27-56, Utah Code Ann., or the spirit of the Equal Access to Justice Act.

9. The equity and other powers and authorities of this court enable it to make the type of award to Respondents, if warranted, as specifically contemplated in the Equal

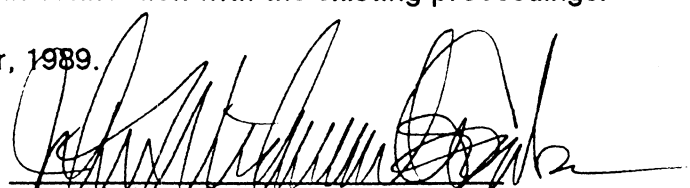
Access to Justice Act, regardless of whether said Act directly applies to these particular proceedings. The spirit of such Act therefore does and should apply to these proceedings regardless.

10. The amended petitions have not been brought with a reasonable investigation of the facts or the law, nor have they been brought after a reasonable inquiry into whether the allegations contained therein are well grounded in fact or whether they are otherwise warranted by existing law or a good faith argument for the modification or reversal of existing law.

11. These proceedings have been brought by the Division and its personnel in bad faith.

WHEREFORE, Respondents pray for an award of all costs, expenses, and attorney's fees incurred by them in any respect in connection with the existing proceedings.

DATED this 21st day of November, 1989.


John Michael Coombs
Attorney for Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 21st day of November, 1989, (s)he mailed a true and correct copy of the foregoing AMENDED ANSWER AND COUNTERCLAIM with attendant Exhibits 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 and Presiding Officer J. Stephen Eklund, Esq., Department of Commerce, 160 East 300 South, P.O. Box 45802, Salt Lake City, Utah 84145-0802; Mark J. Griffin, Esq., Assistant Attorney General, 115 South State Capitol, Salt Lake City, Utah 84114; and to 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.

J:ANSWER.1-3

UTAH CODE ANN. §61-1-6(1)(g) effective 1989

EXHIBIT "10"

COLLATERAL REFERENCES

~~Am. Jur. 2d. — 69 Am. Jur. 2d. Securities Key Numbers — 1872(37); Se-
Regulation — State § 18. curities Regulation — 272.
C.J.S. — 79 C.J.S. Supp. Securities Regula-
tion § 236.~~

61-1-6. Denial, suspension, or revocation of registration — Grounds — Procedure — Examination.

(1) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue an order denying, suspending, or revoking any agent, broker-dealer, or investment adviser registration if he finds that the order is in the public interest and that 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:

(a) filed an application for registration that 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) 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 executive director or any predecessor denying, suspending, or revoking registration as a broker-dealer, agent, or investment adviser;

(f) (i) is the subject of an order entered within the past five years by the securities administrator of any other state or by the Securities and Exchange Commission denying or revoking registration as a broker-dealer, agent, or investment adviser, or the substantial equivalent of those terms as defined in this chapter, 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.

(ii) The division may not institute a revocation or suspension proceeding under this Subsection (f) more than one year from the date of the order relied on, and the executive director may not enter an order under this Subsection (f) on the basis of an order under another state act unless that order was based on facts that would currently constitute a ground for an order under this section;

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

(h) is insolvent, either in the sense that his liabilities exceed his assets or in the sense that he cannot meet his obligations as they mature. However, the executive director may not enter an order against a broker-dealer or investment adviser under this Subsection (h) without a finding of insolvency as to the broker-dealer or investment adviser; or

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

(2) (a) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may issue an order denying, suspending, or revoking any registration, if he finds that the order is in the public interest and that the applicant or registrant:

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

(ii) has failed to pay the proper filing fee.

(b) The division may enter a denial order under this subsection, but shall vacate the order when the deficiency has been corrected.

(c) 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 30 days.

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

(a) The executive director may not enter an order against a broker-dealer on the basis of the lack of qualification of any person other than the broker-dealer himself if he is an individual or an agent of the broker-dealer.

(b) The executive director may not enter an order against an investment adviser on the basis of the lack of qualification of any person other than the investment adviser himself if he is an individual or any other person who represents the investment adviser in doing any of the acts which make him an investment adviser.

(c) The executive 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 executive 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.

(e) The executive 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 initial or renewal registration as a broker-dealer is not qualified as an investment adviser, he may by order condition the applicant's registration as a broker-dealer upon his not transacting business in this state as an investment adviser.

(f) The division shall by rule provide for examinations, which may be written or oral or both, to be taken by all applicants.

(4) The division may take emergency action with respect to registration applications according to the procedures and requirements of Chapter 46b, Title 63.

(5) If the division finds that any registrant or applicant for registration is no longer in existence, has ceased to do business as a broker-dealer, agent, or

investment adviser, 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 by order cancel the registration or application according to the procedures and requirements of Chapter 46b, Title 63.

(6) (a) Withdrawal from registration as a broker-dealer, agent, or investment adviser becomes effective 30 days after receipt of an application to withdraw or within such shorter period of time as the division may determine, unless a revocation or suspension proceeding is pending when the application is filed or a proceeding to revoke or suspend or to impose conditions upon the withdrawal is instituted within 30 days after the application is filed.

(b) If a proceeding is pending or instituted, the division shall designate by order when the withdrawal becomes effective.

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

(ii) If the division decides to issue a revocation or suspension order, the executive director shall enter the order as of the last date on which registration was effective.

(7) The division, board, and executive director shall comply with the procedures and requirements of Chapter 46b, Title 63, before issuing any order under any part of this section.

History: C. 1953, 61-1-6, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 9; 1987, ch. 161, § 233.

Amendment Notes. — The 1987 amendment, effective January 1, 1988, rewrote Subsection (4) to such an extent as to make a detailed analysis impracticable; in Subsection (5) added "according to the procedures and requirements of Chapter 46b, Title 63"; in Subsection (6) added the internal subsection designations and in Subsection (b) substituted "the division shall designate by order when the

withdrawal becomes effective" for "withdrawal becomes effective at such time and upon such conditions as the division by order determines"; rewrote Subsection (7) to such an extent as to make a detailed analysis impracticable; and made minor changes in style and phraseology throughout the section.

Securities Exchange Act of 1934. — The federal Securities Exchange Act of 1934, referred to in Subsection (1)(f), appears as 15 U.S.C. § 78a et seq.

NOTES TO DECISIONS

Scope of inquiry.

Commission had authority to inquire into applicant's or registrant's conduct with respect to unworthiness to carry on business that he or it was registered to carry on, irrespective of

fact that securities to which inquiry was specifically directed did not need to be registered. *Lauren W. Gibbs, Inc. v. Monson*, 102 Utah 234, 129 P.2d 887 (1942) (decided under former law).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 19 to 24.

C.J.S. — 79 C.J.S. Supp. Securities Regulation §§ 223 to 226.

A.L.R. — Churning: stockbroker's liability for allegedly "churning" or engaging customer's account in excessive activity, 32 A.L.R.3d 635.

Law practice: what activities of stock or se-

curity broker constitute unauthorized practice of law, 34 A.L.R.3d 1305.

Mistake: effect, as between stockbroker and customer, of broker's mistaken sale of stock or other security other than that intended by customer, 48 A.L.R.3d 513.

Key Numbers. — Licenses ⇌ 18½ (38), 38; Securities Regulation ⇌ 270, 274, 277.

DIVISION RULE R177-6-1g effective 1989

EXHIBIT "11"

be prepared and filed in accordance with the following requirements:

(A) The financial statements shall be certified by an independent certified public accountant or an independent public accountant.

(B) The audit shall be made in accordance with generally accepted auditing standards; the examination shall include a review of the accounting system, the internal accounting controls and procedures for the safeguarding of securities and funds including appropriate tests thereof since the prior examination.

(C) The audit shall be accompanied by an unqualified opinion of the accountant as to the financial condition. In addition, the accountant shall submit as a supplementary opinion any comments, based upon the audit, as to any material inadequacies found to exist in the accounting system, the internal accounting controls and procedures for safeguarding securities and shall indicate any corrective action taken or proposed.

(3) The financial statements required by this section shall be filed within 90 days following the end of the broker-dealer's fiscal year.

(b) *Investment Adviser Required Financial Reports.* (1) Every investment adviser who has custody or possession of client's funds or securities or requires payment of advisory fees six months or more in advance and in excess of \$500 per client shall file with the Division audited financial statements as of the end of the investment adviser's fiscal year.

(2) Each financial statement filed pursuant to this section shall be prepared and filed in accordance with the following requirements:

(A) The audit shall be certified by an independent certified public accountant or independent public accountant.

(B) The audit shall be made in accordance with generally accepted auditing standards; the examination shall include a review of the accounting system, the internal accounting controls and procedures for the safeguarding of securities and funds including appropriate tests thereof since the prior examination.

(C) The audit shall be accompanied by an unqualified opinion of the accountant as to the report of financial condition. In addition, the accountant shall submit as a supplementary opinion any comments based upon audit, as to any material inadequacies found to exist in the accounting system, the

internal accounting controls and procedures for safeguarding securities and funds, and shall indicate any corrective action taken or proposed.

(3) The financial statements required by this section shall be filed with the Division within 90 days following the end of the investment adviser's fiscal year.

[Adopted eff. 2-15-86.]

[§ 57,403]

R177-6-1g. Rules of conduct for broker-dealers, investment advisers and agents.

Preliminary Notes: 1. R177-6-1g is intended to define certain acts and practices which the Utah Securities Division (the "Division") deems violative of Section 6(1)(g) of the Utah Uniform Securities Act (the "Act"). The list contained herein should not be considered to be all-inclusive of acts and practices which violate that section, but rather is intended to act as a guide to broker-dealers and agents as to the types of conduct which are prohibited.

2. Broker-dealers and agents are reminded that conduct which violated Section 1 of the Act may also be considered to violate Section 6(1)(g) under certain circumstances.

3. This Rule is patterned after well-established standards in the industry which have been adopted by the Securities and Exchange Commission, the NASD, NASAA, the national exchanges and various courts. It represents one of the purposes of the securities laws: to create viable securities markets in which those persons involved are held to a high standard of fairness with respect to their dealings with the public.

(a) *Broker-Dealers.* The following acts and practices, when performed by a broker-dealer or a person over whom the broker-dealer has supervisory authority, are considered contrary to Section 6(1)(g) of the Utah Uniform Securities Act and may constitute grounds for denial, suspension or revocation of registration.

(1) Engaging in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers and/or in the payment, upon request, of free credit balances reflecting completed transactions of any of its customers.

(2) Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account.

(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 rea-

sonable inquiry concerning the customer's investment objectives, financial situation and needs, and any other relevant information known by the broker-dealer.

(4) Executing a transaction on behalf of a customer without prior authorization to do so.

(5) Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders.

(6) Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account.

(7) Failing to segregate customers' free securities or securities held in safekeeping.

(8) Hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by the rules and regulations of the United States Securities and Exchange Commission.

(9) Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

(10) Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus.

(11) Charging fees for services without prior notification to a customer as to the nature and amount of the fees.

(12) Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business.

(13) Offering to buy from or sell to any person any security at a stated price unless such broker-dealer is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell.

(14) Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless such broker-dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created or controlled by such broker-dealer, or by any person for whom he is acting or with whom he is associated in such distribution, or any person controlled by, controlling or under common control with such broker-dealer.

(15) Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:

(A) Effecting any transaction in a security which involves no change in the beneficial ownership thereof;

(B) Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this subsection (B) shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers; or

(C) Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(16) Guaranteeing a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer.

(17) Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which: (A) purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale of such security; or (B) purports to quote the bid price or asked price for any security, unless such broker-

dealer believes that such quotation represents a bona fide bid for, or offer of, such security.

(18) Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure.

(19) Failing to disclose to a customer that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, and if such disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction.

(20) Failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member.

(21) Failure or refusal to furnish a customer, upon reasonable request, information to which he is entitled, or to respond to a formal written request or complaint.

(22) Permitting a person to open an account for another person or transact business in such account unless there is on file written authorization for such action from the person in whose name the account is carried.

(23) Permitting a person to open or transact business in a fictitious account.

(24) Permitting an agent to open or transact business in an account other than his own, unless disclosed in writing (to include the reason therefor) to the broker-dealer or issuer he represents.

(b) *Agents.* The following acts and practices, when performed by agents of broker-dealers or agents of issuers, are considered contrary to Section 6(1)(g) of the Utah Uniform Securities Act and may constitute grounds for denial, suspension or revocation of registration.

(1) Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer.

(2) Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, in the case of agents of broker-dealers, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction.

(3) Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited.

(4) Sharing directly or indirectly in profits or losses in the account of any customer without the prior written authorization of the customer and the broker-dealer which the agent represents.

(5) Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control.

(6) Engaging in conduct specified in subsection (a)(2), (a)(3), (a)(4), (a)(5), (a)(6), (a)(9), (a)(10), (a)(15), (a)(16), (a)(17), or (a)(18).

[§ 57,404]

R177-9-1. Registration by coordination. (a) *Who May File.* Any security for which a registration statement or a notification under Regulation X has been filed under the Securities Act of 1933 in connection with the same offering may be registered by coordination pursuant to Section 9 of the Utah Uniform Securities Act (the "Act").

(b) *Documents to Be Filed.* Applicant shall file one copy each of the following and the appropriate fee pursuant to R177-18-4:

(1) Uniform consent to service of process;

(2) One copy of the disclosure statement, including exhibits, together with all amendments as filed with the Securities and Exchange Commission under the Securities Act of 1933;

(3) An application on Form U-1 which contains the undertaking required by Section 9(1)(d) of the Act.

(c) *Additional Documents.* The applicant shall provide to the Division any additional

SECTION 1401-1404 OF THE NATIONAL ASSOCIATION
OF THE SECURITIES ADMINISTRATORS ASSOCIATION
("NASAA") GUIDELINES (CCH)

EXHIBIT "12"

DISHONEST OR UNETHICAL BUSINESS PRACTICES

Adopted on April 23, 1983

[¶ 1401]

[HIGH STANDARDS AND JUST PRINCIPLES.] Each broker-dealer and agent shall observe high standards of commercial honor and just and equitable principles of trade in the conduct of their business. Acts and practices, including but not limited to the following, are considered contrary to such standards and may constitute grounds for denial, suspension or revocation of registration or such other action authorized by statute.

[¶ 1402]

1. BROKER-DEALERS

- a. Engaging in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers and/or in the payment upon request of free credit balances reflecting completed transactions of any of its customers;
- b. Inducing trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account;
- c. 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;
- d. Executing a transaction on behalf of a customer without authorization to do so;
- e. Exercising any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time and/or price for the execution of orders;
- f. Executing any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account;
- g. Failing to segregate customers' free securities or securities held in safekeeping;
- h. Hypothecating a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by Rules of the Securities and Exchange Commission;
- i. Entering into a transaction with or for a customer at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit;
- j. Failing to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus;
- k. Charging unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of monies due for principal, dividends or interest, exchange or transfer of securities, appraisals,

safekeeping, or custody of securities and other services related to its securities business;

- l. Offering to buy from or sell to any person any security at a stated price unless such broker-dealer is prepared to purchase or sell, as the case may be, at such price and under such conditions as are stated at the time of such offer to buy or sell;
- m. Representing that a security is being offered to a customer "at the market" or a price relevant to the market price unless such broker-dealer knows or has reasonable grounds to believe that a market for such security exists other than that made, created or controlled by such broker-dealer, or by any person for whom he is acting or with whom he is associated in such distribution, or any person controlled by, controlling or under common control with such broker-dealer;
- n. Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:
 - (1) Effecting any transaction in a security which involves no change in the beneficial ownership thereof;
 - (2) Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; provided, however, nothing in this subsection shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers;
 - (3) Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others;
- o. Guaranteeing a customer against loss in any securities account of such customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for such customer;
- p. Publishing or circulating, or causing to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless such broker-dealer believes that such transaction was a bona fide purchase or sale of such security; or which purports to quote the bid price or asked price for any security, unless such broker-dealer believes that such quotation represents a bona fide bid for, or offer of, such security;
- q. Using any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement,

detract from, supersede or defeat the purpose or effect of any prospectus or disclosure; or

- r. Failing to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of such security, the existence of such control to such customer, and if such disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction;
- s. Failing to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member; or
- t. Failure or refusal to furnish a customer, upon reasonable request, information to which he is entitled, or to respond to a formal written request or complaint.

[¶ 1403]

2. AGENTS

- a. Engaging in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer;
- b. Effecting securities transactions not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transactions are authorized in writing by the broker-dealer prior to execution of the transaction;
- c. Establishing or maintaining an account containing fictitious information in order to execute transactions which would otherwise be prohibited;
- d. Sharing directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;
- e. Dividing or otherwise splitting the agent's commissions, profits or other compensation from the purchase or sale of securities with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control; or
- f. Engaging in conduct specified in Subsection 1.b, c, d, e, f, i, j, n, o, p, or q.

[¶ 1404]

[CONDUCT NOT INCLUSIVE.] The conduct set forth above is not inclusive. Engaging in other conduct such as forgery, embezzlement, non-disclosure, incomplete disclosure or misstatement of material facts, or manipulative or deceptive practices shall also be grounds for denial, suspension or revocation of registration.

[The next page is 1001.]

UTAH CODE ANN. §61-1-14(2) and (3) effective 1989

EXHIBIT "13"

Stock Guaranty Mfg. Co. v. Wilcox, 62 Utah 184, 218 P. 133, 30 A.L.R. 1324 (1933). "Sale" did not include a gift of stock because of use of words "for value." Therefore an agreement with a statistician to promote the disposition of such stock was not in violation of the Blue Sky Law. Fact that it was understood at

time of gift that there would be an assessment where donees were not liable to pay an assessment. *Andrews v. Chase*, 89 Utah 601, 49 P.2d 938 (1935), *aff'd on rehearing* in 89 Utah 73, 57 P.2d 702 (1936).

COLLATERAL REFERENCES

Utah Law Review. — Securities Law and the Franchise Agreement, 1980 Utah L. Rev. 311.

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 16, 26, 29, 31, 69 to 85, 102.

C.J.S. — 79 C.J.S. 80 pp. Securities Regulation §§ 201 to 291.

A.L.R. — Sales as "isolated" or "successive" or the like under state securities acts, 1 A.L.R. 3d 614.

Inter: who is "dealer" under state securities acts, 1 A.L.R. 3d 614; Securities Regulation §§ 248 to 269.

issuers not made in course of successive transactions, and the like, 6 A.L.R.3d 1425.

Investment contract: what constitutes an "investment contract" within the meaning of state Blue Sky Laws, 47 A.L.R.3d 1375.

"Common enterprise" element of Howey test to determine existence of investment contract regulable as "security" within meaning of federal Securities Act of 1933 (15 USCS §§ 77a et seq.) and Securities Exchange Act of 1934 (15 USCS §§ 78a et seq.), 90 A.L.R. Fed. 825.

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, or holding company which is subject to the jurisdiction of the Interstate Commerce Commission; a 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; regulated in respect of 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 Quotation System, the New York Stock Exchange, the American Stock Exchange, or on any other stock exchange or medium approved by the division, provided that the division may at any time suspend or revoke this exemption for any particular stock exchange, medium, security, or securities under Subsection 61-1-14(3); any other security of the same issuer which is of senior or substantially equal rank to any security so listed and approved by the division; 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) any security as to which the division, 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 if: (i) it is 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 has 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. The division 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 nontransferrable rights or warrants; (C) the exercise of transferrable 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;

(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 Utah Condominium Ownership Act, whether or not to be sold by installment contract, if the provisions of the Utah Condominium Ownership Act, or if the units are located in another state, the condominium act of that state, the Utah Uniform Land and Timeshare 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 as to which the division, by rule or order, finds that registration is not necessary or appropriate for the protection of investors.

(3) Upon approval by the executive director and a majority of the Securities Advisory Board, the executive director may by order deny or revoke any exemption specified in Subsection (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. No such order may be entered without appropriate prior notice to all interested parties, opportunity for hearing, and written findings of fact and conclusions of law, except that the division may by order summarily deny or revoke any of the specified exemptions pending final determination of any proceeding under this subsection. Upon the entry of a summary order, the division shall promptly notify all interested parties that it has been entered and of the reasons therefor and that within 15 business days of the receipt of a written request the matter will be set down for hearing. If no hearing is requested and none is ordered by the executive director or division, the order will remain in effect until it is modified or vacated by the executive director. If a hearing is requested or ordered, upon approval by the executive director and a majority of the Securities Advisory Board the executive director, after notice of and

opportunity for hearing to all interested persons, may affirm, modify, or vacate the order or extend it until final determination. The executive director may not extend any summary order for more than ten business days. No order under this subsection may operate retroactively. No person may be considered to have violated 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.

History: C. 1953, 61-1-14, enacted by L. 1963, ch. 145, § 1; 1979, ch. 218, § 5; 1983, ch. 284, § 17; 1987, ch. 92, § 106.

Amendment Notes. — The 1987 amendment corrected the statutory reference in Subsection (2)(j)(ii), substituted "Utah Uniform Land and Timeshare Sales Practices Act" for "Utah Uniform Land Sale Practices Act" in Subsection (2)(o), and made minor stylistic changes.

Federal law. — The federal acts cited in this section are codified as:

Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 et seq. For provisions regarding registration of holding companies, see 15 U.S.C. § 79e.

Investment Company Act of 1940, 15 U.S.C. § 80a-1 et seq. For definition of investment

company, see 15 U.S.C. § 80a-3. Section 20 of that act, referred to in Subsection (2)(p)(iii), appears as 15 U.S.C. § 80a-20.

Securities Act of 1933, 15 U.S.C. § 77a et seq.

Section 12(g)(1) of the Securities Exchange Act of 1934, referred to in Subsection (2)(p)(iii), appears as 15 U.S.C. § 78l(g)(1). Section 12(g)(2)(G) of that act appears as 15 U.S.C. § 78l(g)(2)(G). Sections 14(a) and (c) of that act appear as 15 U.S.C. §§ 78n(a) and (c).

Cross-References. — Condominium Ownership Act, § 57-8-1 et seq.

Utah Consumer Credit Code, § 70C-1-101 et seq.

Utah Uniform Land Sales Practices Act, § 57-11-1 et seq.

NOTES TO DECISIONS

ANALYSIS

Debentures of cemetery association.

Isolated transaction.

Stock dividends or distribution out of earnings.

Debentures of cemetery association.

Debentures of an incorporated cemetery association were not exempt from registration where the articles of incorporation did not contain language reasonably interpretable to categorize the corporation as one whose purpose was exclusively for educational, benevolent, fraternal, charitable, or reformatory pursuits. *State ex rel. Securities Comm'n v. Lake Hills*, 14 Utah 2d 14, 376 P.2d 540 (1962).

Isolated transaction.

The exchange by the incorporators of a min-

ing company of shares of stock for mining claims, where the transaction involved the simultaneous issuance of shares to the plaintiff and a third person, did not involve a transaction requiring registration because it was exempt as an isolated transaction. *Johnson v. Crail*, 11 Utah 2d 392, 360 P.2d 485 (1961).

Stock dividends or distribution out of earnings.

To claim exemption, it had to be shown that corporation was distributing shares to its shareholders as a stock dividend out of earnings or surplus, or that it was increasing its capital stock. *Harper v. Tri-State Motors, Inc.*, 90 Utah 212, 58 P.2d 18 (1936), rehearing denied, 90 Utah 226, 63 P.2d 1056 (1937) (decided under former law).

COLLATERAL REFERENCES

Brigham Young Law Review. — The Elusive Limited Offering Exemption of the Utah Uniform Securities Act, 1976 B.Y.U. L. Rev. 825.

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 69 to 85.

C.J.S. — 79 C.J.S. Supp. Securities Regulation §§ 201 to 221.

A.L.R. — Sales as "isolated" or "successive" or the like under state securities acts, 1 A.L.R.3d 614.

Dealer: who is "dealer" under state securities acts exempting sales by owners other than issuers not made in course of successive transactions, and the like, 6 A.L.R.3d 1425.

Who may exercise voting power of corporate

UTAH CODE ANN. §61-1-24 and §61-1-27

EXHIBIT "14"

NOTES TO DECISIONS

ANALYSIS

Construction and application.
Appealable judgments, orders and decrees.
Jurisdiction of court.
Presumptions as to court order.
Who may appeal.

Construction and application.

The proceeding was in the nature of an original proceeding, and the only issues before the court were those raised by the pleadings. *Lauren W. Gibbs, Inc. v. Monson*, 102 Utah 234, 129 P.2d 887 (1942); *Withers v. Golding*, 100 Utah 179, 111 P.2d 550 (1941).

Upon proper and sufficient allegations of the complaint the district court was to determine, as on an appeal in equity, whether the findings of the commission were contrary to the clear preponderance of the evidence adduced before it. *Lauren W. Gibbs, Inc. v. Monson*, 102 Utah 234, 129 P.2d 887 (1942).

The court should hear proof on issue raised of the insufficiency of the evidence to sustain commission's order canceling registrant's registration. *Lauren W. Gibbs, Inc. v. Monson*, 102 Utah 234, 129 P.2d 887 (1942).

Appealable judgments, orders and decrees.

An appeal was allowed from any final order

of the commission; no other order was appealable. *In re Deseret Mortuary Co.*, 78 Utah 393, 3 P.2d 267 (1931).

Jurisdiction of court.

The district court, being court of general jurisdiction, had inherent power to grant stay orders. *Lauren W. Gibbs, Inc. v. Monson*, 102 Utah 234, 129 P.2d 887 (1942).

Presumptions as to court order.

Order suspending commission's order would be presumed valid rather than invalid or void. *Lauren W. Gibbs, Inc. v. Monson*, 102 Utah 234, 129 P.2d 887 (1942).

Who may appeal.

Under former provision authorizing persons "directly affected and aggrieved" to appeal an order, it was unlikely that mere competitors of applicant, or members of the public desiring that no unworthy securities be placed before the public, would be qualified to take appeal. The words "directly affected and aggrieved" were to be given the same construction as was given to words "interested parties" in prior statute, and be held to refer to persons who were touched in their property or person by the order complained of. *In re Deseret Mortuary Co.*, 78 Utah 393, 3 P.2d 267 (1931).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State § 94.

C.J.S. — 53 C.J.S. Licenses § 43; 79 C.J.S. Supp. Securities Regulation § 227.

Key Numbers. — Licenses ⇨ 18½ (38), 22; Securities Regulation ⇨ 275.

61-1-24. 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.

History: C. 1953, 61-1-24, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 34; 1987, ch. 161, § 237.

Amendment Notes. — The 1987 amendment, effective January 1, 1988, added the internal subsection designations in Subsection (1); in Subsection (1)(a) deleted "including rules and forms governing registration statements, applications, and reports, and defining any terms, whether or not used in this chapter,

insofar as the definitions are not inconsistent with this chapter" following "chapter"; added the internal subsection designations in Subsections (2) and (3) and made various stylistic changes in those subsections; and deleted former Subsection (6) pertaining to public hearings and redesignated former Subsection (7) as Subsection (6).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 87, 89.

C.J.S. — 79 C.J.S. Supp. Securities Regulation §§ 222, 226.

Key Numbers. — Licenses ⇨ 18½(31), (38); Securities Regulation ⇨ 270, 274.

~~61-1-25. 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.

which is brought under this chapter or any other chapter 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.

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

History: C. 1953, 61-1-26, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 36.

Cross-References. — Corporations doing

business in state to have resident agent, Utah Comp. Art. XII, Sec. 9.

NOTES TO DECISIONS

ANALYSIS

Foreign contracts.
In personam jurisdiction.

Foreign contracts.

Act did not apply to contracts made and entered into in another state. *United States Bond & Fin. Corp. v. National Bldg. & Loan Ass'n of Am.*, 80 Utah 62, 12 P.2d 758, rehearing denied, 80 Utah 70, 17 P.2d 238 (1932) (decided under former law).

In personam jurisdiction.

Subsection (7) does not provide the exclusive

method of acquiring jurisdiction over one in violation of the Securities Act, but simply gives a special means of doing so; it does not prevent the obtaining of personal jurisdiction by any other means provided by statute and, in particular, does not preclude the use of § 78-27-22, the "long-arm statute." *Piantes v. Hayden-Stone, Inc.*, 30 Utah 2d 110, 514 P.2d 529 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893, rehearing denied, 416 U.S. 963, 94 S. Ct. 1983, 40 L. Ed. 2d 314 (1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 17, 92.

C.J.S. — 79 C.J.S. Supp. Securities Regulation § 198.

Key Numbers. — Licenses ⇨ 18½ (36); Securities Regulation ⇨ 271.

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.

History: C. 1953, 61-1-27, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 37.

UTAH CODE ANN. §61-1-26(3) aeffective 1989

EXHIBIT "15"

History: C. 1953, 61-1-25, enacted by L.
1963, ch. 145, § 1; 1983, ch. 284, § 35.

61-1-26. Application of sections — Transactions in Utah — Irrevocable consent to service.

(1) Sections 61-1-1, 61-1-3(1), 61-1-7, 61-1-17 and 61-1-22 apply to persons who sell or offer to sell when an offer to sell is made in this state, or an offer to buy is made and accepted in this state.

(2) Sections 61-1-1, 61-1-3(1), and 61-1-17 apply to persons who buy or offer to buy when an offer to buy is made in this state, or an offer to sell is made and accepted in this state.

(3) For the purpose of this section, an offer to sell or to buy is made in this state, when the offer 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) An offer to sell or to buy is not made in this state when 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 a radio or television program originating outside this state is received in this state.

(5) Sections 61-1-2 and 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.

(6) 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.

(7) 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 (6) 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.

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

History: C. 1953, 61-1-26, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 36.

business in state to have resident agent, Utah Const. Art. XII, Sec. 9.

Cross-References. — Corporations doing

NOTES TO DECISIONS

ANALYSIS

Foreign contracts.
In personam jurisdiction.

Foreign contracts.

Act did not apply to contracts made and entered into in another state. *United States Bond & Fin. Corp. v. National Bldg. & Loan Ass'n of Am.*, 80 Utah 62, 12 P.2d 758, rehearing denied, 80 Utah 70, 17 P.2d 238 (1932) (decided under former law).

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method of acquiring jurisdiction over one in violation of the Securities Act, but simply gives a special means of doing so; it does not prevent the obtaining of personal jurisdiction by any other means provided by statute and, in particular, does not preclude the use of § 78-27-22, the "long-arm statute." *Piantes v. Hayden-Stone, Inc.*, 30 Utah 2d 110, 514 P.2d 529 (1973), cert. denied, 415 U.S. 995, 94 S. Ct. 1599, 39 L. Ed. 2d 893, rehearing denied, 416 U.S. 963, 94 S. Ct. 1983, 40 L. Ed. 2d 314 (1974).

COLLATERAL REFERENCES

Am. Jur. 2d. — 69 Am. Jur. 2d Securities Regulation — State §§ 17, 92.

C.J.S. — 79 C.J.S. Supp. Securities Regulation § 198.

Key Numbers. — Licenses ⇌ 18½ (36); Securities Regulation ⇌ 271.

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.

History: C. 1953, 61-1-27, enacted by L. 1963, ch. 145, § 1; 1983, ch. 284, § 37.

SECTIONS 12(j) AND (k), 15A, 19(g)(1) AND (h)(2),
AND 27, OF THE SECURITIES EXCHANGE ACT OF 1934

EXHIBIT "16"

of any of the above-mentioned sections, as the Commission shall deem appropriate, and of any other provisions of law, for each such class.

[As added by Act of August 20, 1964, Sec. 3(d), 78 Stat. 568.]

[§ 20,321]

[Securities Issued by Banks]

(i) In respect of any securities issued by banks and savings associations the deposits of which are insured in accordance with Federal Deposit Insurance Act, the powers, functions, and duties vested in the Commission to administer and enforce sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16, (1) with respect to national banks and banks operating under the Code of Law for the District of Columbia are vested in the Comptroller of the Currency, (2) with respect to all other member banks of the Federal Reserve System are vested in the Board of Governors of the Federal Reserve System, (3) with respect to all other insured banks are vested in the Federal Deposit Insurance Corporation, and (4) with respect to savings associations the accounts of which are insured by the Federal Deposit Insurance Corporation are vested in the Office of Thrift Supervision. The Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision shall have the power to make such rules and regulations as may be necessary for the execution of the functions vested in them as provided in this subsection. In carrying out their responsibilities under this subsection, the agencies named in the first sentence of this subsection shall issue substantially similar regulations to regulations and rules issued by the Commission under sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16, unless they find that implementation of substantially similar regulations with respect to insured banks and insured institutions are not necessary or appropriate in the public interest or for protection of investors, and publish such findings, and the detailed reasons therefor, in the Federal Register. Such regulations of the above-named agencies, or the reasons for failure to publish such substantially similar regulations to those of the Commission, shall be published in the Federal Register within 120 days of the date of enactment of this subsection, and, thereafter, within 60 days of any changes made by the Commission in its relevant regulations and rules.

[As added by Act of August 20, 1964, Sec. 3(e), 78 Stat. 569, amended by Act of July 29, 1968, 82 Stat. 454; amended by Act of October 28, 1974, 88 Stat. 1503; and Act of August 9, 1989 (Financial Institutions Reform, Recovery, and Enforcement Act of 1989), Sec. 744(v)(2), Pub. Law 101-73, 103 Stat. 183.]

[§ 20,322]

[Suspension or Revocation of Registration of Security]

(j) The Commission is authorized, by order, as it deems necessary or appropriate for the protection of investors to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to revoke the registration of a security, if the Commission finds, on the record after notice and opportunity for hearing, that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder. No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security the registration of which has been and is suspended or revoked pursuant to the preceding sentence.

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 9, 89 Stat. 118.]

[§ 20,323]

[Suspension of Trading of Security]

(k) TRADING SUSPENSIONS; EMERGENCY AUTHORITY.—

(1) TRADING SUSPENSIONS.—If in its opinion the public interest and the protection of investors so require, the Commission is authorized by order—

(A) summarily to suspend trading in any security (other than an exempted security) for a period not exceeding 10 business days, and

(B) summarily to suspend all trading on any national securities exchange or otherwise, in securities other than exempted securities, for a period not exceeding 90 calendar days.

The action described in subparagraph (B) shall not take effect unless the Commission notifies the President of its decision and the President notifies the Commission that the President does not disapprove of such decision.

[Added by the Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 9, 89 Stat. 118; amended by Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Public Law 101-432, 104 Stat. 963.]

~~§ 20,323A [Emergency Orders]~~

(2) EMERGENCY ORDERS.—(A) The Commission, in an emergency, may by order summarily take such action to alter, supplement, suspend, or impose requirements or restrictions with respect to any matter or action subject to regulation by the Commission or a self-regulatory organization under this title, as the Commission determines is necessary in the public interest and for the protection of investors—

(i) to maintain or restore fair and orderly securities markets (other than markets in exempted securities), or

(ii) to ensure prompt, accurate, and safe clearance and settlement of transactions in securities (other than exempted securities).

(B) An order of the Commission under this paragraph (2) shall continue in effect for the period specified by the Commission, and may be extended, except that in no event shall the Commission's action continue in effect for more than 10 business days, including extensions. In exercising its authority under this paragraph, the Commission shall not be required to comply with the provisions of section 553 of title 5, United States Code, or with the provisions of section 19(c) of this title.

[As added by Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Public Law 101-432, 104 Stat. 963.]

~~§ 20,323B~~

~~[Termination of Emergency Orders]~~

(3) TERMINATION OF EMERGENCY ACTIONS BY PRESIDENT.—The President may direct that action taken by the Commission under paragraph (1)(B) or paragraph (2) of this subsection shall not continue in effect.

[As added by Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Public Law 101-432, 104 Stat. 963.]

~~§ 20,323C~~

~~[Compliance]~~

(4) COMPLIANCE WITH ORDERS.—No member of a national securities exchange, broker, or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security in contravention of an order of the Commission under this subsection unless such order has been stayed, modified, or set aside as provided in paragraph (5) of this subsection or has ceased to be effective upon direction of the President as provided in paragraph (3).

[As added by Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Public Law 101-432, 104 Stat. 963.]

~~§ 20,323D~~

~~[Review of Orders]~~

(5) LIMITATIONS ON REVIEW OF ORDERS.—An order of the Commission pursuant to this subsection shall be subject to review only as provided in section 25(a) of this title. Review shall be based on an examination of all the information before the Commission at the time such order was issued. The reviewing court shall not enter a stay, writ of mandamus, or similar relief unless the court finds, after notice and hearing before a panel of the court, that the Commission's action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

[As added by Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Public Law 101-432, 104 Stat. 963.]

~~§ 20,323E~~

~~[Emergency]~~

(6) DEFINITION OF EMERGENCY.—For purposes of this subsection, the term 'emergency' means a major market disturbance characterized by or constituting—

(A) sudden and excessive fluctuations of securities prices generally, or a substantial threat thereof, that threaten fair and orderly markets, or

(B) a substantial disruption of the safe or efficient operation of the national system for clearance and settlement of securities, or a substantial threat thereof.

[As added by Act of October 16, 1990 (Market Reform Act of 1990), Sec. 2, Public Law 101-432, 104 Stat. 963.]

[The next page is 15,127.]

[As added by Act of November 19, 1988 (Insider Trading and Securities Fraud Enforcement Act of 1988), Sec. 5(b)(1), Pub. Law 100-704, 102 Stat. 4677, effective for actions occurring after November 18, 1988.]

[¶ 20,410]

REGISTERED SECURITIES ASSOCIATIONS

[Title as amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(1), 89 Stat. 127, effective December 1, 1975.]

Sec. 15A. (a) An association of brokers and dealers may be registered as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the association and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410A]

[Requirements for Regulation]

(b) An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410B]

[Ability to Carry Out Purposes of Law]

(1) By reason of the number and geographical distribution of its members and the scope of their transactions, such association will be able to carry out the purposes of this section.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a)(1), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410C]

[Organization of Association; Ability to Enforce Compliance]

(2) Such association is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, the rules of the Municipal Securities Rulemaking Board, and the rules of the association.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a)(1), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410D]

[Membership in Association]

(3) Subject to the provisions of subsection (g) of this section, the rules of the association provide that any registered broker or dealer may become a member of such association and any person may become associated with a member thereof.

[As added by Act of June 25, 1938, 52 Stat. 1070; and amended by Act of August 20, 1964, Sec. 7(a)(2), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410E]

[Administration of Association's Affairs]

(4) The rules of the association assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the association, broker, or dealer.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a)(3), 78 Stat. 574-578; as amended by Act of June 4, 1975, Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410F]

[Equitable Allocation of Dues, Fees and Charges]

(5) The rules of the association provide for the equitable allocation of reasonable dues fees and other charges among members and issuers and other persons using any facility or system which the association operates or controls

[As added by Act of August 20 1964 Sec 7(a)(4) 78 Stat 574 578 as amended by Act of June 4 1975 (Securities Acts Amendments of 1975) Sec 12(2) 89 Stat 127 effective December 1 1975]

[¶ 20,410G]

[Design of Association's Rules]

(6) The rules of the association are designed to prevent fraudulent and manipulative acts and practices to promote just and equitable principles of trade to foster cooperation and coordination with persons engaged in regulating clearing settling processing information with respect to and facilitating transactions in securities to remove impediments to and perfect the mechanism of a free and open market and a national market system and in general to protect investors and the public interest and are not designed to permit unfair discrimination between customers issuers brokers or dealers to fix minimum profits to impose any schedule or fix rates of commissions allowances discounts or other fees to be

charged by its members, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the association.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 127, effective December 1, 1975.]

[¶ 20,410H] [Disciplining of Members and Persons Associated with Members]

(7) The rules of the association provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of any provision of this title, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association, by expulsion, suspension, limitation of activities, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410I] [Fair Procedure]

(8) The rules of the association are in accordance with the provisions of subsection (h) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the association of any person with respect to access to services offered by the association or a member thereof.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410J] [No Burden on Competition]

(9) The rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

[As added by Act of June 25, 1938, 52 Stat. 170; as amended by Act of August 20, 1964, Sec. 7(a), 78 Stat. 574-578; Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410K] [Affiliated Association]

(10) The requirements of subsection (c), insofar as these may be applicable, are satisfied.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of August 20, 1964, Sec. 7(a)(6); Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(2), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410L] [Distribution or Publication of Quotations]

(11) The rules of the association include provisions governing the form and content of quotations relating to securities sold otherwise than on a national securities exchange which may be distributed or published by any member or person associated with a member, and the persons to whom such quotations may be supplied. Such rules relating to quotations shall be designed to produce fair and informative quotations, to prevent fictitious or misleading quotations, and to promote orderly procedures for collecting, distributing, and publishing quotations.

[As added by Act of August 20, 1964, Sec. 7(a)(7); 78 Stat. 577; and as amended by Act of June 4, 1975, Sec. 12(2), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410M] [Affiliated Securities Associations]

(c) The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b), to provide for the admission of an association registered as an affiliated securities association pursuant to subsection (d), to participation in said applicant association as an affiliate thereof, under terms permitting such powers and

responsibilities to such affiliate, and under such other appropriate terms and conditions, as may be provided by the rules of said applicant association, if such rules appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section. The duties and powers of the Commission with respect to any national securities association or any affiliated association shall in no way be limited by reason of any such affiliation.

[¶ 20,410N] [Requirements for Registration of Affiliated Securities Association]

(d) An applicant association shall not be registered as an affiliated securities association unless it appears to the Commission that—

(1) such association, notwithstanding that it does not satisfy the requirements set forth in paragraph (1) of subsection (b), will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to said subsection (b), in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c); and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (10) inclusive and paragraph (12), of subsection (b); except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.

[As amended by Act of August 20, 1964, Sec. 7(b), 78 Stat. 577.]

[¶ 20,410O] [Dealing with Nonmember Professionals]

(e)(1) The rules of a registered securities association may provide that no member thereof shall deal with any nonmember professional (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as redesignated from subsection (i) to (e) and amended by Act of June 4, 1975 (Securities Acts of Amendments of 1975), Sec. 12(3), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410P] [Nonmember Professional]

(2) For the purposes of this subsection, the term "nonmember professional" shall include (A) with respect to transactions in securities other than municipal securities, any registered broker or dealer who is not a member of any registered securities association, except such a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, and commercial bills, and (B) with respect to transactions in municipal securities, any municipal securities dealer (other than a bank or division or department of a bank) who is not a member of any registered securities association and any municipal securities broker who is not a member of any such association.

[As added by Act of June 25, 1938, 52 Stat. 1070; and as amended by Act of June 4, 1975 (Securities Acts of Amendments of 1975), Sec. 12(3), 89 Stat. 128, effective December 1, 1975.]

[¶ 20,410Q] [Allowances to Members; Municipal Securities]

(3) Nothing in this subsection shall be so construed or applied as to prevent (A) any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms, in connection with the purchase or sale of securities, or (B) any member of a registered securities association or any municipal securities dealer which is a bank or a division or department of a bank from granting to any member of any registered securities association or any such municipal securities dealer any dealer's discount, allowance, commission, or special terms in connection with the purchase or sale of municipal securities: Provided, however, That the granting of any such discount, allowance, commission, or special terms in connection with the purchase or sale of municipal securities shall be subject to rules of the Municipal Securities Rulemaking Board adopted pursuant to section 15B(b)(2)(K) of this title.

[As added by Act of June 25, 1938, 52 Stat 1070 and as amended by Act of June 4, 1975 (Securities Acts of Amendments of 1975), Sec 12(2), 89 Stat 128, effective December 1, 1975]

[¶ 20,410QA]**[Transaction in Exempted Security]**

(f)(1) Except as provided in paragraph (2) of this subsection, nothing in this section shall be construed to apply with respect to any transaction by a registered broker or dealer in any exempted security

[As added by Act of June 25, 1938, 52 Stat 1070, as redesignated from (m) by Act of June 4, 1975, Sec 12(3), 89 Stat 129, effective December 1, 1975, and amended by Act of October 28, 1986 (Government Securities Act of 1986), effective July 25, 1987 Sec 102(g) Pub Law 99-571, 100 Stat 3218]

[¶ 20,410QB]**[Rulemaking by Associations]**

(2) A registered securities association may adopt and implement rules applicable to members of such association (A) to enforce compliance by registered brokers and dealers with applicable provisions of this title and the rules and regulations thereunder (B) to provide that its members and persons associated with its members shall be appropriately disciplined, in accordance with subsections (b)(7), (b)(8), and (h) of this section, for violation of applicable provisions of this title and the rules and regulations thereunder, (C) to provide for reasonable inspection and examination of the books and records of registered brokers and dealers, (D) to provide for the matters described in paragraphs (b)(3), (b)(4), and (b)(5) of this section (E) to implement the provisions of subsection (g) of this section, and (F) to prohibit fraudulent, misleading, deceptive, and false advertising

[As added by Act of October 28, 1986 (Government Securities Act of 1986), effective July 25, 1987, Sec 102(g), Pub Law 99-571, 100 Stat 3218]

[¶ 20,410QC]**[Rules Involving Municipal Securities Transactions]**

(3) Nothing in subsection (b)(6) or (b)(11) of this section shall be construed to permit a registered securities association to make rules concerning any transaction by a registered broker or dealer in a municipal security

[As added by Act of October 28, 1986 (Government Securities Act of 1986), effective July 25, 1987, Sec 102(g), Pub Law 99-571, 100 Stat 3218]

[¶ 20,410R]**[Denial of Membership]**

(g)(1) A registered securities association shall deny membership to any person who is not a registered broker or dealer

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec 12(4), 89 Stat 129, effective December 1, 1975]

[¶ 20,410S]**[Persons Subject to Statutory Disqualification]**

(2) A registered securities association may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection of investors shall, deny membership to any registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A registered securities association shall file notice with the Commission not less than thirty days prior to admitting any registered broker or dealer to membership or permitting any person to become associated with a member, if the association knew, or in the exercise of reasonable care should have known, that such broker or dealer or person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec 12(4), 89 Stat 129, effective December 1, 1975]

[¶ 20,410T] [Who May Be Denied Membership or Association with Member]

(3)(A) A registered securities association may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural person associated with such broker or dealer does not meet such standards of training,

experience and competence as are prescribed by the rules of the association or (ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A registered securities association may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the association.

(B) A registered securities association may bar a natural person from becoming associated with a member or condition the association of a natural person with a member if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the association or (ii) has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A registered securities association may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the association and require a natural person associated with a member, or any class of such natural persons, to be registered with the association in accordance with procedures so established.

(C) A registered securities association may bar any person from becoming associated with a member if such person does not agree (i) to supply the association with such information with respect to its relationship and dealings with the member as may be specified in the rules of the association and (ii) to permit examination of its books and records to verify the accuracy of any information so supplied.

(D) Nothing in subparagraph (A), (B), or (C) of this paragraph shall be construed to permit a registered securities association to deny membership to or condition the membership of or bar any person from becoming associated with or condition the association of any person with a broker or dealer that engages exclusively in transactions in exempted securities.

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975) Sec. 12(4), 89 Stat. 129, effective December 1, 1975, and amended by Act of October 28, 1986 (Government Securities Act of 1986) effective July 25, 1987, Sec. 102(g), Pub. Law 99-571, 100 Stat. 3218.]

[¶ 20,410TA] [Qualification Standards for Membership by Government Securities Brokers and Dealers or Association With Member]

(4)(A) A registered securities association may deny membership to or condition the membership of, a government securities broker or government securities dealer if such government securities broker or government securities dealer (i) does not meet standards of financial responsibility under rules adopted pursuant to section 15C(b)(1)(A) of this title, or (ii) has engaged and there is a reasonable likelihood that it will again engage in any conduct or practice which would subject such government securities broker or government securities dealer to sanctions under section 15C(c) of this title. A registered securities association may establish procedures including examination of the books and records of government securities brokers and government securities dealers to verify compliance with the provisions of this title and the rules thereunder.

(B) A registered securities association may bar any person from becoming associated with a member or condition the association of a person with a member (i) if such person has engaged in any conduct or practice and there is a reasonable likelihood that such person will again engage in any conduct or practice which would subject such person to sanctions under section 15C(c) of this title, or (ii) if such person does not agree to supply such association with such information with respect to its relationship and dealings with the member as may be specified in the rules of the association and to permit examination of its books and records to verify the accuracy thereof.

[As added by Act of October 28, 1986 (Government Securities Act of 1986), effective July 25, 1987, Sec. 102(g), Pub. Law 99-571, 100 Stat. 3218.]

[¶ 20,410U] [Type of Business Done]

(5) A registered securities association may deny membership to a registered broker or dealer not engaged in a type of business in which the rules of the association require members to be engaged. Provided, however, That no registered securities association may deny (cont. d)

membership to a registered broker or dealer by reason of the amount of such type of business done by such broker or dealer or the other types of business in which he is engaged.

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(4), 89 Stat. 130, effective December 1, 1975; and redesignated as paragraph (5) by Act of October 28, 1986 (Government Securities Act of 1986), effective July 25, 1987, Sec. 102(g), Pub. Law 99-571, 100 Stat. 3218.]

[¶ 20,410V]

[Disciplinary Proceedings]

(h)(1) In any proceeding by a registered securities association to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection) the association shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the association to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this title, the rules or regulations thereunder, the rules of the Municipal Securities Rulemaking Board, or the rules of the association which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reason therefor.

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(4), 89 Stat. 130, effective December 1, 1975.]

[¶ 20,410W]

[Procedure]

(2) In any proceeding by a registered securities association to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the association or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the association shall notify such person of and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the association to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the association or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

[As added by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 12(4), 89 Stat. 130, effective December 1, 1975.]

[¶ 20,410X]

[Summary Proceeding]

(3) A registered securities association may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the association determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the association, or (C) limit or prohibit any person with respect to access to services offered by the association if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the association determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the association. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the association in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

furthurance of the purposes of this title or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

[As added by Act of July 29, 1968, 82 Stat. 4531 and as amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 16, 89 Stat. 151.]

[§ 20,463] [Standards for Review of Denial of Membership, Etc.]

(f) In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the public grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner consistent with the purposes of this title, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

[As amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 16, 89 Stat. 151.]

[§ 20,464] [Compliance and Enforcement of Compliance]

(g)(1) Every self-regulatory organization shall comply with the provisions of this title, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 17(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

[As amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 16, 89 Stat. 152, effective December 1, 1975.]

[§ 20,465] [Relief from Compliance Responsibility]

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this title, may relieve a self-regulatory organization of any responsibility under this title to enforce compliance with any specified provision of this title or the rules or regulations thereunder by any member of such organization or person associated with such member, or any class of such members or persons associated with a member.

[As amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 16, 89 Stat. 152, effective December 1, 1975.]

[§ 20,463] [Standards for Review of Denial of Membership, Etc.]

(h)(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and opera-

tion of such self-regulatory organization, if such appropriate regulatory agency finds on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provisions of this title, the rules or regulations thereunder, or its own rules or without reasonable justification, it has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

[As amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 16, 89 Stat. 152, effective December 1, 1975.]

[§ 20,467] [Power of Appropriate Regulatory Agency Over Members and Participants]

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 15(b)(4) of this title or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

[As amended by Act of June 4, 1975 (Securities Acts Amendments of 1975), Sec. 16, 89 Stat. 153, effective December 1, 1975.]

[§ 20,468] [Power of Appropriate Regulatory Agency Over Persons Associated with Members]

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 15(b)(6) or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

title or rules and regulations thereunder, shall be deemed to be a statement of report is true and accurate on its face or that it is not so. It shall be unlawful to make, or cause to be made, to any purchaser or seller of a security any representation that the Commission or any officer or failure to act by any such authority is to be so construed as having such effect.

[As amended by Act of August 23, 1935, 49 Stat. 767.]

[§ 20,551]

JURISDICTION OF OFFENSES AND SUITS

Sec. 27. The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder. Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this title or rules and regulations thereunder, or to enjoin any violation of such title or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of title 28, United States Code. No costs shall be assessed for or against the Commission in any proceeding under this title brought by or against it in the Supreme Court or such other courts.

[As amended by Act of June 25, 1936, 49 Stat. 1921; Act of June 25, 1948, Sec. 32(b), 62 Stat. 991; Act of May 24, 1949, Sec. 127, 53 Stat. 107; amended by Act of December 4, 1987 (Securities and Exchange Commission Authorization Act of 1987), Sec. 326, Pub. Law 100-181, 101 Stat. 1249.]

[§ 20,552]

ON PRIVATE CAUSE OF ACTION

Sec. 27A. (a) EFFECT ON PENDING CAUSES OF ACTION.—The limitation period of any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991, shall be the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991.

[As added by Act of December 19, 1991 (Federal Deposit Insurance Corporation Improvement Act of 1991), Sec. 476, Pub. Law 102-242, 105 Stat. 2236.]

[§ 20,553]

[Effect on Dismissed Causes of Action]

(b) EFFECT ON DISMISSED CAUSES OF ACTION.—Any private civil action implied under section 10(b) of this Act that was commenced on or before June 19, 1991—

(1) which was dismissed as time barred subsequent to June 19, 1991, and

(2) which would have been timely filed under the limitation period provided by the laws applicable in the jurisdiction, including principles of retroactivity, as such laws existed on June 19, 1991,

shall be reinstated on motion by the plaintiff not later than 60 days after the date of enactment of this section.

[As added by Act of December 19, 1991 (Federal Deposit Insurance Corporation Improvement Act of 1991), Sec. 476, Pub. Law 102-242, 105 Stat. 2236.]

[§ 20,561]

EFFECT ON EXISTING LAW

Sec. 28. (a) The rights and remedies provided by this title 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 title 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 title 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 title or the rules and regulations thereunder. No State law which prohibits or regulates the making or promoting of wagering or gaming contracts shall be affected by this title.

[As amended by Act of August 23, 1935, 49 Stat. 767.]

§ 20,551 Sec. 27

SECURITIES EXCHANGE ACT RELEASE NO. 34-7920,
JULY 19, 1966, 31 F.R. 10076

EXHIBIT "17"

of the NYSE's conduct in cancelling a sale of Equity Funding bonds. The bondholder had directed his broker to effectuate such sale which direction had been carried out. Since trading of Equity Funding securities had been suspended prior to the opening of the market on the day said order was given, however, the Exchange had deemed the sale improper and cancelled it.—*Equity Funding Corporation of America* (SEC 1973), 1973 CCH Dec. ¶ 79,537.

40 Transactions in suspended securities.—While it is possible for a broker-dealer transacting all its business on a national securities exchange to sell securities for which trading has been suspended, the practical problems are considerable. In that respect, the prohibition against the use of any instrument of interstate commerce includes the transfer of the securities, telephone discus-

sions during negotiations for the sale, and the mailing of confirmations of sale.—*Sprague & Nammack* (SEC 1973), 1973 CCH Dec. ¶ 79,434.

47 Suspension of trading—Private sales—Broker-dealer involvement.—Although Section 15(c)(5) of the Exchange Act prohibits a broker-dealer from taking any action in arranging or consummating a transaction involving a security for which trading has been suspended, a holder of such securities may make a private disposition of his shares.—*McVeigh* (SEC 1972), '72-'73 CCH Dec. ¶ 79,275.

See also:

Douglas R. Graham (SEC 1975), '75-'76 CCH Dec. ¶ 80,232 (private individual could cover his short position in warrants even though suspension of trading in security was still in force).

[¶ 25,139]

Consummation of Securities Transactions by Broker-Dealers When Trading Is Suspended

Release No. 34-7920, July 19, 1966, 31 F. R. 10076.

→ The release below is based on the law in effect prior to the Securities Acts Amendments of 1975. Sec. 12(k) at ¶ 23,371 consolidates former Sections 15(c)(5) and 19(a)(4). See ¶ 23,371.10. CCH.

17 CFR 241.7920.

The Securities and Exchange Commission today made public a policy statement of its Division of Trading and Markets relating to the post-suspension consummation of securities transactions entered into by brokers and dealers before the Commission suspended trading in the security pursuant to Section 15(c)(5) or Section 19(a)(4) of the Securities Exchange Act of 1934, as amended.

The text of the statement, issued by Irving M. Pollack, Director of the Division, follows:

"A number of questions have been presented recently as to whether, during the period when trading is suspended by order of the Commission pursuant to Section 15(c)(5) or Section 19(a)(4) of the Securities Exchange Act of 1934, a broker or dealer may complete (e.g., by payment or delivery) an agency or principal contract entered into prior to the suspension.

"It is the position of the Division that where the broker or dealer is himself acting in good faith, where he is not connected with the activity announced by the Commission as a basis for suspension pursuant to Section 15(c)(5) or Section 19(a)(4), and where he has no reason to believe that his customer is so connected, no objection need be raised under such sections because the broker-dealer completes his contractual obligations in the particular transaction (e.g., by payment or delivery) while the suspension is still in effect. The Division believes that in each such case, however, he should inform his customer, prior to consummating the transaction, that trading in the security is suspended and of the reasons announced by the Commission for suspending trading.

"A broker-dealer, in deciding whether to consummate such a transaction, must of course consider not only the provisions of Sections 15(c)(5) and 19(a)(4) but also all other applicable provisions of the Federal securities laws."

[Release No. 34-7920, July 19, 1966, 31 F. R. 10076.]

UNCIVIL RITES, THE NEW REPUBLIC,
DECEMBER 16, 1991, at p. 9 (ISSUE 4,013)

EXHIBIT "18"

INSIDE AMERICA'S SCHOOLS: A SPECIAL REPORT

DECEMBER 16, 1991 • \$2.95

THE NEW REPUBLIC

Nicholas Lemann on scandal • Vukovar's nightmare • James J. Cramer on Michael Milken

The strange life of an inner-city teacher, by Sara Mosle
The gifted child boondoggle • The limits of racial role modeling
Could you pass the Japanese SAT? • The 'equal funding' myth
George Bush's plan for better schools—and ours, by the Editors

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UNCIVIL RITES

Conservatives argued for years that the problem with liberals was that they relied on an activist Supreme Court for victories they were unable to win in Congress. Last week President Bush fell into the same unfortunate habit. The civil rights bill and the attempt to lift the gag rule on abortion were introduced to overrule conservative Supreme Court decisions that ironically claimed to be deferring to the "original intention" of Congress. In both cases, Congress said the Court got its intention wrong. And in both cases, Mr. Bush refused to enforce the laws as written, even after Congress tried to make its intention clear.

The question in the abortion debate was what Congress intended when it passed the Family Planning Act of 1970. The purpose of the act (according to the preamble) is to "make readily available information on family planning." But in 1988 a pro-life Reagan aide wrote a regulation that said the act was intended to ban federally financed clinics from discussing abortion. Deferring to his "expertise," the Court upheld the regulation last spring. Majorities in both houses of Congress immediately said they intended nothing of the sort, and tried to lift the gag rule, but Mr. Bush vetoed. The moral is that conservative federal agencies can ignore or rewrite their statutory mandates, unless two-thirds of both houses agree to stop them.

The civil rights bill, similarly, was introduced to overrule a series of recent Supreme Court decisions interpreting the Civil Rights Act of 1964. After attacking the measure as a "quota bill," Mr. Bush caved on the central point and agreed to shift the burden of proving discrimination back from the employee to the employer. To remedy this, administration lawyers are now claiming they acquiesced to a "killer provision" in the bill that, although clearly framed by Democrats to endorse affirmative action, will be read by them—and the Court—to strike down all means of affirmative action. (See "Last Laugh" by Fred Barnes, below.) To add insult to injury, on the eve of the signing, C. Boyden Gray, Mr. Bush's legal adviser, went one step further. He tried to achieve by executive fiat what he had failed to achieve in Congress, and instructed federal agencies to end affirmative action. (See "Race Unconscious," *TRB*, page 4.) Although Mr. Bush disavowed the order, he signed a "signing statement" written by Mr. Gray. It tells agencies to follow an interpretation of the law that Congress had rejected, but that a handful of Republican senators placed in the *Congressional Record* as part of its "legislative history."

Both moves are particularly cynical. The first is simply a bid to get Congress to enact a law that's clearly against its intention. The second is a more fundamental breach of the principles of judicial restraint. In the past, Mr. Bush's lawyers have repeatedly endorsed Justice Antonin Scalia's view that judges should ignore legisla-

tive history since it's easily manipulated by special interests and rarely reflects the views of a majority of Congress. But despite his emphasis on the text of a bill, Justice Scalia is reluctant to enforce Congress's intentions unless there are no ambiguities—an unrealistic proposition. The upshot is that in conflicts with the new executive/judicial axis, Congress will lose one way or another.

This is hardly good news for principled conservatives. Contempt for original intention in statutory interpretation is hard to reconcile with respect for original intention in constitutional interpretation. And it's ironic that the "strict constructionist" president and Supreme Court are conspiring to prevent the people's representatives in Congress from enacting their will into law, either by legislative mischief or by judicial and executive fiat. Excuse us, but wasn't that the problem with the Warren Court?

~~NOTEBOOK~~

BUSHISM OF THE WEEK: "I don't want to just sit here blaming Congress. I mean, we're all in this together." —President Bush, November 20, to news anchor Bill Stuart of KCNC-TV, Denver
"I think the Congress should be blamed." —several minutes later, to Warner Saunders of WMAQ-TV, Chicago •

~~WHITE HOUSE WATCH~~

~~LAST LAUGH~~

By Fred Barnes

C. Boyden Gray, the White House legal counsel and foe of racial quotas, is blamed for bungling negotiations on the new Civil Rights Act. President Bush was forced to settle for a bill that, by nearly all accounts, contained more of what Democrats and the civil rights lobby had sought, and less of what Bush wanted. Gray, in an op-ed piece in *The Washington Post*, insisted that Bush had gotten the better of the deal, but few believed him. Then Gray tried to get Bush to invoke presidential authority to eliminate the government's program of racial quotas, preferences, and set-asides. That blew up in Gray's (and Bush's) face. The president confronted with an angry protest by black leaders and Republican Senator Jack Danforth of Missouri, split publicly with Gray. When he signed the bill on November 22, Bush declared his support for "the government's affirmative action program." Gray dutifully fell on his