ADMINISTRATIVE PROCEEDING
FILE NO. 3-5670

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of :

HAMMON CAPITAL MANAGEMENT CORPORATION:

(801-9795) :
and
:

GABE HAMMON
:

INITIAL DECISION

Washington, D.C.
January 25, 1980

Warren E. Blair
Chief Administrative Law Judge

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(801-9795)	:	INITIAL DECISION
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APPEARANCES: Thomas E. Boyle, of the Denver Regional Office of the Commission, for the Division of Enforcement.

David M. Greenberg, of San Francisco, California, for Hammon Capital Management Corporation and Gabe Hammon.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

These public proceedings were instituted on February 27, 1979 by order of the Commission ("Order") pursuant to Section 203(e) of the Investment Advisers Act of 1940 ("Advisers Act"). The Order directed that a public hearing be held to determine whether Hammon Capital Management Corporation ("HCM" or "registrant") and Gabe Hammon ("Hammon") had engaged in the misconduct alleged by the Division of Enforcement ("Division") and whether remedial action was appropriate in the public interest.

In substance, the Division alleged that HCM, wilfully aided and abetted by Hammon, wilfully violated Section 204 and Rules 204-1 and 204-2 thereunder by failing to file with the Commission certain amendments to HCM's Form ADV and by failing to make and keep true, accurate, and current books and records relating to HCM's investment advisory business. The Division also alleged that HCM and Hammon also violated Section 204 of the Advisers Act by a refusal to permit representatives of the Commission to make an examination of HCM's books and records for a period of approximately six (6) days in October, 1978.

Respondents appeared through counsel, who participated throughout the hearing. As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Filings thereof, accepted as timely, have been made by the parties.

Respondents

HCM, a California corporation, became registered as an investment adviser under the Advisers Act as of January 10, 1974,

having succeeded to the investment advisory business operated by Hammon as a sole proprietor since December, 1973. Hammon is and was president, a director, and principal shareholder of HCM during the period in which the alleged offenses occurred and was responsible for HCM's operations.

Violations

At the outset of the hearing, counsel for respondents requested and was granted permission to make oral answer to the allegations in the Order, and on their behalf, admitted the allegations. Those admissions and the record otherwise establish that HCM wilfully violated and Hammon wilfully aided and abetted violations of Section 204 of the Advisers Act and Rules 204-1 and 204-2 thereunder as alleged in the Order, as amended.[1/]

Failure to Amend Form ADV

Rule 204-1(b),[2/] promulgated by the Commission pursuant to Section 204 of the Advisers Act, requires a registered investment adviser to promptly file an amendment on Form ADV correcting any information contained in its "application for registration or in any amendment thereto" which becomes inaccurate. The Division alleged and the record reflects that registrant, while under Hammon's

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1/ Immediately before resting its case, the Division moved to amend Section II, paragraph C, subparagraph 2, to add the allegation that "on or about May 1, 1979 Registrant vacated its offices at Unit 100, Cherry Hills III, 2800 South University Blvd., Denver, Colorado." Over objection of respondents, the motion was granted. The effect of the amendment is to include an additional failure to file an amendment to HCM's Form ADV application for registration as an investment adviser. Hammon, testifying upon call of his counsel subsequent to the amendment of the Order, admitted the alleged books and records violations and failures to amend HCM's Form ADV.

2/ 17 CFR 275.204-1(b).

control and direction, failed to promptly file amendments required by Rule 204-1.

As of July 1, 1977, the Secretary of State for California, acting upon information received from the State Franchise Tax Board,[3/] recorded HCM as a corporation having its corporate powers, rights, and privileges suspended, a condition that remained in effect at least until April 23, 1979.[4/] Further action against HCM was taken by California authorities on November 28, 1978 in the form of a summary suspension of HCM's California Investment Adviser's Certificate. That action arose out of HCM's failure to file, on or before its due date, a report required by the State Commissioner of Corporations.

Although HCM filed an amendment to its Form ADV in December, 1978 with respect to other information in its registration, none was filed as required by Rule 204-1 to disclose the California actions against registrant. Although admitting failure to disclose these changes in HCM's corporate powers, Hammon testified that he had been unaware of the actions of the California authorities until staff members of the Denver Regional Office (DRO) brought them to his attention in October or November, 1978. With respect to the absence of disclosure thereafter in a Form ADV amendment which was filed in December, 1978 to reflect a change in HCM's address and that of its predecessor, Hammon claimed that he understood that

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3/ This action was taken under authority of Section 23302 of the Revenue and Taxation Code of the California Bank and Corporation Tax Law.

4/ The Secretary of State certified on April 23, 1979 that HCM's corporate powers had not been reinstated.

upon receipt of the payment of $200 he had forwarded to the California Secretary of State, the suspension of registrant's corporate powers would be automatically lifted. As to the suspension of HCM's investment adviser certificate, Hammon again claimed lack of knowledge prior to filing the December amendment, testifying that his wife signed for the certified mailing containing the notice of suspension during his absence from California and that he did not open his mail until Christmas week. After learning of the suspension, Hammon did not amend registrant's Form ADV because of an asserted understanding received in speaking to the staff of the California Department of Corporations that the suspension was being held in abeyance pending completion of the SEC investigation.

Accepting Hammon's explanations at face value, and they are subject to considerable doubt because no documents were produced which would nullify the notices of action taken by California against HCM, there would still be no justification for failures to amend registrant's Form ADV to disclose the adverse actions by California. The record of those actions would not be obliterated by any later termination of the suspensions.

Additionally it appears, as alleged, that HCM changed the address of its offices to 475-17th Street, Denver, Colorado on or about April 19, 1978, and that it again moved its offices on or about October 10, 1978 to Unit 100, Cherry Hills III, 2800 South University Boulevard, Denver, Colorado. In neither instance did HCM file or Hammon cause to be filed the required

amendments to HCM's Form ADV reflecting those moves or that HCM later vacated the latter premises on or about May 1, 1979.

Failure to Make and Keep Books and Records

Under the provisions of Section 204 of the Advisers Act and Rule 204-2, 5/ HCM was required to make and keep true, accurate, and current certain specified books and records relating to its investment advisory business. Respondents' admissions and the evidence in the record establish that from about September 30, 1977 to December 20, 1978 registrant, wilfully aided and abetted by Hammon, wilfully violated Section 204 of the Advisers Act and Rule 204-2 by registrant's failure, while under Hammon's direction and control, to make and keep current:

1. A journal or journals, including cash receipts and disbursements;

2. General and auxiliary ledgers or other comparable records reflecting asset, liability, reserve, capital, income and expense accounts;

3. A memorandum of each order given by the investment adviser for the purchase or sale of any security;

4. All bills or statements or copies thereof, paid or unpaid, relating to the business of HCM;

5. All trial balances, financial statements, and internal audit working papers relating to the business of HCM; and

6. For each security in which any client has a current position, information from which HCM could promptly furnish the name of each client and the current amount or interest of each client.

5/ 17 CFR 275.204-2.

Respondents attempt to minimize these violations by arguing that registrant had various documents which would provide the same information that would have been found in books and records kept in compliance with Rule 204-2. But registrant's obligation to comply with the regulatory provisions which have been designed to provide effective control and expeditious access to information regarding the operations of an investment adviser is not satisfied by its keeping a melange of records which require time-consuming analysis before a reconstruction of a registrant's operations can be accomplished.[6/] Further, the record establishes that material portions of the information in the documents available for examination were either incomplete or erroneous.

Refusal to Permit Examination of Registrant's Books and Records

Respondents admit, and the record establishes, that during regular business hours on October 12, 1978, staff members of the DRO attempted to examine HCM's books and records but, upon instructions of Hammon, were denied access to those books and records. As a result of respondents' refusal to allow that examination, the Commission obtained a Temporary Restraining Order on October 17, 1978 from the United States District Court for the District of Colorado restraining respondents from refusing to permit Commission representatives to examine registrant's records.[7/] Access to

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6/ Cf. Eugene N. Owens, 42 S.E.C. 149, 151 (1964).

7/ SEC v. Hammon Capital Management Corporation, Civil Action File No. 78-1074 (D. Colo. Oct. 17, 1978).

registrant's records was accomplished by the DRO in accordance with the Court's order.[8/]

Respondents' explanation for the delay in permitting examination of registrant's books and records is to the effect that Hammon was not refusing to permit the examination but simply attempting to delay access until he could consult an attorney. That excuse loses persuasiveness in view of respondents' failure to advise the DRO of the availability of registrant's records prior to the Commission's obtaining its temporary restraining order some six days later.

Inasmuch as HCM was required by Section 204 of the Advisers Act[9/] to make its books and records available for reasonable examination by Commission representatives and at Hammon's direction refused to do so, it is found that respondents, as alleged by the Division, "refused to permit representatives of the Commission to make an examination of the books and records of Registrant in violation of Section 204 of the Advisers Act."

Public Interest

While admitting the alleged violations, respondents propose that the record shows need for "only a modest sanction." The Division takes the position that revocation of HCM's investment adviser registration and a bar against Hammon being associated with an investment adviser are necessary and appropriate in the

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8/ On November 30, 1978, pursuant to stipulation of the parties, SEC v. Hammon Capital Management Corporation was dismissed without prejudice.

9/ 15 U.S.C. §80b-4.

public interest.

Upon careful consideration of the record, including the arguments supporting the respective proposals of the parties, it is concluded that it is in the public interest to suspend the investment adviser registration of HCM for ninety (90) days and bar Hammon from associating with any investment adviser for a like period except in a non-supervisory and non-proprietary capacity.

There can be no quarrel with the Division's view that the record evidences little realization on the part of Hammon for the necessity to comply with the important bookkeeping and registration requirements the Commission promulgated in order to bring under control the activities of investment advisers who wish to deal with the public. His first and apparently only concern has been to keep his business operating without regard for the formalities that effective regulation dictates must be imposed by regulatory authorities upon those operations. His attitude is readily perceived from the actions taken against HCM by California authorities and by the Commission. But it is also true that the record does not evidence, as it frequently has in other cases, that non-compliance with the filing and bookkeeping requirements under the Advisers Act has been resorted to in order to delay discovery of fraudulent activities by a registrant. Here we are dealing only with respondents who have inexcusably ignored rules that have been devised to assist regulatory authorities in the discharge of their responsibilities and have imposed administrative burdens which cannot be tolerated.

Nonetheless, the Division's proposed sanctions are, even under the described circumstances, far too draconic for acceptance.

Controlling considerations are set forth in Steadman v. Securities and Exchange Commission, wherein the United States Court of Appeals for the Fifth Circuit stated: 10/

> ". . . In our view, however, permanent[17] exclusion from the industry is 'without justification in fact' unless the Commission specifically articulates compelling reasons for such a sanction. For example, the facts of a case might indicate a reasonable likelihood that a particular violator cannot ever operate in compliance with the law, see SEC v. Blatt, 583 F.2d 1324, 1334 (5th Cir., 1978), or might be so egregious that even if further violations of the law are unlikely, the nature of the conduct mandates permanent disbarment as a deterrent to others in the industry...."
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> [17]"Permanent" in this context really means "indefinite" since the Commission retains the power to modify its orders. . . This does not make the sanction less severe, however.

The record does not establish that HCM and Hammon "cannot ever operate in compliance with the law." In fact, the probability is otherwise, should Hammon's financial situation improve to a degree that would allow him to pay his accountants for their work. This is not to suggest that HCM should continue in business without compliance with Commission regulations, but only that a suspension of ninety (90) days should suffice to impress Hammon with the need for close attention to those regulations and with the fact that the alternatives to compliance are voluntary cessation of his advisory business until compliance is achieved or, absent that, compulsory termination of it by order of the Commission.

Although there is substance to the Division's complaints regarding Hammon's attitude toward compliance and apparent absence of cooperation with the Commission staff, Hammon did offer explanations during his testimony of the incidents underlying the staff

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10/ 603 F.2d 1126, 1140 (5th Cir. 1979).

complaints. His rationalization, although not totally credible, has a plausibility that cannot be ignored. Taken as a whole, the mitigation of the violations and conduct complained of offered by respondents is sufficient to preclude the finding of egregiousness in respondents' conduct in a degree that would satisfy the standards for disbarment set by the Steadman case, supra.[11/]

Accordingly, IT IS ORDERED that the registration of Hammon Capital Management Corporation as an investment adviser be, and hereby is, suspended for a period of ninety (90) days; and

FURTHER ORDERED that Gabe Hammon be, and hereby is, barred for a period of ninety (90) days from association with an investment adviser in any proprietary or supervisory capacity.

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

Pursuant to Rule 17(f) of the Rules of Practice, 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

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11/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

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.

Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
January 25, 1980