

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :
:
PRUDENTIAL INVESTMENT CORPORATION :
MIAMI SECURITIES, INC. and :
NICHOLAS M. TORELLI :
(8-16344) : INITIAL DECISION

PRUDENTIAL INVESTMENT CORPORATION :
HOWARD LEON ALDERSON :
SIDNEY LEAVITT and :
NICHOLAS M. TORELLI :
(8-9230) :

(Consolidated Proceedings) :

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Washington, D.C.

Ralph H. Tracy
Hearing Examiner

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INITIAL DECISION

APPEARANCES: Roderick Knott, Stephen W. Arky and Reginald E. Moore
of the Miami Branch Office for the Division of
Trading and Markets

Richard B. Marx, Esq. for Sidney Leavitt

Robert A. Freeman, Esq. of Tew, Tew, Rozen & Murray
for Nicholas M. Torelli, Prudential Investment
Corporation and Miami Securities, Inc.

Howard Leon Alderson, pro se

BEFORE: Ralph H. Tracy, Hearing Examiner

THE PROCEEDINGS

These are public consolidated proceedings, instituted by orders of the Commission pursuant to Sections 15(b) and 15 A of the Securities Exchange Act of 1934, as amended ("Exchange Act") to determine whether an application for broker-dealer registration filed by Miami Securities, Inc. ("applicant") should be denied and whether remedial sanctions should be imposed on Prudential Investment Corporation ("registrant"), Nicholas M. Torelli ("Torelli") president and controlling or sole stockholder of both applicant and registrant, Sidney Leavitt ("Leavitt") and Howard Leon Alderson ("Alderson").

The order for proceeding alleged in substance that registrant, Torelli, Leavitt and Alderson, singly and in concert, willfully violated and/or willfully aided and abetted violations of Sections 10(b), 15(c)(3) and 17(a) of the Exchange Act and the rules thereunder, and Sections 5(a) and (c) and 17(a) of the Securities Act of 1933 ("Securities Act"). Also, registrant and Torelli were charged with failing reasonably to supervise persons under their supervision with a view to preventing such violations.

Respondent Alderson filed a reply generally denying the allegations as to him but did not appear at the evidentiary hearing or file a brief. The other respondents were represented by counsel.^{1/} After the conclusion of the evidentiary hearing, the Division and Leavitt filed proposed findings of fact, conclusions of law and briefs in support thereof.^{2/} Torelli filed a memorandum in support of his contentions which has been accepted for the record.

1/ Torelli, registrant and applicant were represented by counsel at the evidentiary hearing only.

2/ Leavitt filed a reply to the Division's reply brief; Leavitt's reply is now accepted as part of the record herein.

The findings and conclusions herein are based upon the record and upon observation of the witnesses.

FINDINGS OF FACT AND LAW

The Respondents

Prudential Investment Corporation ("Registrant"), a Florida corporation with its principal place of business at 1313 N.E. 125th Street, North Miami, Florida, has been registered as a broker-dealer pursuant to Section 15(b) of the Exchange Act since February 14, 1961 and is a member of the National Association of Securities Dealers, Inc. On March 12, 1971 registrant filed Form BDW Notice of Withdrawal From Registration as a Broker-Dealer pursuant to Rule 17 CFR 240.15b6-1. This has not been acted on pending resolution of these proceedings.

Miami Securities, Inc. ("Applicant"), a Florida corporation with its principal place of business at 1313 N.E. 125th Street, North Miami, Florida, filed an application with the Commission on February 11, 1971 for registration as a broker-dealer pursuant to Section 15(b) of the Exchange Act. The Commission by order of March 25, 1971 postponed the effective date of the registration application pending final determination whether such registration shall be denied.

Nicholas M. Torelli is the president and a director of both registrant and applicant and, with his wife, owns all the outstanding shares in both firms.

Sidney Leavitt is a professional musician who was employed as a registered representative at Prudential from about February 1967 to about December 1969.

Howard Leon Alderson was the sole registered representative of Prudential in its branch office in Houston, Texas from on or about March 12, 1968 to on or about January 6, 1970 with the title of Regional Manager.

Injunction Chargeable to Registrant

Section 15(b)(5)(C) of the Exchange Act provides that one of the bases for revocation or denial of a broker-dealer's registration or the imposition of lesser sanctions is the existence of a described permanent injunction issued by a court of competent jurisdiction.^{3/}

The order for proceeding alleges, and the record establishes, that on November 23, 1970, the U.S. District Court for the District of Arizona entered a default judgment permanently enjoining registrant, among others, from further violations of Sections 5(a), 5(c) and 17(a) of the Securities Act and of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in connection with its activity in the offer, purchase, and sale of the unregistered common stock of Continental Investment Corporation ("CIC").

Further, the order for proceeding alleges, and the record establishes, that on March 25, 1970, the U.S. District Court at Denver, Colorado, on the stipulation of registrant and Torelli, entered an order directing

^{3/} Section 15(b)(5)(C) provides as follows:

"(5) The Commission shall, after appropriate notice and opportunity for hearing, by order censure, deny registration to, suspend for a period not exceeding twelve months, or revoke the registration of, any broker or dealer if it finds that such censure, denial, suspension or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated --

* * * *

(C) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, or dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security."

them not to violate the registration and antifraud provisions of the securities acts in connection with transactions in the securities of JB&T Co. and S&M Industries, Inc. The stipulation provided that any order entered pursuant to it could not be regarded as an injunction and, therefore, does not provide a statutory basis for revocation or denial of registration. However, the entry of the order may appropriately be considered on the question of public interest.

Net Capital Violations

The order for proceeding alleged that from on or about January 31, 1971 to on or about February 10, 1971, registrant willfully violated and Torelli willfully aided and abetted in the violation of the net capital provisions of Section 15(c)(3) of the Exchange Act and Rule 15c3-1 thereunder.^{4/} The order further alleged that during the above period, registrant and Torelli willfully violated the anti-fraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder in that they accepted orders for the purchase and sale of securities and effected transactions for customers at a time when registrant was incapable of promptly consummating such transactions and without disclosing such fact.^{5/}

^{4/} Section 15(c)(3) of the Exchange Act, insofar as here pertinent, prohibits securities transactions by a broker-dealer in contravention of the Commission's rules prescribed thereunder providing safeguards with respect to the financial responsibility of brokers and dealers. Rule 15c3-1 provides, subject to certain exemptions not applicable here, that no broker or dealer shall permit his aggregate indebtedness to all persons to exceed 2,000% of his net capital computed as specified in the rule or have a net capital of less than \$5,000.

^{5/} Under Section 15(b)(5)(D) of the Exchange Act, willfull violations or willfull aiding and abetting of violations of that Act or rules thereunder, provide a statutory basis for revocation or denial of a broker-dealer's registration.

The record clearly establishes, and the registrant and Torelli do not deny, that during the relevant period registrant engaged in business in violation of the Commission's net capital requirements and that the additional capital required to bring it into compliance as of January 31, 1971 was \$44,121.16. An examination of registrant's blotter for the period from February 1, 1971 through February 10, 1971 revealed 59 transactions on behalf of customers.

Torelli admits that on or about February 10, 1971 his accountant informed him that registrant was out of capital compliance whereupon he immediately ceased doing business and suspended any further audit of registrant's financial condition because he wished to curtail expenses. He argues, in mitigation, that with one exception, all of the customers in the 59 transactions revealed by the examination to have taken place during the relevant period have since been paid. Torelli contends, further, that any violations on the part of registrant or himself were not willfull.

Torelli's arguments that he did not willfully violate Sections 15c3-1 and 10b-5 of the Exchange Act and Rules 15c3-1 and 10b-5 thereunder are rejected. Willfullness for purposes of Section 15(b) of the Exchange Act does not require that one knows that he is breaking the law but only that he intended to do the act that resulted in the violation.^{6/} Accordingly, it is found that for the period from on or about January 31, 1971 to on or about February 10, 1971, registrant, willfully aided and abetted by Torelli, willfully violated Sections 15(c)(3) and 10(b) of the Exchange Act and Rules 15c3-1 and 10b-5 thereunder.

6/ Hughes v. SEC, 174 F. 2d 969, 977 (C.A.D.C. 1949); Churchill Securities Corp., 38 SEC 856,859 (1959).

Failure to File Financial Report

A diligent search of the Commission's files did not disclose that any report of financial condition for the year 1970 was filed with this Commission by registrant and, accordingly, it is found that registrant, aided and abetted by Torelli, willfully violated Section 17(a) of the Exchange Act and Rule 17a-5 thereunder. Torelli's contention that it was not clear that such report was required to be filed in view of the cessation of registrant's business is rejected as having no basis in fact.

Sales of Unregistered Stock

The Division charges that during the period from on or about October 30, 1968 to on or about January 1969 registrant and Torelli willfully violated and willfully aided and abetted violations of sections 5(a) and 5(c) of the Securities Act by selling and offering for sale to the public the common stock of S&M Industries Inc. ("S&M") when no registration statement was in effect.

The record discloses that Junction Bit and Tool Company ("JB&T") issued 30,000 shares of its common stock to Prudential as a finder's fee for which Torelli signed an investment letter dated April 8, 1968 stating that he was taking the shares for investment and not with a view to distribution. Subsequently, JB&T issued 30,000 shares of S&M to Prudential in a spin-off. These shares were then sold to the public by registrant.

By letter dated March 4, 1969 Torelli requested the S&M transfer agent to transfer the shares into the names of approximately 126 customers to whom they had been sold.

The record discloses that JB&T filed a regulation A offering with the Commission on March 31, 1955 and thereafter reported sales of 33,745 shares. The files of the Commission do not disclose that any registration statement has ever been filed under the name of S&M Industries Inc., JB&T or Junction, Bit and Tool Company pursuant to the Securities Act of 1933, as amended.

On March 25, 1970 the United States District Court of Denver, Colorado, ordered Prudential and Torelli, among others, not to violate the securities acts in connection with the offer, sale and purchase of S&M Industries Inc., and JB&T shares (see Injunction Chargeable to Registrant page 3, supra).

Torelli does not deny that registrant made a market in JB&T and that it also sold S&M. He contends that such sales did not violate the Securities Act as he had been so advised by counsel before participating in them. However, this contention is unsupported except for Torelli's own testimony which is not accepted. Moreover, reliance on advice of counsel does not constitute a defense. As the court said in Custer Channel Wing:^{7/} "Since section 5 is for the protection of the public, the terms of the exemption must be strictly construed against the one claiming it, and the burden of establishing the exempt character of the transaction rests on him who claims the exemption." He also argues, somewhat confusedly, that the allegation of willful violation must be another case of "mistaken identity" in that any possible violation was not willful. The record substantiates a finding that registrant and Torelli willfully violated Sections 5(a) and 5(c) of the Securities Act.

^{7/} U.S. v. Custer Channel Wing Corporation, 376 F. 2d 675, 678 (C.A. 4, 1967 cert. den. 389 U.S. 850. See, also, SEC v. Ralston Purina Co., 346 U.S. 119, (1953); SEC v. Culpepper, 270 F. 2d 241 (C.A. 2, 1959).

Violation of Anti-Fraud Provisions

The order for proceedings alleges that during the period from February 1969 to about July 1969 Torelli, registrant and Leavitt willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and rule 10b-5 thereunder in offering, selling, effecting transactions in, and distributing the common stock of Continental Investment Corporation of Arizona (CIC). It is alleged that respondents failed to make reasonable and diligent inquiry as to the true nature and worth of such securities and made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made, in light of the circumstances in which they were made, not misleading.

The record discloses that CIC filed a registration statement with the Commission on December 29, 1961 but that it was withdrawn with Commission consent on May 17, 1962 without becoming effective. On May 9, 1962 CIC filed a regulation A offering for 200,000 shares of its common stock at \$1.50. On September 7, 1962 CIC reported that 196,887 shares had been sold to the public.

The record establishes that during the relevant period, February to July 1969, registrant effected sales to the public of approximately 15,000 shares of CIC common stock and that respondent Leavitt was primarily responsible for such sales. Also, that the sale of CIC stock was suspended by the Commission for the periods May 7 through May 16, 1969 and June 6 through June 11, 1969.^{8/}

The record further discloses that the foregoing suspensions were publicly disseminated over the "broad-tape" on the dates they were

^{8/} Securities Exchange Act Releases 8603 and 8619 dated May 7, 1969 and June 6, 1969, respectively.

issued. Both Torelli, president of registrant and Leavitt testified they saw the "broad-tape" public notice on the same dates the suspension orders were issued by the Commission.

Five customers who purchased a total of 7200 shares of CIC stock at prices ranging from 2 7/8 to 1/2 testified to various representations made to them by Leavitt. Among other things, Leavitt stated that CIC was purchasing property in Florida, that it was in the land investing business, that he had been waiting for the go ahead signal before recommending it, the stock was going up as there were big plans in the wind, and that he was buying it himself. When the SEC suspensions were announced Leavitt told these customers that this was just a routine procedure inasmuch as the suspensions were temporary and that when the suspension is lifted it usually means that the SEC has found everything to be alright and usually the stock goes on to bigger and better things. He said that these suspensions happened quite frequently and it usually took a week to 10 days to straighten them out but that there was nothing to worry about.

Leavitt's factual representations were materially false or misleading and his predictions had no reasonable basis. Leavitt originally heard about CIC from another customer and when he attempted to obtain information for himself concerning CIC he was unable to learn anything. He then consulted with Mr. Torelli who testified that he too was unable to obtain any concrete facts concerning the business of CIC. However, this inability to learn anything about CIC was not disclosed to customers nor did it prevent registrant and Leavitt from continuing to solicit purchases of CIC.

The Commission has repeatedly held that it is a violation of the anti-fraud provisions for a broker-dealer to recommend a security unless there is an adequate and reasonable basis for the recommendations. In

addition, if such dealer lacks essential information about the issuer, he must disclose this lack of knowledge and caution customers as to the risk involved in purchasing the securities without it.^{9/}

It is found that Torelli, registrant, and Leavitt willfully violated Section 17(a) of the Securities Act and Section 10b of the Exchange Act and Rule 10b-5 thereunder in the offer and sale of the common stock of CIC.

The order for proceeding alleges, further, that during the period from on or about April, 1969 to on or about January, 1970, registrant and Alderson willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by soliciting and accepting orders for certain securities, namely, Port of New York Authority and Kentucky Turnpike municipal bonds and shares of Competitive Capital Fund and then, among other things, failing to complete the purchase and delivery of said fully paid for securities to customers; converting and permitting the conversion to the personal use of Alderson monies paid to him by customers for the purchase of securities; and, making false and misleading statements of material facts and omitting to state material facts concerning, among other things, the activities described above.

Torelli, president of registrant, testified that registrant opened a branch office at Houston, Texas, in 1967 at the request of Lou Arky, ("Arky")^{10/} a registered representative formerly employed by registrant in Miami. In 1968 Arky informed registrant that he had to leave and recommended Alderson, who had been in the used car and insurance

^{9/} See SEA Rel. 6721 (February 2, 1962) and cases cited therein.

^{10/} No relation to Division counsel Stephen W. Arky.

business, as his successor. Torelli visited the Houston office on a weekend when it was closed, met Alderson and hired him without any investigation. Although this was a one man office, Alderson asked to be named regional manager. Torelli agreed and even had business cards printed to that effect and at registrant's expense in Miami. Although Arky left about February 1, 1968, Alderson's registration as a securities salesman in Texas did not become effective until March 29, 1968 and the Houston Branch office was not registered with the NASD until June 1969.

Mrs. D. J. testified that in April, 1969 she gave Alderson \$30,000 to invest for her in Competitive Capital Corporation a mutual fund whose shares were retailed by registrant. The record shows that Alderson telephoned this order to registrant late in the afternoon and then called back the next day with instructions to hold it. No money was ever forwarded.

Torelli testified that he was informed of the order by registrant's mutual funds manager but took no action. Moreover, under questioning, Torelli stated that he did not know what happened to the \$30,000 and made no effort to find out. The record indicates that Mrs. D. J. instituted suit against registrant to recover her money.

Mrs. J. A., mother of Mrs. D. J., testified that she placed an order with Alderson for \$13,000 face amount Kentucky Turnpike bonds and \$10,000 face amount Port of New York Authority bonds for the trust accounts of each of her three children. The actual purchase price for each account was \$17,801.88. These orders were placed on November 21, 1969 with Alderson who telephoned them to registrant in Miami. The orders were executed by registrant but when payment was not received registrant did not deliver the bonds but began pressing Alderson for payment. After considerable delay Alderson sent three personal checks dated December 10, 1969

payable to the order of Prudential Investment Corporation in the amount of \$17,801.88 each. Torelli testified that he was surprised to receive Alderson's personal checks and that although he thought it was "very funny" he never checked with the customer. On December 24th the checks were returned marked insufficient funds (ISF). Torelli testified that he called Alderson who stated that the money had not been released from the trust accounts. Again, the customer was not called. The checks were redeposited and returned on January 5, 1970 again marked ISF. Torelli then called Alderson's bank for the first time and learned that there was no money in the account and that Alderson had apparently absconded with the funds. Mrs. J. A., also, has sued registrant in an effort to recover her money.

It is found that registrant and Alderson willfully violated Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. Although Torelli participated in and was aware of the aforesaid conduct and activities he is not charged under this section of the order with having violated the above stated anti-fraud provisions and, accordingly, no findings are made as to him.

Failure to Supervise

The order for proceeding alleges that from March 12, 1968 to June 14, 1971, registrant and Torelli failed reasonably to supervise Leavitt and Alderson, who were subject to their supervision, with a view to preventing the violations committed by them.

During the relevant time period concerned here the registrant was solely under the control of Torelli who, as he testified, was the only one who had supervisory jurisdiction which he exercised by delegating authority to responsible people. Therefore, Torelli and registrant were

under a duty to use reasonable care to see to it that the everyday operations of the firm's business were properly performed.^{11/} The record is replete with instances where registrant and Torelli failed in the performance of such duty. Accordingly, it is concluded that registrant and Torelli failed reasonably to supervise persons subject to their supervision namely, Leavitt and Alderson, with a view to preventing the violations committed by them.

Public Interest

The violations found to have occurred herein are numerous, serious and varied and took place over an extended period of time. Each violation has been previously discussed in detail but the cumulative effect must be taken into account in considering appropriate sanctions to be applied for the protection of investors. This is particularly true as to Torelli who was at all times responsible for the conduct of registrant's business and the supervision of respondents Leavitt and Alderson. Torelli's principal argument in mitigation is that his activities were not willfull. This has previously been dealt with in this decision.^{12/} It is well established that a finding of willfullness under Section 15(b) of the Exchange Act does not require an intent to violate the law and that it is sufficient that a respondent intentionally engage in conduct which constitutes a violation.^{13/}

^{11/} Madison Management Corp., Securities Exchange Act Release No. 7453, p. 3 (Oct. 30, 1964); General Investing Corporation, Securities Exchange Act Release No. 7316, p. 6 (May 15, 1964).

^{12/} See page 5 and footnote 6, supra.

^{13/} Dunhill Securities Corporation, SEA Release 8563, p. 5 (July 14, 1969); Tager v. SEC, 344 F. 2d 5, 8, (C.A. 2, 1965).

The record of the registrant and its president, Torelli, as evidenced by the violations found in this proceeding, reflects either an unwillingness or a lack of capacity to operate as a broker-dealer in conformity with applicable laws and regulations. The impression imparted by Torelli through his actions as reflected by the record and his appearance as a witness is that of an individual who has no comprehension of what is required to properly manage a securities business. This is illustrated by his failing to properly supervise Leavitt and the sales of securities in the Miami office and by his lackadaisical attitude concerning the staffing, registering and operation of the Houston branch office.

In view of the nature and extent of the violations, the injunction and the court order and the lack of any genuinely mitigating factors, it is concluded that the public interest requires that the registration of the registrant be revoked,^{14/} that the application of the applicant be denied, and that respondent Torelli be barred from association with a broker or dealer.^{15/}

With respect to respondents Leavitt and Alderson it is concluded, in view of all of the circumstances, that the public interest requires that each of them be barred from being associated with a broker or dealer.^{16/}

^{14/} Registrant's application to withdraw its registration Form BWD, Notice of Withdrawal From Registration as a Broker-Dealer, is rejected.

^{15/} It should be noted that a bar order does not preclude the person barred from making such application to the Commission in the future as may be warranted by the then-existing facts. Fink v. SEC (C.A. 2, 1969), 417 F. 2d 1058, 1060; Vanasco v. SEC, (C.A. 2d, 1968) 395 F. 2d 349, 353.

^{16/} See footnote 15, supra.

Respondent Leavitt contends that as a licensee, he was not given an opportunity to achieve compliance prior to the institution of these proceedings as required by section 9(b) of the Administrative Procedure Act ("APA").^{17/} The Division does not concede that Leavitt is a licensee within the meaning of section 9(b) of the APA, but in any event there is no merit in his contentions. These proceedings are within the exception expressly provided in section 9(b) of the APA for cases based on the willfulness of the violations and requirements of the public interest.^{18/}

ORDER

Accordingly, IT IS ORDERED that the registration as a broker-dealer of Prudential Investment Corporation is revoked and the firm expelled from membership in the National Association of Securities Dealers, Inc.; that the application of Miami Securities, Inc., is denied; and that Nicholas M. Torelli, Sidney Leavitt and Howard Leon Alderson and each of them, is barred from association with a broker-dealer.

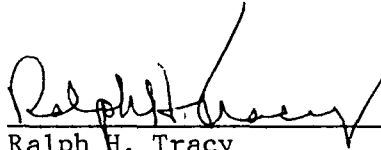
^{17/} Section 9(b) of the APA provides in part:

"Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements."

^{18/} Sterling Securities Company, 37 S.E.C. 837 (1957); M. J. Shuck Company, 38 S.E.C. 69, 74-5 (1957), aff'd Shuck v. S.E.C., 264 F. 2d 358 (C.A.D.C., 1958); H. Carroll & Co., 39 S.E.C. 780, 788 (1960); Lile & Co., Inc., S.E.A. release no. 7644, p. 3 (July 9, 1966)

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice.

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party.^{19/}



Ralph H. Tracy
Hearing Examiner

Washington, D.C.
February 23, 1972

^{19/} To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected.