ADMINISTRATIVE PROCEEDING
FILE NO. 3-5823

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

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| In the Matter of | : |
| LOWE MANAGEMENT CORPORATION<br>CHRIS L. LOWE | : |
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FILED

# INITIAL DECISION

April 14, 1980
Washington, D.C.

Max O. Regensteiner
Administrative Law Judge

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APPEARANCES: Lawrence J. Toscano, Larry H. Irom, Laura A. Corsell and Thomas R. Hickey, Jr. (Law Clerk), of the Commission's New York Regional Office, for the Division of Enforcement.

Michael E. Schoeman, of Schoeman,Marsh, Updike & Welt, for respondents.

BEFORE: Max O. Regensteiner, Administrative Law Judge.

In these proceedings under Section 203 of the Investment Advisers Act of 1940 ("the Act"), the order for proceedings presents the issues whether allegations by the Commission's Division of Enforcement with respect to Lowe Management Corporation ("registrant"), a registered investment adviser, and Chris L. Lowe, its president, a director and majority shareholder, are true and what, if any, remedial action is appropriate in the public interest. The allegations are that during the period from about June 1976 to April 1978, registrant, willfully aided and abetted by Lowe, willfully violated Sections 206(1) and (2) of the Act by withholding funds of clients and making false and misleading statements concerning the return of such funds; that in April 1978 and again in March 1979, Lowe was convicted of crimes of a nature constituting a basis for remedial action under Sections 203(e) and (f); and that Lowe willfully aided and abetted willful violations by registrant of Sections 204 and 207 of the Act and Rule 204-1(b) (17 CFR 275.204-1(b)) thereunder, by failing to amend registrant's registration application (Form ADV) to disclose those convictions.

Following hearings, the parties filed proposed findings and conclusions and supporting memoranda, and the Division filed a reply memorandum.

Respondents

Lowe, who was then 22 years old, caused registrant to become registered in 1974. Early in its existence, it provided investment advisory and management services for clients on an individual basis and published and offered on a subscription basis a twice-monthly market letter entitled the Lowe Investment and Financial Letter ("LIFL"). Respondents assert that for some years now they have been engaged solely as "publishers and writers." They

base their defense in large measure on the Constitutional protections which, they contend, attach to those activities. An amendment to registrant's Form ADV, executed on December 4, 1979, the day of the hearing in this matter, indicates that presently registrant's sole activity is the publication of two "financial newsletters" on a subscription basis.[1/] One of these is a weekly publication of recent origin, the Lowe Stock Advisory. The record contains no further indication of its content. The other is LIFL, sample copies of which were placed in evidence. It includes commentary on the market as a whole and recommendations of particular securities.

Violations of Antifraud Provisions

The alleged antifraud violations relate to respondents' conduct with respect to a Sergeant B., a career U.S. Air Force man. In the spring of 1976, Sergeant B., who was then stationed in England and wished to invest $10,000, entered into an "investment account management agreement" with registrant, specifying that his investment objective was "aggressive trading." Under the terms of the agreement, registrant was to open an account for Sergeant B. with a broker-dealer that was to hold his cash and securities; registrant was to have sole discretion over trading in the account. The agreement provided for certain fees based on a percentage of the account size, with a minimum annual fee of $500. It permitted Sergeant B. to terminate the agreement upon 10 days' notice. Pursuant to Lowe's instructions, Sergeant B. mailed a check for $10,000 to the broker-dealer.

According to Sergeant B.'s undisputed testimony, he became suspicious after receiving a statement that reflected an account

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1/ As requested by both the Division and respondents, I have taken official notice of the amendment.

balance of about $35 and "no other statements to show what had happened to the rest of the money." (Tr. 20) Thereupon, in August or September 1976, he decided to liquidate his account and sent letters requesting liquidation to Lowe, to the broker-dealer, and to the latter's clearing firm. Having had no response for about two months, he complained to the Commission. Shortly thereafter, he received a call from Lowe. The latter stated that he had been out of town, had just received Sergeant B.'s letter and would mail a check to him immediately. Lowe further stated that he would waive the $500 fee because the account had been open only a short time. In the latter part of 1976, Sergeant B., not having received a check, called Lowe, who stated that the first check must have gotten lost and that he would send another one. In late 1976 or early 1977, Sergeant B. finally received from Lowe a check drawn by registrant in the amount of about $8,800, but it was returned by the drawee bank marked "insufficient funds." Between then and about July 1977, during which period Sergeant B. called Lowe "over and over again," and Lowe "said he'd make good on it," (Tr. 30) he received three further checks which also "bounced."

In about July 1977, Sergeant B., who had by then been reassigned to the United States, received a call from the New York State Attorney General's Office advising him that Lowe had been arrested and had promised to make full restitution.[2/] Shortly thereafter, Sergeant B. received from that office another of Lowe's (or registrant's) checks. But that check also bounced, as did

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2/ Sergeant B. had previously complained to the Attorney General's Office.

a second check transmitted by the Attorney General's Office. In February 1978, Lowe called Sergeant B. to advise him that he had mailed him a Western Union money order in the amount of $10,000. In fact, the money order was in the amount of $10.[3/]

A few weeks earlier, Sergeant B. had retained a New York City attorney to represent him. The attorney obtained a check from Lowe, deposited it in his trust account,and in March 1978, sent his own check to Sergeant B., after deducting his fee. Sergeant B. acknowledged that he thus recovered the full amount of his investment, minus attorney's fee.

Section 206 of the Act, as here pertinent, prohibits an investment adviser from (1) employing any device, scheme or artifice to defraud any client, and from (2) engaging in any transaction, practice or course of business which operates as a fraud or deceit upon any client. Respondents urge that since Sergeant B.'s funds were returned to him, the record does not establish that Lowe engaged in any fraudulent practice. With respect to registrant, they contend that there is nothing in the record to support a finding that Lowe acted on registrant's behalf in "allegedly withholding" Sergeant B.'s funds and in his communications with Sergeant B. These arguments, however, lack merit.

There is no basis for distinguishing in this case between the actions of Lowe and registrant, which is Lowe's corporate alter ego. Registrant, as a corporation, could act only through its officers or other agents. Nor can it be claimed that Lowe was

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3/ The money order incident is further discussed below at pp. 7-8.

off on some "frolic of his own" unrelated to registrant's business. Sergeant B.'s agreement was with registrant, and it was registrant's responsibility to see that his funds were promptly returned when Sergeant B. terminated the agreement. And at least some of the checks that bounced were those of registrant. If Lowe engaged in misconduct in connection with the return of the funds and statements made to Sergeant B. with respect thereto, under the doctrine of respondeat superior such misconduct must also be regarded as registrant's misconduct.[4/]

Particularly in light of respondents' fiduciary relationship with their clients, there can be little doubt that their conduct with respect to Sergeant B. violated the Act's antifraud provisions cited above.[5/] The record shows that funds due to Sergeant B. were withheld from him for almost 1-1/2 years.[6/] The unexplained withholding of those funds[7/] was tantamount to their misappropriation. During the period

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4/ See Armstrong Jones & Co. v. S.E.C., 421 F.2d 359, 362 (C.A. 6, 1970), cert. denied 398 U.S. 958; H.F. Schroeder & Co., 27 S.E.C. 833, 837 (1948); Cady Roberts & Co., 40 S.E.C. 907, 911 (1961).

5/ Because Section 206 prohibits conduct by an investment adviser, an associated or other person participating in violations of that Section is found to have aided and abetted such violations.

6/ As noted, Sergeant B. sent the $10,000 to a broker-dealer when he entered into the agreement with registrant. The record does not show what happened to those funds. No claim is made by respondents, however, and there is nothing in the record to suggest, that the broker-dealer withheld the funds from registrant after Sergeant B. terminated the account. To the contrary, the record shows that Lowe, on behalf of registrant, considered that they were responsible for and undertook to make repayment.

7/ Invoking his privilege against self-incrimination, Lowe declined to testify.

in question, Lowe repeatedly assured Sergeant B. that payment would be made promptly or was already on its way. Yet the checks which were sent were unsupported by funds and were dishonored, and the money order which was represented to be in the amount of $10,000 proved to be only for $10. It was only under the pressure of certain criminal proceedings, discussed infra, that restitution was finally made. Even then, Sergeant B. was not reimbursed for the fee deducted by his attorney nor for the income which his funds could have earned during the period they were improperly withheld.

Accordingly, I find that, as alleged, registrant, willfully aided and abetted by Lowe, willfully violated Sections 206(1) and (2) of the Act.[8/]

Convictions

In July 1977 Lowe was indicted by a New York State grand jury. The indictment charged him, among other things, with violating (a) Section 352-c of New York's General Business Law in that, on or about February 6, 1977, he represented in writing to a Mr. P. that he had managed and invested P.'s funds to the extent of earning a 27 percent profit through the purchase and sale of securities, when in fact Lowe made no such purchase or sale and instead appropriated

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8/ Cf. Darrell G. Hafen, 44 S.E.C. 347 (1970); Cromwell & Co., 38 S.E.C. 913, 915 (1959).

Since the facts are undisputed, it is immaterial whether the "clear and convincing" or the preponderance standard of proof is applied. Moreover, assuming that a finding of scienter is necessary to establish a violation of Section 206(1) (see Steadman v. S.E.C, 603 F.2d 1126, 1134 (C.A. 5, 1979)), respondents had the requisite scienter (paraphrased by Steadman as intentional, as contrasted with negligent, conduct. Ibid). Moreover, scienter is not required under Section 206(2). S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963); Steadman v. S.E.C., supra. The finding that respondents violated Section 206(1) is merely cumulative, and the sanctions being imposed would be the same even had no finding been made under that provision.

the funds to his own use;[9] and (b) Section 359-eee of that Law by engaging in business as an investment adviser in New York during the period from about January to June 1977 without having filed a registration statement with the designated state agency.

On November 4, 1977, Lowe pleaded guilty to those charges, both misdemeanors. In the course of court proceedings on that date, Lowe's counsel stated that he had turned over to one of the prosecutors a check for $10,087, payable to Sergeant B., to be forwarded to Sergeant B. As noted previously, this check bounced. Lowe appeared again before the same judge on February 22, 1978, as part of the sentence calendar. At that time, discussions centered on Lowe's restitution to Sergeant B. The court noted that Lowe had tendered to him a photocopy of a money order (or money order receipt) payable to Sergeant B. in the amount of $10,000, when the original was only in the amount of $10.[10] Noting that Lowe's guilty pleas to two counts in "satisfaction" of a multi-count indictment had been accepted on condition that he make restitution to Sergeant B., the Court granted the Attorney General's

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9/ Section 352-c prohibits a variety of fraudulent or deceptive acts and practices.

10/ I reserved decision on respondents' objection to the admission of Division Exhibit 15, the transcript of the February 22 proceedings. Respondents objected specifically to the admission of statements by the court concerning the falsified money order. However, the court's observations have a bearing on the remedial action which is appropriate here. Neither Lowe nor his then counsel disputed the accuracy of those observations when they were made. And in subsequent proceedings Lowe expressly admitted the conduct reflected therein. In their proposed findings and conclusions and memorandum, respondents did not oppose the Division's renewed request, in its submission, that the exhibit be admitted. Accordingly, Exhibit 15 is hereby received in evidence.

request to withdraw those pleas. Subsequently, however, the guilty pleas were reinstated and on April 5, 1978, Lowe was sentenced to three years' probation on the Section 352-c count and given an "unconditional discharge" on the other count.

In October 1978, Lowe was charged by the State of New York with, among other things, the felonies of Tampering with Physical Evidence and Grand Larceny in the Third Degree. The tampering charge was that in the February 22, 1978 court proceeding referred to above, Lowe had offered evidence which he knew to be false, namely the copy of the money order whose face amount had been altered from $10 to $10,000. The larceny count charged that in October 1977, Lowe stole $684 from a New York bank. On December 1, 1978, Lowe pleaded guilty to the above crimes. With respect to the larceny charge, Lowe described his misconduct as follows: He deposited in the New York bank checks drawn on a closed account in an out-of-state bank and then issued checks drawn on the purported balance in the New York bank account which were paid from that account. 11/

On March 27, 1979, the court imposed a concurrent sentence for the two convictions of sixty days in prison followed by probation for four years and ten months. Lowe was also required to make restitution to the New York bank. 12/

Under Section 203 of the Act, convictions of certain types of crimes of an investment adviser or person associated with it

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11/ Lowe admitted that the total amount taken in this manner from the New York bank far exceeded the amount specified in the count to which he pleaded guilty.

12/ The Act, in Section 202(a)(6), defines the term "convicted" to include a plea of guilty, whether or not sentence has been imposed. Accordingly, for the purposes of this proceeding the date of the larceny and tampering convictions is December 1, 1978, not March 27, 1979 as alleged in the order for proceedings. This slight variance has no significance with reference to the issues herein.

provide a basis for remedial action.[13] The enumerated crimes include, as here pertinent, any felony or misdemeanor which (a) involves the purchase or sale of any security; (b) arises out of the conduct of the business of an investment adviser; or (c) involves the larceny or misappropriation of funds or securities. Lowe's conviction of engaging in business as an unregistered investment adviser falls squarely within category (b). Contrary to respondents' argument, the New York statute defines the term "investment adviser" in substantially the same terms as the Act. While it is not entirely clear that the Section 352-c conviction arose out of Lowe's conduct of an investment advisory business, as alleged, his misconduct also involved a misappropriation of funds, one of the other specified categories of crimes. The felony larceny conviction, of course, falls squarely within category (c). Finally, as to the tampering with evidence conviction, the Division does not disagree with respondents' argument that that conviction does not fall within the types of crimes specified in the Act.[14] It does not follow, however, as respondents would have me find, that it is therefore irrelevant. The conviction has a significant bearing on the determination of the remedial action which is appropriate in the public interest.

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13/ Respondents' argument that Lowe's convictions cannot be attributed to registrant is correct, but of no practical significance. Under the Act, the convictions of Lowe, a "person associated with" registrant, provide a statutory basis for remedial action not only as to him (Section 203(f)), but as to registrant as well (Section 203(e)).

14/ Since the evidence with which Lowe tampered was a money order supposedly representing restitution to Sergeant B., an investment advisory client, a plausible argument could be made that the crime arose out of the conduct of an investment advisory business.

Respondents urge that it would be inappropriate and indeed improper for the Commission, on the basis of the convictions, to impose a "second round of punishment" on Lowe since he has already been punished by the state for his violations of state law. The argument overlooks the fact that criminal and administrative proceedings serve different purposes. As pointed out by the Commission in A.J. White & Co., Securities Exchange Act Release No. 10645 (February 15, 1974), 3 SEC Docket 550, 551:

> "In the law of crime, the courts' jurisdiction is exclusive. It is for them -- and them alone -- to pass on criminal charges. And only they can mete out criminal penalties. But they have no power to bar someone from the securities business or to affect his capacity to engage in it. That power is vested solely in us. And the considerations by which we must be guided in exercising it differ from those that govern in criminal cases." (Footnotes omitted)

Moreover, as noted, a conviction, whether by a state or by a federal court, rather than being a barrier to administrative action, is made an express ground for remedial action under Sections 203(e) and (f) of the Act. 15/

Failure to Amend Form ADV

Prior to its recent amendment, registrant's Form ADV contained a negative answer to the question whether any officer, director or controlling person had been convicted of certain crimes, including any felony or misdemeanor arising out of the conduct of an investment adviser business or involving misappropriation of funds or securities.

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15/ Cf. Kamen & Company, 43 S.E.C. 97, 108, n. 17 (1966).

Although Rule 204-1(b) requires an investment adviser promptly to file an amendment to its Form ADV if the information therein becomes inaccurate,[16/] that answer was not amended promptly after Lowe's convictions in April 1978 which, as noted, fell within the specified categories. It was not until December 1979, some twenty months later and almost two months after institution of these proceedings, that registrant submitted a revised Form ADV disclosing the convictions. That this was not a prompt amendment, as required by the rule, hardly needs belaboring.[17/] In Marketlines, Inc., 43 S.E.C. 267, 271, aff'd 384 F.2d 264 (C.A. 2, 1967), cert. denied 390 U.S. 947 (1968), the Commission rejected the contention that a delay of somewhat less than three months in filing an amendment was not unreasonable, stating: "The application for registration is a vital element in our regulation of investment advisers and a delay of such duration is inconsistent with the duty to keep filings current."

While acknowledging the requirement of prompt corrective amendments contained in Rule 204-1(b), respondents question the statutory basis for such requirement. Aside from the question whether it is within my province to pass on the validity of rules adopted by the Commission, respondents' argument lacks merit.

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16/ The Rule was amended in certain respects in 1979, coincident with the adoption of a revised Form ADV. See Investment Advisers Act Release No. 664 (January 30, 1979), 16 SEC Docket 901. As pertinent here, however, the requirement of prompt amendment remained unchanged.

17/ Larceny of funds or securities was one of several types of crimes added by Congress in 1975 to the crimes which under Section 203 of the Act provide a basis for the imposition of sanctions. However, the Form ADV in effect prior to July 31, 1979 did not, in the question pertaining to convictions, refer to those added crimes. Thus, it appears that Lowe's larceny conviction in 1978 did not render registrant's Form ADV inaccurate.

Section 204 of the Act, in pertinent part, requires investment advisers to make such reports as the Commission, by rule, prescribes as necessary or appropriate in the public interest or for the protection of investors.[18/] It seems clear that under this provision the Commission may require correction of registration applications which have become inaccurate.[19/] Moreover, the Commission has repeatedly held that a failure to correct material information in a registration application violates Section 207 of the Act.[20/] Respondents' further argument that the failure promptly to file an amendment following Lowe's convictions was not shown to be willful is equally unfounded. They obviously were aware of the convictions and of the fact that no amendment had been filed. And a finding of willfulness under Section 203 of the Act, just as such a finding under Section 15(b) of the Securities Exchange Act of 1934, requires no finding that the respondent intended to violate the law.[21/]

Accordingly, I find that Lowe willfully aided and abetted willful violations by registrant of Sections 204 and 207 of the Act and Rule 204-1(b) thereunder.

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18/ Respondents' argument in part rests upon the erroneous premise that the 1975 amendments to Section 204 changed the requirement to "make" reports to one to "disseminate" reports. In fact, the amendments merely added the words "and disseminate" after the word "make."

19/ Rule 204-1 defines amendments to Form ADV as "reports."

20/ See, e.g., Edwiin Hawley, 32 S.E.C. 375 (1951); Cambridge Research and Investment Corp., 40 S.E.C. 252 (1960).

Section 207 makes it unlawful willfully to misstate or omit to state material facts in any registration application or report filed with the Commission under Section 203 or 204.

21/ See Tager v. S.E.C., 344 F.2d 5, 8 (C.A. 2, 1965); Sterling Securities Company, 39 S.E.C. 487, 495 (1959).

Public Interest; Constitutional Arguments

The Division, asserting that respondents' conduct demonstrates a total inability to comply with the fiduciary standards which an investment adviser must meet under the Act, urges that revocation of registrant's registration and a bar of Lowe from association with an investment adviser are necessary for the protection of the public. For the reasons discussed below, I agree.

Respondents contend that the action sought by the Division amounts to an attempt to prohibit them from publishing their subscription publications and therefore from exercising their constitutionally protected rights of free speech and press. They point out that they are no longer engaged in advising individual clients or in handling clients' funds, and that their sole business activity is the writing and publication of financial newsletters on a subscription basis. On the basis of these facts, and noting the absence of any suggestion that their publications have been or are deceptive or misleading, respondents, pointing to recent Supreme Court decisions extending the scope of First Amendment protections with respect to business and commercial information, contend that the Commission has no authority to prohibit (and thereby subject to "prior restraint") the publication of their newsletters.

The Division, with much justification, urges that its request for sanctions cannot be equated with an attempt to prohibit publication of respondents' newsletters. It is nevertheless true that that would be the consequence of imposing the requested sanctions, unless registrant's activities bring it within the "bona fide newspaper"

exclusion from the definition of "investment adviser." [22] Respondents do not claim entitlement to that exclusion. Rather, their argument at bottom is that by virtue of the First Amendment, those whose activities are limited to the publication of investment news and opinion may not be regulated under the Act, at least not to the extent of suspending or cutting off their right to publish such materials. Respondents also maintain that Section 202(a)(11), which defines the term "investment adviser" and hence determines coverage and regulation under the Act, makes constitutionally impermissible distinctions by excluding certain categories of persons who give or publish information about investments, while not excluding others.

The short answer to these arguments is that, as the Commission said some years ago in response to another attack on the Act's constitutionality, based on entirely different grounds, it is not its function to "pass on the constitutionality of our governing acts." [23] "As the administrative

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22/ Section 202(a)(11), subject to certain exclusions, defines the term "investment adviser" as "any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities." Among the exclusions is one for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." (Clause D of Section 202(a)(11)) As to the interpretation of that exclusion, see S.E.C. v. Wall Street Transcript Corp., 422 F.2d 1371 (C.A. 2), cert. denied 398 U.S. 958 (1970); 454 F. Supp. 559 (S.D.N.Y., 1978).

23/ Stanford Investment Management, Inc., 43 S.E.C. 864, 874 (1968).

agency delegated by Congress to administer the . . . Act, we necessarily proceed on the assumption that such Act is constitutional unless and until the courts declare otherwise." 24/ It should be noted, however, that in a recent decision under the Commodity Futures Trading Commission Act of 1974 ("CFTC Act") involving facts remarkably similar to those in the instant proceeding, the U.S. Court of Appeals for the Seventh Circuit rejected Constitutional arguments very much like those presented by respondents.25/ Savage published a commodity newsletter. After enactment of the CFTC Act, he could not continue to do so unless registered as a "commodity trading advisor" (which the CFTC Act defines in terms paralleling the "investment adviser" definition). Following hearings, the Commodity Futures Trading Commission denied Savage's application for registration because some years before he had been convicted of securities fraud. Its decision was based on a provision of the CFTC Act which, as pertinent here, authorizes the Commission to deny registration where an applicant is found "unfit to engage" in business as a commodity trading advisor because he had been convicted of a felony.

On review, Savage argued, among other things, that a statutory requirement that a license be obtained in order to publish information and opinions regarding the commodities markets was an

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24/ Ibid. To the same effect, with reference to other statutes administered by the Commission, see Houston Natural Gas Corporation, 3 S.E.C. 664, 671 (1938); Walston & Co., 5 S.E.C. 112, 113 (1939); Mutual Fund Distributors, Inc., 41 S.E.C. 174, 181 (1962).

25/ Savage v. Commodity Futures Trading Commission, 548 F.2d 192 (C.A. 7, 1977).

unwarranted impairment of First Amendment rights of freedom of speech and press; that the First Amendment covered newsletters though they were published in anticipation of economic gain; and that prior restraints were presumed illegal, especially where it was sought to prohibit publication of a newsletter without any evidence that it was used in a deceptive or fraudulent manner.

The Court found those arguments without merit. In a passage which, though somewhat lengthy, warrants quoting here, it said:

> Commercial speech is entitled to a measure of First Amendment protection. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 . . . (1976), but it has long been recognized that the Amendment does not remove a business engaged in the communication of information from general laws regulating business practices. As Justice Harlan stated in Curtis Publishing Co. v. Butts, 388 U.S. 130. . . (1967):
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> > "A business 'is not immune from regulation because it is an agency of the press . . . .' Federal securities regulation, mail fraud statutes, and common-law actions for deceit and misrepresentation are only some examples of our understanding that the right to communicate information of public interest is not 'unconditional.'" (Citations and footnotes omitted).
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> See also Securities and Exchange Commission v. Wall Street Transcript Corp., 422 F.2d 1371 (2d Cir. 1970). At issue here is not the worth or accuracy of Savage's publication, . . . . He might well have advised his clients with skill as to what commodities to buy and sell. But Congress was interested in the character of the advisor and publisher — not his advice or publication — and in its desire to protect the public it had a right to evince this interest. 26/

The remaining issue concerns the sanctions which are appropriate in the public interest. Lowe's record, as reflected

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26/ Id. at 197. See also Securities Exchange Act Release No. 16590 (February 19, 1980), 19 SEC Docket 659 (announcing the adoption of Rule 11Ac1-2 under the Exchange Act), where the Commission, in rejecting the argument of a vendor of securities information that the Rule would violate its freedom of speech and press, stated (at p. 668) that the Supreme Court "has yet to enunciate a definitive test for determining the validity of regulations governing the publication of commercial speech. However, recent cases suggest that, where a valid regulatory objective as well as a rational relationship between the regulation and the objective are demonstrated, the regulation would be upheld." (citations omitted)

in his conduct with respect to Sergeant B., his various convictions and his attempted deception of a New York court, is one of recurrent dishonesty and dissimulation almost from the beginning of his career in the investment advisory business. And respondents' failure to amend the Form ADV indicates an indifference to important regulatory requirements. Respondents have propounded no mitigating factors (other than the ultimate restitution to Sergeant B. and the recent amendment of registrant's Form ADV, which for reasons already indicated carry little weight). Under the circumstances, there would ordinarily be no question that Lowe and his firm should not be permitted to continue in the investment advisory business. In a recent case where the president and sole shareholder of an investment adviser had been convicted of making false statements in a loan application, the Commission, finding that he did not meet the standards requisite for an investment adviser, barred him from association with an investment adviser and revoked the adviser's registration.[27/] The Commission referred to an earlier holding that "[a]n investment adviser is a fiduciary in whom clients must be able to put their trust. As one Court has stated, it is an 'occupation which can cause havoc unless engaged in by those with appropriate background and standards.'"[28/]

Even assuming that in the future respondents' sole activity in the investment advisory field would be the publication and

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27/ Benjamin Levy Securities, Inc., Investment Advisers Act Release No. 613 (January 12, 1978), 13 SEC Docket 1348.

28/ Joseph P. D'Angelo, Investment Advisers Act Release No. 562 (December 16, 1976), 11 SEC Docket 1263, 1264, aff'd without opinion, C.A. 2 (May 5, 1977), quoting from Marketlines, Inc. v. S.E.C., 384 F.2d 264, 267 (C.A. 2, 1967), cert. denied. 390 U.S. 947 (1968).

distribution of their subscription publications, those considerations apply with substantially undiminished force. In that activity, opportunities for dishonesty and self-dealing abound, ranging from those related to the existence of self-interest in the selection of material to be published[29/] to those deriving from the receipt of advance payment by subscribers to the publications.[30/] Once more, the Savage decision is instructive. In rejecting Savage's argument that the CFTC improperly refused to recognize that he would be unable to commit the harm sought to be prevented by the statute because as an advisor he would not handle customer funds, the Court stated: "Congress has already made the judgment that trading advisors hold a fiduciary relationship and must meet high standards so as to protect the public."[31/] The Court further emphasized "a Congressional purpose, clearly evidenced at least since 1933, to protect the American investing and speculating public not only from fraud and fraudulent practices, but from those whose past actions indicate that they might be tempted to engage in such practices."[32/]

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29/ An example would be the "scalping" practice which was the subject of the Supreme Court's decision in S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

30/ See also S.E.C. v. Wall Street Transcript Corp., 422 F.2d 1371 (C.A. 2), cert. denied 398 U.S. 958 (1970), regarding other opportunities for fraud by publishers of market letters.

31/ 548 F.2d at 197.

32/ Ibid. The Court specifically cited the Investment Advisers Act as one of the statutes to which it had reference. See also Potomac Investment Advisers, Ltd., Investment Advisers Act Release No. 716 (March 28, 1980), 19 SEC Docket .

Accordingly, IT IS ORDERED that

(1) the registration as an investment adviser of Lowe Management Corporation is hereby revoked; and

(2) Chris L. Lowe is hereby barred from being associated with an investment adviser.[33/]

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

Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 17(b) within fifteen days after service of the initial decision upon him, 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.

Max O. Regensteiner
Administrative Law Judge

Washington, D.C.
April 14, 1980

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33/ All proposed findings and conclusions and all contentions have been considered. They are accepted to the extent they are consistent with this decision.