ADMINISTRATIVE PROCEEDING
FILE NO. 3-7023

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
MICHAEL J. FEE

INITIAL DECISION

October 19, 1990
Washington, DC

Jerome K. Soffer
Administrative Law Judge

ADMINISTRATIVE PROCEEDING
FILE NO. 3-7023

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:	
MICHAEL J. FEE	:	INITIAL DECISION

APPEARANCES: Nancy J. Smith, Barbara Kern and Patricia Holland, of the Chicago Regional Office, for the Division of Enforcement

J. Michael Farrell, Attorney for Respondent Michael J. Fee

BEFORE: Jerome K. Soffer, Administrative Law Judge

On June 2, 1988, the Commission issued an Order Instituting Public Proceedings ("Order") pursuant to Sections 15(b) and 19(h) of the Securities Exchange Act of 1934 ("Exchange Act"), naming as respondents Michael J. Fee, Michael F. Callahan and John E. Krutsick.

The Order alleges that in or about June 1985, the respondents willfully violated Section 17(a) of the Securities Act of 1933 ("Securities Act") as well as Section 10(b) of the Exchange Act and Rule 10(b)-5 promulgated thereunder, in the offer or sale of shares of common stock of Airwave Communications Corporation of America ("Airwave") by failing to have a sound and adequate basis to support their recommendation of Airwave stock to their customers.

The Order directed that a public hearing be held before an administrative law judge to determine the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest for the protection of investors.

Hearings were held in Chicago, Illinois on March 7, 1989, in Bloomington, Illinois on March 8, 1989, and concluded in Philadelphia, Pennsylvania on May 24, 1989.

Pursuant to offers of settlement by respondents Michael F. Callahan and John E. Krutsick, the Commission issued orders dated September 29, 1988 (SEA Release No. 26133) and December 5, 1988 (SEA Release No. 26340), respectively,

barring respondents Krutsick and Callahan from association with the securities industry with the right to reapply after three years for permission to again become so associated. Hence, the only remaining respondent is Michael J. Fee. As stated in these settlement orders, the findings contained in each are not binding upon any other respondents in this proceeding, specifically Fee.

Following the close of the hearing, the parties filed successive proposed findings of fact and conclusions of law together with supporting briefs. The Division of Enforcement also served a reply brief.

The findings and conclusions herein are based upon the evidence as determined from the record and from observing the demeanor of the witnesses. The preponderance of evidence is the standard of proof that has been applied.[1/]

On October 3, 1989, almost five months following the closing of the hearing, respondent moved for leave to reopen his case and/or supplement the record in several respects. This motion was denied by my Order of November 28, 1989 primarily for the reason that respondent had not made the requisite showing under Rule 21(d) of the Commission's Rules of Practice that there were reasonable grounds for his failure to adduce the additional evidence at the hearing.

1/ See Steadman v. S.E.C., 450 U.S. 91 (1981).

Introduction

Following his graduation with a master's degree of business administration from Drexel University, respondent became employed as a registered representative in 1978 and in subsequent years with several brokers-dealers. In mid-1984 or early 1985 he entered the employ of Butcher & Singer, Inc., and continued in such employment during the relevant period herein.

Sometime in June 1985, respondent first heard of Airwave in a restaurant and bar in Philadelphia which was an after working hours gathering place for stock brokers and other securities employees, where, in the course of things, they might exchange ideas and opinions concerning various aspects of the securities business. As described by respondent (Transcript page 152):

> "As best I can remember there were 10 or 15 of us standing around and different people were exchanging different ideas, and someone brought up the conversation on a company called Airwaves Communications, and as best I can remember the person started expounding on it being a company in the entertainment and music, recording and video type (tape?) business. And it was a low-priced stock, speculative by nature and basically extolled some of the reasons why that it would be an idea for somebody to possibly pursue, which I did."

According to respondent this individual was a complete stranger to him. He did not know who he was, had never seen him before or since, was unable to describe any of his

physical characteristics and would not know him if he ever saw him again. However, because of the circumstances of time and place, respondent assumed that the stranger was somehow connected with the securities industry and was a knowledgeable individual.[2/]

A short time thereafter respondent began soliciting for the sales of Airwave stock among some 15 or 20 of his customers whom he deemed were suitable for engaging in speculative transactions. During the entire month of July 1985, nine of respondent's customer entered into eleven purchase transactions totalling 28,000 shares at prices ranging from a high of $1 per share on July 1, 1985 down to $.625 per share on July 31, for total purchases of $23,125, from which respondent estimates he earned about $2,000 in commissions.[3/] All of these purchases were executed through the Butcher & Singer trader who negotiated the prices.

There were never any reported transactions in Airwave stock prior to May 7, 1985, when trading first began. In fact, the brokers who handled initial purchase orders, had to go short to effect the transactions. During the period

---

2/ The other respondents, Callahan and Krutsick, were also present at this time and place.

3/ Stocks selling for less than $5.00 per share are commonly referred to as "penny stocks", and known to be of a highly speculative nature.

from June 27 to August 12, 1985, a total of about 526,000 shares were sold into the market of which some 314,000 involved individual, and the remainder inter-dealer, transactions.

During this period, purchases by Butcher & Singer customers totalled some 54,500 shares, which were filled by going to one single dealer. There is no showing that any customers ever sold their shares. The 526,000 shares that were traded during the June 27 to August 12 period, were made available by 3 individual accounts who sold these stocks directly or indirectly into the market. Since there is no showing that these accounts had previously purchased Airwave shares in the market, the source of these securities is not clear.

All transactions in Airwave virtually ceased by August 30, 1985. The last transaction involved a purchase of 10,000 shares on October 8th at a price of $.1875. The stock is now virtually worthless.

The prices at which respondent's customers bought the Airwave stock during the month of July were, on the whole, greater than the prices at which these shares were being sold in the market. For example, although between July 1 and 11, market prices ranged from a low of $.25 to $1 per share, purchases by respondent's customers were at $1.00 per share, as negotiated by the trader at Butcher & Singer.

There has never been a registration statement filed on behalf of the Airwave securities involved herein.

Discussion and Conclusions

The Order charges respondent, in connection with the sales of the common stock of Airwave, with violating the anti-fraud provisions of the securities laws in two ways: (1) by failing to have a sound and adequate basis for his recommendation to his customers to purchase Airwave shares, and (2) by making untrue statements of material facts and in omitting to state material facts.[4/]

4/ Section 17(a) of the Securities Act makes it unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce, or by the use of the mails, directly or indirectly -- to do any of the following:

"(1) to employ any device, scheme or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading, or

(3) to engage in any transactions, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Section 10(b) of the Exchange Act makes it unlawful, in connection with the purchase or sale of any security to use or employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may presecribe as necessary or appropriate in the public interest or for the protection of investors."

Rule 10b-5 promulgated thereunder, extends, in effect and with a few language changes, the provisions of 17(a) of securities to both the purchase or sale.

It has long been held that when a salesman recommends securities to his customers, he is under a duty to insure that his representation has a reasonable basis. As the Court of Appeals for the Second Circuit held in Hanly v. S.E.C., 415 F.2d at 595-597 (1969):

> "Brokers and salesmen are under a duty to investigate . . . Thus, a salesman cannot deliberately ignore that which he has a duty to know and recklessly state facts about matters of which he is ignorant...
>
> In summary, the standards . . . are strict. [A salesman] cannot recommend a security unless there is an adequate and reasonable basis for such recommendation. He must disclose facts which he knows and those which are reasonably ascertainable. By his recommendation he implies that a reasonable investigation has been made and that his recommendations rest on the conclusions based on such investigations . . .
>
> A salesman may not rely blindly upon the issuer for information concerning a company, although the degree of independent investigation which must be made by a securities dealer will vary in each case. Securities issued by smaller companies of recent origin obviously require more thorough investigation. (Footnotes omitted, emphasis added).

See also Matter of John R. Brick & Company, et al., 46 S.E.C. 43, 49 (1975); Matter of Lester Kuznetz, 48 S.E.C. 551, 554 (1986).

In his testimony at the evidentiary hearing, respondent described an investigation that he had allegedly made prior to recommending the Airwave purchase to his clients, as follows: that several days after learning of Airwave in the

bar he looked to find out whether there was a "Standard and Poor's" or a "Dun and Bradstreet" write-up on Airwave, and whether Butcher and Singer or some other broker-dealer had a write-up on Airwave. He further testified that he looked to the "pink sheets" to see whether any quotations were being made for this stock on the assumption that any dealer making the quotation would have made a "due diligence" investigation as required by Exchange Act Rule 15c2-11(5), and that he made telephone requests of traders for information on Airwave. 5/ He asserted, additionally, that about a week or two later in response to these requests, he received from one of these unidentified traders materials consisting of a "Corporate Profile" of Airwave prepared by a public relations firm, a press release issued by Airwave describing "commodity-like" buying of futures contracts in recorded music, an "Interim Shareholders Report" as of March 15, 1985 with respect to Airwave, and a "due-diligence memorandum" dated March 10, 1985 concerning Airwave, ostensibly prepared in accordance

---

5/ The "pink sheets", also known as National Daily Quotation Sheets, are published privately by the National Quotation Bureau in which broker-dealers wishing to make a market in any particular stock, place daily quotations for securities in which they trade. The mere fact that a security is entered in the pink sheets is no basis for the recommendation of a stock since it conveys no information about the status of a security.

with Rule 15c2-11(5).[6/] Respondent's further testimony was that the information in these documents was analyzed by him and that after he had "ample time" to look at them, he began soliciting those of his clients he deemed suitable for the purchase of Airwave, an admitted speculative "penny stock".

This testimony by respondent is in significant contrast with his sworn testimony (Exhibit 5) given to Commission staff during an investigation of the activities of one, Marshall Zolp, (File No. C-2386) on October 29, 1986, some 2 1/2 years prior to the hearing herein and about 15 months after the sales of Airwave. At that time, respondent testified that he recommended Airwave to his customers primarily based upon what the stranger in the bar told him about the stock, that the extent of his efforts to obtain other information was to seek it from the Butcher & Singer over-the-counter trader, who had none, and that he did not know where else to go (Exhibit 5, p.36). He further testified at the earlier time, as follows (Exhibit 5, p.32),:

Q. Now, have you ever received any materials about the stock from anyone?

A. No, I did not, sir

6/ These four documents are in evidence as respondent's Exhibits A through D, respectively.

Moreover, his answer to the Order for Proceedings, dated July 12, 1988, as late as some 9 months prior to the hearing, contains his admission (at Paragraph 13 under the heading of "Affirmative Defenses") to "having recommended Airwave as a speculative over-the-counter stock in the recording industry solely upon the tip of an anonymous person in a bar". (Underlining added). No mention is made of reliance upon any written material.

Respondent undertakes to explain the discrepancies in his testimony concerning his efforts to inform himself concerning Airwave, as follows: that it was only after seeing the documents comprising Exhibits A through D following the prehearing conference in this proceeding on October 27, 1988 as a result of the exchange of documentary evidence, did he "recall" that they even existed and he assumed that he must have read them prior to soliciting his customers. He further asserts that it was the refusal of Butcher & Singer to give him access to his personal records after his employment ceased that prevented him from sooner recalling his use thereof. 7/

7/ Exhibits A through D, had been delivered to the Commission by some broker-dealers otherwise not identified in connection with the Marshall Zolp investigation.

Based upon the demeanor of the witnesses, the length of time elapsing between the first and second versions in respondent's testimony, the proximity of the earlier version to the facts, and the size and contents of Exhibits A through D, it is concluded that the contents of these exhibits could not have been the basis for respondent's recommendation of this security to his customers, two of whom testified at the hearing.

Lorenz Kubach, Jr. began doing business with respondent in early 1985. At that time, he was 35 years of age with an annual income of $89,000. On July 1, 1985 he purchased 2,000 shares of Airwave at $1 per share based upon the telephonic recommendation of and solicitation by respondent. Prior thereto, it was agreed between them that some of Kubach's investments could be speculative ones.

During the telephone conversation resulting in the purchase of Airwave (they never met personally), respondent told Kubach that although the stock was trading at $1 per share, it had the potential to rise to about $5.00 a share in two to four months' time, claiming that Airwave was anticipating special deals involving well-known performers and movie stars who had been signed on by the company to make audio recordings. Respondent told Kubach that he learned of

Airwave as the result of a tip, although he did not mention that this occurred at a bar.[8/] Kubach eventually sold his Airwave shares at 2 cents per share for a loss of approximately $2,000.

During July, 1985 Terry Stahly was a customer of respondent who had succeeded to the account when a prior registered representative left Butcher & Singer. At that time, Stahly was 32 years of age, single, with an annual income of over $100,000.

In July 1985, Stahly was solicited by respondent via telephone with respect to purchasing stock in Airwave, as a result of which he bought 6,000 shares at .75 per share. This was his first transaction with respondent. Stahly never discussed investment objectives with respondent, although he was not averse to some speculation.

In his solicitation, respondent represented to Stahly that Airwave was a "good investment", that a company by the name of "RCA" was very interested in technology owned by Airwave and that it was expected that RCA would be making a bid to purchase the company which could make the stock's

---

8/ Kubach testified that had he known respondent learned of Airwave as a result of a tip acquired in a bar he does not think he would have made the purchase. However, it would not appear that where the tip was acquired would have made any difference to Kubach.

price rise to $2 to $3 and perhaps as high as $4 or $5 per share.

Stahly recognized that in buying a low-priced stock such as Airwave he would be making a speculative investment. Respondent told him he learned of Airwave from a "tip"; he never told Stahly where or under what circumstances he received the tip about Airwave (i.e., in a bar).

Both of the witnesses had previously traded in the securities market.

Respondent states that in his solicitation of customers for penny stock purchases such as Airwave he used a three-phase approach, the first involving a discussion of advantages and disadvantages of buying penny stocks, the next to determine the client's suitability to engage in such trading, followed by the third phase wherein an actual recommendation of a specific security would be made. He further asserts that he had advised his customers of the speculative nature of an investment in Airwave, but recommended the purchase of Airwave as a stock with potential to move up with a limited downside, and that he told them that the company was in the musical industry with some fairly recognizable names under contract. He admits that he may have told his prospective buyers there was some possibility that Airwave would either be taken over or merged by another corporation, although he

does not believe he mentioned RCA specifically. He was satisfied with the suitability of these customers to purchase speculative securities, and that they were aware of the speculative nature of penny stocks in general and of Airwave in particular.

If, as respondent now contends, he had been aware of and relied upon the contents of Exhibits A through D prior to making his recommendations to his customers, there is nothing in these Exhibits which would have justified the favorable recommendation without further investigation. Nowhere do they mention the possibility of a takeover by RCA or any other company. Neither do they provide any basis for the prediction of a rise in the stock price to $5 per share. In fact, they show that Airwave was a company that had performed no operations from 1974 until 1985 when the documents were prepared.[9/] None of this information was conveyed to his customers.

Thus, it is concluded that under either of respondent's versions as to the extent of his investigation into Airwave there is no basis to support his recommendation of Airwave to his clients.

9/ Although these documents contain an assertion that hope of future profitability was to result from a far-fetched scheme to create commodities futures in audio recordings of musical performances, he never mentioned this to his customers as a basis for buying (if, in fact, he had read these documents, as he now alleges).

However if, as appears more likely, the information he had concerning Airwave stock was based solely on the statements given to him by a tipster at a bar then his efforts to fulfill his obligation to familiarize himself with the security was totally lacking. Reliance upon this type of information shows a reckless disregard of the standards to which professionals in the securities business must adhere when they recommend unknown securities of obscure issuers.

Materiality

Respondent's misrepresentations to his clients that Airwave might be taken over by another company, that the price of the shares could rise to as much as $5,[10/] and that Airwave was a good investment made without a suitable investigation by respondent, together with his failure to disclose the circumstances surrounding the learning of the so-called "tip", were material factors in the sale of these bonds. It has long been held that a fact is "material" if there is a substantial likelihood that reasonable investors would consider these misrepresentations or omissions important in making their investment decision. TSC Industries, Inc. v. Northway, Inc., 426 U.S. 837 (1976).

10/ As noted in Matter of Kuznetz, supra, at page 553, "Predictions of specific and substantial increases in the price of a security that are made without a reasonable basis are fraudulent".

Suitability

Respondent argues that the two customers who testified in this proceeding were suitable for the recommendation of the purchase of speculative penny stocks, in the sense that they could financially afford their losses and knew that Airwave was a speculative investment. However, the fact that the witnesses were sophisticated investors who understood the nature of penny stock does not give a salesman a license to solicit the purchase of the security based upon misrepresentations or the omission of material information. Nor is it necessary to establish that customers relied on such representations in order to establish violations of the anti-fraud provisions. See Matter of Kuznetz, supra, page 554.

Scienter

One of the elements required to be established to show a violation of Exchange Act Rule 10(b)-5 and the first subsection of Securities Act Section 17(a) is that respondents acted with "scienter", defined as "a mental state embracing intent to deceive, manipulate, or defraud". Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193, n.12 (1976). Scienter is established by knowing or intentional conduct. Aaron v. SEC, 446 U.S. 680, 690 (1980). It may also be established by reckless conduct. Nelson v. Serwold, 576 F.2d 1332, 1337-8 (9th Cir.), cert. den., 439 U.S. 970 (1978). Courts recognize that absent an admission by defendant,

scienter may be inferred from circumstantial evidence which "can be more than sufficient". Herman & McLean v. Huddleston, 459 U.S. 375, 390 n.30 (1983).

It is concluded that given the nature of his investigation at the very least respondent acted with that degree of recklessness in recommending Airwave to his clients as to satisfy the scienter requirement. This was exhibited by his willingness to make such a recommendation without having conducted a suitable investigation. Even if it were to be believed that he had Exhibits A through D in his possession and had read them, they provided no basis for the recommendations made.

Further proof of the existence of knowing and intentional conduct or at least the recklessness substitute therefor, is the fact that although all of respondent's Airwave sales were solicited by him, out of a total of 16 order tickets written by him to record his sales of Airwave, he marked 13 of them "unsolicited", meaning that the customer sought out the salesman rather than the other way around. Respondent asserts he was merely following the instructions of his employer that in all instances involving a transaction of a low-price stock the order ticket should be marked "unsolicited" whether or not this was so. It is difficult to believe this assertion by respondent that his employer

would have deliberately advised him to violate the requirements of the Commission concerning the keeping of accurate records.[11/] More than likely, he marked the tickets "unsolicited" to avoid more detailed inquiry for whatever reason as to the transactions being represented thereby. That this was, in fact, not company policy is found in the order tickets of another Butcher & Singer salesman engaged in the sales of Airwave showing that of 18 transactions he marked only one of the orders as being "unsolicited". It is concluded that respondent's mismarking of the order tickets demonstrates knowing misconduct with respect to these transactions.

In any event, scienter is not necessary to establish violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act, (See Aaron v. S.E.C., supra, p.690) and all of the findings of fraud herein are made under both these Sections as well as under Sections 17(a)(1) of the Securities Act and 10(b) of the Exchange Act and Rule 10(b)-5 thereunder.

11/ The falsification of order tickets constitutes a violation of the record keeping provisions of the Commission. See Matter of James F. Novack, 47 S.E.C. 892, 896. However, respondent is not charged with such a violation.

Under all of the circumstances it is concluded that respondent has wilfully violated the cited anti-fraud provisions of the securities laws.[12/]

Public Interest

The finding of violations having been made, it must be determined what sanction should be imposed in the public interest.[13/]

The Division urges that respondent be barred from any association with any broker or dealer with the right, however, to reapply after five years for permission to become so associated.

12/ It is well established that a finding of "willfulness" does not require an intent to violate the law; it is sufficient that the one charged with the duty consciously performs the acts constituting the violation. See Tager v. S.E.C., 344 F.2d 5, 8, (C.A. 2, 1965); and Arthur Lipper & Co. v. S.E.C., 547 F.2d 171, 180 (1976).

13/ At the pre-hearing conference held in connection with this proceeding on October 27, 1988, respondent's counsel represented that the entire theory of respondent's defense would concern the sanction to be imposed in this situation and that he was not going to contest the fact that Airwave was a speculative stock, that respondent recommended this stock based solely on an anonymous tip he received from a stranger, and that he recommended the stock on an inadequate basis. However, in his proposed findings of fact and conclusions of law, respondent has requested that findings be made that he did have a sound and adequate basis for his recommendation to his customers with respect to purchasing Airwave stock, thereby changing the nature of his defense and the issues to be resolved.

Respondent, on the other hand, suggests a sanction which would bar him from engaging in "retail" selling while permitting him to continue to engage in his present employment for a registered broker/dealer, S.E.I. Financial Services Co.[14/] as a salesman of investment packages to mutual funds, investment companies and financial institutions. In this capacity, respondent deals only with investment officers of banks, funds and trust departments to promote the sale of S.E.I.'s product line, the quality of which is controlled by S.E.I.'s board of trustees and supervised by the legal department on a daily basis. The salespersons' duties are two-fold: to service and retain existing customers for which they receive a basic compensation, and to solicit and obtain new customers for which they are compensated based upon the amount of business generated. In no way are these sales people, including respondent, involved with retail selling of securities.

Respondent urges that since he would be dealing with knowledgeable, sophisticated and trained investors at the wholesale level, there could be no likelihood or opportunity

---

14/ This company is a subsidiary of S.E.I. Corporation and employs between 40 and 45 institutional sales representatives nationally. S.E.I. presently has under management about $10.5 Billion in assets.

for him to repeat the fraudulent conduct found herein with respect to Airwave stock. Moreover, in his present position, he is and would continue to be carefully monitored and his activities scrutinized by officers of S.E.I.[15/] Thus, respondent reasons that under the sanction he proposes, the public interest would be protected from his repetition of the acts at issue herein.

In assessing a sanction, due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish a respondent but to protect the public interest from future harm. See Berko v. S.E.C., 316 F.2d, 137, 141 (2d Cir. 1963) and Leo Glassman, 46 SEC 209, 211 (1975). Sanctions should also serve as a deterrent to others. Richard C. Spangler, Inc., 46 SEC, 238, 254 n.67 (1976).

15/ Two officers of S.E.I. who function in a supervisory capacity over respondent testified to the supervision that is now exercised over him and that they would undertake to supervise him even more closely should he be allowed to continue in the employ of S.E.I. The company would also agree to supervise and report as to respondent's compliance with the preparation and taking of the "Series 24" principals examination.

For 3 or 4 years prior to his employment at S.E.I., one of these officers, an executive vice-president named Paul Hondros, had engaged the services of respondent as his personal broker and was responsible for the hiring of respondent to engage in his present activities for S.E.I. Hondros was highly satisfied with the investment advice he had received from respondent during that period.

In imposing administrative sanctions, the Commission may take into account such factors as:

> * * * the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations. See Steadman v. S.E.C., 603 F.2d 1126, 1140 (5th Cir., 1979), affirmed on other grounds, 450 U.S. 91 (1981).

Steadman also tells us that when the agency seeks to impose drastic disciplinary sanctions, such as a bar from practice, it has the burden of demonstrating that less drastic sanctions will not suffice to protect the public interest (603 F.2d at p. 1129).

Under all of the circumstances, including the otherwise past good conduct of respondent, especially in the employ of S.E.I., the relatively few of his customers who testified against him, the small number of Airwave transactions in which he engaged, and his limiting of solicitation to those of his clients who were financially able to engage in a speculative investment, all justify the conclusion that the sanction proposed by the Division involving a total bar from all associations with brokers or dealers has not been justified.

On the other hand, the nature of the misrepresentations made to his customers by respondent, his reliance solely upon the statements given to him by some unknown individual in the setting of a liquor bar, his inability and failure to seek a sound basis for the recommendation of Airwave stock, the inconsistencies in his testimony at various stages of these proceedings, his failure to recognize fully the gravity of his violations, and the mismarking of the order tickets negate the conclusion that respondent should go virtually scot-free in a practical sense, as is suggested in the sanction he proposes. In other words, he is seeking to continue without change or interruption the activities in which he now engages and to be barred from doing that which he does not perform anyway. Such a result would hardly be deemed to serve as a deterrent not only to himself, but to others who might be similarly inclined in the promotion and sale of "penny stocks". In fact, the sanction proposed by respondent might very well encourage others to at least take a chance on getting away with similar improper conduct. 16/

16/ It is noted that on August 22, 1989 the Commission has adopted Rule 15c2(6) of the Exchange Act, effective January 1, 1990, placing certain restrictions and requirements relating to the sale of penny stocks.

Based upon all the factors stated, it is concluded that the sanction hereinafter recommended comports with the requirements that a sanction should not be a punishment, should tend to ensure that the respondent will not repeat such conduct, and should serve as a deterrent to others in the industry who may be inclined to act in a similar fashion.

ORDER

Under all of the circumstances herein,

IT IS ORDERED that the respondent, Michael J. Fee, be suspended from association with any broker or dealer for a period of 90 days following the effective date of this order.

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 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.[17/]

Jerome K. Soffer
Administrative Law Judge

October 19, 1990
Washington, D.C.

17/ In their briefs and arguments, the parties have requested the Administrative Law Judge to make findings of fact and have advanced arguments in support of their respective positions other than those heretofore set forth. All such arguments herein have been fully considered and the Judge concludes that they are without merit, or that further discussion is unnecessary in view of the findings herein.