INITIAL DECISION RELEASE NO. 61

ADMINISTRATIVE PROCEEDING
FILE NO. 3-8394

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
VICTOR TEICHER,
ROSS S. FRANKEL, and
VICTOR TEICHER & CO., L.P.

INITIAL DECISION

Washington, D.C.
February 27, 1995

Glenn Robert Lawrence
Administrative Law Judge

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Appearances: Jonathan E. Breckenridge, Edwin H. Nordlinger, Carmen J. Lawrence, Robert B. Blackburn for the Division of Enforcement

Catherine M. Foti, Morvillo, Abramowitz, Grand, Iason & Silverberg for Respondents Victor Teicher and Victor Teicher & Co., L.P.

Roger J. Bernstein for Respondent Ross S. Frankel

Before: Glenn Robert Lawrence, Administrative Law Judge

These public proceedings were instituted against the respondents by an order of the Securities and Exchange Commission (Commission) dated June 20, 1994 (Order). The proceeding was brought against Victor Teicher and Ross S. Frankel under the Securities Exchange Act of 1934 (Exchange Act) pursuant to Sections 15(b) and 19(h). Additionally, it was brought against Victor Teicher under Section 203(f) of the Investment Advisers Act of 1940 (Advisers Act) and under Section 203(e) of the Advisers Act against Victor Teicher & Co., L.P. The question raised was whether the allegations of misconduct made against the respondents by the Division of Enforcement (Division) are true and what, if any, remedial action, in the nature of sanctions, is appropriate in the public interest.

Respondents Teicher and Teicher & Co. (Teicher Respondents) and the Division have elected to stipulate the facts and sanctions, as will be discussed below in greater detail. Accepting the stipulation, the only issue that remains as to the Teicher Respondents is whether under the authority of the Advisers Act an unregistered investment adviser may be sanctioned. As discussed below, I find that the relevant section of the Advisers Act makes no distinction between registered and unregistered investment advisers such that Commission has jurisdiction to sanction Respondent Teicher & Co., an unregistered investment adviser, and Respondent Teicher, an associated person of an unregistered investment adviser.

Respondent Frankel, on the other hand, questions the jurisdiction of this forum to bar him from association with investment advisers inasmuch as the Order does not charge him with a violation of the Advisers Act. I agree with that view. Further, Respondent Frankel in his final submission, in the nature of proposed findings, also questions the propriety of a permanent bar from an association with a broker dealer and argues for only a ten year bar. This position is different from that taken by Respondent Frankel in his answer to the Order, in which he consented to such a permanent bar. In light of that consent and considering his particularly egregious actions during the investigation of his activities, as discussed in detail below, I have decided that he should be permanently barred from association with a broker or dealer as well

as an investment company, municipal securities dealer, member of a national securities exchange or registered securities association.

This decision will discuss the Teicher Respondents and Respondent Frankel matters separately, identified as Sections I and II, respectively.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon my observation of the various witnesses that testified at the hearing that was held in New York, New York, on September 22, 1994, and at the Federal Correction Institution in Fairton, New Jersey, on September 26, 1994, as well as the brief, arguments and proposals of fact and law of the parties and the relevant statutes and regulations.[1]

I. TEICHER RESPONDENTS

The Teicher Respondents and the Division have stipulated[2] to the entry of findings and the imposition of remedial sanctions barring the Teicher Respondents from associating with any broker or dealer, investment company, registered investment adviser, or municipal securities dealer.[3] The undersigned has determined that it is in the public interest to accept the stipulation.

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[1]The Division moved to file a surreply brief as to the Teicher Respondents, which I granted, and the Teicher Respondents submitted a response. Because I find that the Commission has jurisdiction to bar the Respondent Teicher from association with any investment adviser, it is unnecessary to consider the arguments regarding the Commission's authority under the Exchange Act to bar a respondent from association with an investment adviser.

[2]Stipulation of Teicher Respondents and Proposed Order Making Findings and Imposing Remedial Sanctions.

[3]The Teicher Respondents also have agreed to be permanently barred from any aspect of association with an unregistered investment adviser, only if and when a final order is entered (after the exhaustion of all appellate remedies elected by either party) and only to the extent that such order determines that the Commission has authority under Sections 203(e) and 203(f).

Findings of Fact and Conclusions of Law

The Teicher Respondents and the Division have stipulated to the following facts regarding the activities and prior court proceedings related to this proceeding. Accordingly, I so find.

Relevant Entities and Persons

Edward A. Viner & Co., Inc. (Viner), is a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act since 1955. At all times, Viner's offices were located in New York, New York. On May 3, 1988, Viner changed its name to Fahnestock & Co., Inc. (Fahnestock).

Teicher was a registered representative of Viner during 1985 and 1986. From April 1988 through April 1990, Teicher was a registered representative of Fahnestock.

Teicher & Co., a Delaware limited partnership that maintained offices on Viner's premises, was formed by Teicher in New York, New York, on January 6, 1986. Teicher is, and has always been, the sole general partner and 75 percent owner of Teicher & Co. During 1986, Teicher & Co.'s primary business was investing in securities and, for compensation, investing in or investing the funds of limited partnerships that invest in securities. Siget Partners was the only limited partner of Teicher & Co. in 1986.

Carmel Partners, L.P. (Carmel), a Delaware limited partnership, was formed by Teicher, acting through Teicher & Co., on January 6, 1986. In 1986, Teicher & Co. was the general partner of Carmel, and Chichester Partners, L.P. (Chichester) was the only limited partner. During 1986, Teicher & Co. and Chichester had an equity interest in Carmel in proportion to their respective contributions of capital. Carmel's partnership agreement provided that Teicher & Co., as general partner, was to receive an annual salary of $100,000 and, at the end of each fiscal year, 25 percent of the partnership's gains after certain deductions set forth in the partnership agreement. During 1986, Carmel was a partnership account for which Teicher & Co. traded at Viner, and for which Teicher was the registered representative. At

the same time, Chichester also maintained a brokerage account at Viner, for which Teicher was the registered representative.

During 1986, Teicher & Co. operated out of Viner's offices pursuant to a December 1985 agreement between Teicher, acting on behalf of Teicher & Co., which he was in he process of forming, and Viner. Under the agreement, Teicher & Co. rented space from Viner at cost, was responsible for the investment of certain funds for Viner (through an account called Arbitrage 2) and cleared and executed trades through Viner. Besides providing space, capital and clearing facilities, Viner also provided payroll, secretarial and clerical services to Teicher & Co. Under the December 1985 agreement with Viner, Teicher & Co.'s compensation for managing the Arbitrage 2 account included 25 percent of the gains in the account after certain deductions set forth in the agreement.

Until December 31, 1993, Teicher & Co. was the general partner of, and, for compensation, invested the funds of two private investment partnerships in addition to Carmel: Mount Tavor Partners, L.P., and Ithaca Partners, L.P. Teicher is the general partner of VT Partners, a Delaware limited partnership. VT Partners has two limited partners and, until December 31, 1993, managed, for compensation, the investments of a Cayman Island corporation named Carmel Fund, Ltd. The purpose of Carmel Fund, Ltd., is to invest money for its shareholders.

The Teicher Respondents' Convictions

On April 6, 1990, a jury found Teicher guilty of fourteen felony counts: one count of conspiracy, nine counts of securities fraud (in violation of Section 10(b) of the Exchange Act and Rule 10b-5), two counts of fraud in connection with a tender offer (in violation of Section 14(e) of the Exchange Act and Rule 14e-3), and two counts of mail fraud. In connection with the securities fraud verdicts, the jury found that Teicher purchased or sold the securities of the following companies while in possession of material, non-public information, which he knew had been misappropriated in breach of a fiduciary duty or other duty arising out of a

relationship of trust and confidence: American Can Company, Inc.; Allegheny International, Inc.; Avondale Mills, Inc.; American Brands, Inc.; Westchester Financial, Inc.; Warnaco, Inc.; and Revco D.S., Inc. In connection with the verdicts for fraud in connection with a tender offer, the jury found that, after Dominion Textiles, Inc., a company offering to buy the securities of Avondale Mills, had taken substantial steps to commence a tender offer for Avondale Mills' securities, Teicher purchased or sold the securities of Avondale Mills while in possession of material, non-public information that he knew was not public and acquired from a person acting on behalf of Dominion Textiles. Teicher directed Teicher & Co. to make most of these trades in the Carmel and Arbitrage 2 accounts. In addition, Teicher was found guilty of mail fraud as a result of the mailing of certain trade confirmations for transactions in the securities of American Brands.

On May 5, 1992, the District Court entered a judgment of conviction on all counts for which Teicher was found guilty and sentenced Teicher to 18 months imprisonment for thirteen of the felony counts, terms to run concurrently. The court suspended imposition of sentence on the remaining felony count and, instead, placed Teicher on probation for five years, to begin after his release from incarceration. Teicher also was fined $200,000. Similarly, the court entered a judgment of conviction on all counts for which Teicher & Co. was found guilty and leveled a fine of $600,000 against Teicher & Co. Teicher began his incarceration on January 5, 1994, and was released to a half-way house on November 7, 1994.[4]

Final Conclusions

Teicher was associated with a broker dealer at the time of his illegal conduct and was criminally convicted of fourteen felony counts. The conspiracy and securities fraud counts involved the purchase or sale of securities. These convictions, therefore, are bases for

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[4]The Teicher Respondents' criminal convictions were affirmed by the United States Circuit court for the Second Circuit in March 1993, and, in November 1993, the United States Supreme Court denied their petition for a writ of certiorari. United States v. Teicher, 987 F.2d 112 (2d Cir. 1993), cert. denied, 114 S.Ct. 467 (1993).

sanctioning Teicher under Section 15(b)(6)(A)(ii) of the Exchange Act. The mail fraud convictions are also bases for sanctioning Teicher under Section 15(b)(6)(A)(ii) of the Exchange Act.

Based on the jury findings underlying his criminal convictions, Teicher willfully violated Sections 10(b) of the Exchange Act and Rule 10b-5, by, directly or indirectly, in connection with the purchase or sale of securities, by use of the means or instrumentality of interstate commerce or of the mails, or any facility of any national securities exchange, employing devices, schemes and artifices to defraud, making untrue statements of material facts, omitting to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, and engaging in acts, practices and courses of business which operated as a fraud or deceit. Teicher's willful violation of a provision of the Exchange Act and of a rule promulgated thereunder constitutes conduct under Section 15(b)(6)(A)(i) of the Exchange Act for which he may be sanctioned.

The Commission therefore has jurisdiction to remedially sanction Teicher with respect to his association with any broker or dealer. Further, the undersigned accepts Teicher's stipulation agreeing to be barred from association with any investment company, registered investment adviser, or municipal securities dealer. The undersigned similarly accepts Teicher & Co.'s stipulation agreeing to be barred from association with any broker or dealer, investment company, registered investment adviser, or municipal securities dealer.

The above facts and conclusions of law were agreed upon by the Teicher Respondents and the Division. The only issue remaining is whether the Commission has authority under Sections 203(e) and (f) of the Advisers Act to bar the Teicher Respondents from associating with unregistered investment advisers. For the reasons discussed below, I find, as previously indicated, that the Commission does possess such authority.

The primary section at issue, Section 203(e)(4) of the Advisers Act, provides that:

> The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months,

> or revoke the registration of ***any investment adviser*** if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such investment adviser, or any person associated with such investment adviser, whether prior to or subsequent to becoming so associated ... has willfully violated any provision of ... the Securities Exchange Act of 1934 ... or the rules or regulations [there]under ... (emphasis added)

As the Division notes and the emphasized language makes clear, the section contains no exclusion for those advisers who are not required to register. By its unqualified terms, the section applies to any investment adviser.

Similarly, Section 203(f) of the Advisers Act provides that "[t]he Commission, by order, shall censure or place limitations on the activities of any person associated [with] ... or, at the time of the alleged misconduct was associated ... an investment adviser, or suspend ... or bar any such person from being associated with an investment adviser, if the Commission finds, on the record after notice and opportunity for hearing" that such person committed any of several enumerated acts, including conviction of felonies.

Section 202(11) of the Advisers Act defines an 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." This section excludes from the definition of investment adviser those persons who would otherwise come within the plain meaning of the definition, but for various policy reasons are not subject to the provisions of the Advisers Act. For example, banks that are not investment companies and lawyers and accountants who perform such services incidental to the practice of their profession are excluded. The Teicher Respondents do not argue that Teicher & Co. was excluded from the definition of investment adviser contained in Section 202(11).

Section 203(b) of the Advisers Act exempts from its registration provisions advisers: (1) for whom all clients are residents of the same state as the adviser; (2) for whom the only

clients of the adviser are insurance companies; and (3) that had fewer than 15 clients during the preceding 12 months and did not hold itself out to the public as an investment adviser or act as an adviser to an investment company. Presumably, Teicher & Co. was exempt from registration under the Advisers Act because it met the criteria of one or more of these categories.

The Teicher Respondents make three basic arguments that the language of Section 203(e) applies only to registered investment advisers. First, it is noted that the heading of Section 203 is "Registration of Investment Advisers." In response, the Division notes that it is well settled that the title attached to a particular statutory section cannot override or limit the substantive terms contained in it. See Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Co., 331 U.S. 519, 528 (1947). Therefore, the fact that Section 203 of the Advisers Act is titled "Registration of Investment Advisers" cannot limit Section 203(e) to registered investment advisers when the section explicitly says "any investment adviser."

Second, the Teicher Respondents argue that principles of statutory construction require that "words grouped in a list should be given a related meaning," Securities Industry Association v. Board of Governors of Federal Reserve System, 468 U.S. 207, 218 (1984). Since suspension and revocation can only apply to registered advisers, the other sanctions contained in Section 203(e) (censure, placing limitations on) should be similarly applied only to registered investment advisers. The Division argues in reply that the fact that one or two of the listed sanctions in Section 203(e) could only be imposed on registered advisers does not imply that the entire subsection applies only to registered entities. Further, contrary to the Teicher Respondents' assertion, the words grouped in Section 203(e) are remedies, not a description of the Commission's jurisdiction.

Finally, Section 15(b) of the Exchange Act, which is substantially identical to Section 203(e), has been held to apply only to registered broker dealers and those applying for registration, not unregistered broker dealers. Wallach v. SEC, 202 F.2d 462 (D.C. Cir. 1953).

On this point, the Division argues that Wallach does not provide guidance in this case because the only sanctions available under Section 15(b) of the Exchange Act at the time Wallach was decided were denial or revocation of registration -- remedies that by definition are not applicable to unregistered entities. However, the sanctions presently available under Section 203(e) of the Advisers Act are not so limited.

The Teicher Respondents also argue that the structure of the Advisers Act suggests that only registered investment advisers are subject to the Commission's regulatory jurisdiction. In particular, the Teicher Respondents point to amendments to other sections of the Advisers Act that made other sections applicable to unregistered investment advisers which were not so applicable previously. According to this argument, the lack of similar changes to Section 203(e) implies that it applies only to registered investment advisers. Specifically, Sections 204 and 205 originally applied only to registered investment advisers, but in 1960 these sections were amended to apply to all investment advisers, except those exempt from registration. Similarly, Section 206 was amended to allow the Commission to pursue injunctive actions against any investment adviser who committed fraud by use of the mails or the means of interstate commerce.

The Division, on the other hand, argues that since some sections of the Advisers Act provide remedies and requirements that apply only to investment advisers required to register under the Act, Congress' failure to so limit Sections 203(e) and (f) indicates that those remedies are not intended to be limited to registered investment advisers. Further, the Division notes that the changes which the Teicher Respondents point to as reflecting Congressional determination to extend provisions to unregistered investment advisers are consistent with the wording at issue in Sections 203(e) and (f). As the Division said: "Congress' reliance on the words 'any investment adviser' when it intended to make Section 206 applicable to unregistered advisers shows that these words are to be read without qualification, and that Section 203(e) [therefore] applies to exempted investment advisers." [Div. Post-Hearing Memorandum 14]

The Teicher Respondents acknowledge that the Commission's opinion in John Kilpatrick, 48 S.E.C. 481 (1986), suggests that it has authority to sanction them in this case. In John Kilpatrick, the Commission noted that "Section 15(b)(6) does not limit us to proceeding against persons associated with registered broker-dealers, although other provisions of the Exchange Act are so limited," 48 S.E.C. at 487. I conclude that the statutory sections at issue providing for sanctions makes no distinction between registered and unregistered investment advisers and therefore find that the Commission has the authority to sanction the Teicher Respondents.

I am persuaded by the Division's arguments and therefore find, based on the foregoing, that it is appropriate and in the public interest to bar Teicher & Co. from association with any broker or dealer, investment company, investment adviser (both registered and unregistered), or municipal securities dealer. Similarly, I find that it is appropriate in the public interest to bar Teicher from association with any broker or dealer, investment company, investment adviser (both registered and unregistered), or municipal securities dealer.[5]

II. RESPONDENT FRANKEL

Findings of Fact and Conclusions of Law

The Commission Order that instituted these public proceedings against Respondent Frankel pursuant to Sections 15(b) and 19(h) of the Exchange Act is based on: (1) the criminal convictions of Respondent Frankel for violating Section 10(b) of the Exchange Act Rule 10b-5, conspiracy to commit securities fraud and mail fraud, mail fraud, perjury, and obstruction of justice in United States v. Victor Teicher & Co., L.P., 88 Cr. 796; (2) the civil consent injunction dated May 19, 1994, against Respondent Frankel in SEC v. Teicher, 91 Civ. 1634

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[5]I recognize that the entities from which the Teicher Respondents are barred from association under the Exchange Act are different than the proposed bar of Frankel under the same Act. Specifically, the bar as to the Teicher Respondents does not include members of a national securities exchange or registered securities associations. This variation is due solely to the language of the stipulation between the Teicher Respondent and the Division on the one hand and that of Respondent Frankel's concession in his answer to the Order on the other.

(S.D.N.Y.), enjoining him from further violations of Section 10(b) of the Exchange Act and Rule 10b-5; and (3) Respondent Frankel's willful violation of Section 10(b) of the Exchange Act and Rule 10b-5 based on his conduct for which he was convicted in United States v. Victor Teicher & Co., L.P.

As alleged in the Order, Respondent Frankel purchased securities of American Brands while in possession of material, non-public information regarding that company, which he knowingly acquired in breach of a fiduciary or other duty arising out of a relationship of trust and confidence. The Order also alleged that Respondent Frankel participated in a conspiracy to misappropriate and exchange material non-public information, and trade in securities while in possession of such information. Based on Frankel's conviction, injunction, and willful violations, the Division seeks an order permanently barring Respondent Frankel from association with any aspect of the securities industry.

Relevant Entities and Persons

Respondent Frankel was a registered representative at Drexel Burnham Lambert, Inc. (Drexel) from 1984 to February 1990. In January 1985, he became a departmental vice-president of Drexel's Domestic Arbitrage Department. In January 1986, Frankel became a corporate vice-president of Drexel. At all relevant times, Frankel was the head of research for Drexel's Domestic Arbitrage Department. Since January 1993, Frankel has been employed by a family-run, privately held, garment business. After leaving Drexel in February 1990, Respondent Frankel has not worked in the securities industry. In January 1993, Frankel, who had been admitted to practice law in New York, was disbarred by the Appellate Division (First Department) in New York based on his criminal convictions. [Frankel Answer § II, ¶¶ 28-30]

Drexel was a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act. Drexel operated a Domestic Arbitrage Department, primarily engaged in risk arbitrage. Drexel and its parent company, Drexel Burnham Lambert Group, Inc., filed for

bankruptcy under Chapter XI of the Federal Bankruptcy Code on February 13, 1990. At all relevant times, Drexel's headquarters and its Domestic Arbitrage Department were located in New York, New York. [Frankel Answer § I]

Paul, Weiss, Rifkind, Wharton & Garrison (Paul Weiss) is a law firm with offices, among other places, in New York, New York. Paul Weiss represented many clients involved in, or considering involvement in, corporate takeovers. Paul Weiss had a relationship of trust and confidence with each of its clients and was entrusted by them with confidential, material non-public information concerning proposed, anticipated and possible corporate takeovers, leveraged buyouts and other corporate combinations. [Frankel Answer § II, ¶ 31]

Marcus Schloss & Co., Inc. (Marcus Schloss) is a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act since 1973. Its offices are located in New York, New York. At all relevant times, it engaged in risk arbitrage. [Frankel Answer § I]

Michael David was a law associate with Paul Weiss in 1985 and 1986. As a Paul Weiss employee, he had a fiduciary duty or other duty of trust or confidence to Paul Weiss and its clients with respect to any information that he obtained during the course of his employment. [Frankel Answer § II, ¶¶ 32-33]

Robert Salsbury was a research analyst in Drexel's Domestic Arbitrage Department in 1985 and 1986. David and Salsbury met in 1983, when they were both students at the University of Chicago Graduate School of Business, and thereafter maintained contact. Frankel was Salsbury's supervisor at Drexel. Sometime between October and December 1985, Salsbury introduced David to Frankel on the telephone. [Frankel Answer § II, ¶¶ 36, 40, 42]

American Brands, Inc., was a public company whose common stock was listed for trading on the New York Stock Exchange in 1985 and 1986. [Frankel Answer § I]

Frankel's Criminal Convictions

Respondent Frankel was tried before a jury on six criminal charges from January 1990 to April 6, 1990, in the United States District Court for the Southern District of New York. [Frankel Answer § II, ¶ 6] The indictment, which formed the basis for Respondent Frankel's criminal trial, alleged that Frankel knowingly and willfully: (1) conspired with at least four other persons [6] to commit securities fraud and mail fraud [Div. Ex. 1 ¶¶ 1, 8-13]; (2) committed securities fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5 [Div. Ex. 1 ¶¶ 14, 15]; (3) caused confirmations relating to his purchases of American Brands options to be mailed and delivered in furtherance of a fraudulent scheme in violation of 18 U.S.C. § 1341 (mail fraud) [Div. Ex. 1 ¶¶ 21-23]; (4) perjured himself during the course of a Commission investigation [Div. Ex. 1 ¶¶ 24-27]; and (5) obstructed justice by destroying documents relevant to a Commission investigation [Div. Ex. 1 ¶¶ 28, 29].

With respect to the conspiracy allegations in the indictment, the indictment alleged that Frankel knowingly and willfully associated himself with a conspiracy, the goal of which was to enrich the conspirators by exchanging misappropriated information relating to Paul Weiss and its clients, the clients of Drexel, and persons entrusting information to Marcus Schloss and then to trade while in possession of this information. [Div. Ex. 1 ¶¶ 8-10]

On April 6, 1990, the jury found Frankel guilty on all six felony counts with which he was charged in the indictment: one count of conspiracy, one count of securities fraud, one count of mail fraud, one count of perjury in a formal Commission investigation and two counts of obstruction of justice during a Commission investigation. [Div. Ex. 3; Div. Ex. 4, 4] On April 28, 1992, the Court entered a judgment of conviction against Frankel on all counts for which he was found guilty, and sentenced Frankel to eighteen months imprisonment on each

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[6]Two of Frankel's co-conspirators, Teicher and Teicher & Co., were also his co-defendants at the criminal trial.

count, sentences to run concurrently, and fined Frankel $10,000. [Div. Ex. 9] Frankel served over six months in prison before being released. [Frankel Answer § II, ¶ 13][7]

Frankel's Civil Injunction

On March 7, 1991, the Commission filed a civil complaint against Frankel and three co-defendants in SEC v. Teicher.[8] This civil action was based on the same conduct underlying the criminal convictions of Frankel and his co-defendants. [Frankel Answer § II, ¶ 5] In its complaint, the Commission sought the following relief against Frankel: (1) a permanent injunction enjoining him from future violations of Section 10(b) of the Exchange Act and Rule 10b-5, (2) disgorgement of $8,714, (3) prejudgment interest on the disgorgement amount, and (4) a civil penalty under the Insider Trading Sanctions Act of 1984 (ITSA). [Div. Ex. 10 ¶¶ A, D, E]

The Commission alleged that, as a part of an insider trading scheme involving at least five other persons and the securities of seven companies, Frankel purchased options in American Brands while in possession of material non-public information he knew or was reckless in not knowing was misappropriated. [Div. Ex. 10 ¶¶ 41-100] The Commission alleged that Frankel personally profited in the amount of $8,714 as a result of his illegal trading, and that others involved in the scheme reaped illegal profits of $297,300.44. [Div. Ex. 10 ¶¶ C, D]

On May 18, 1994, the Court entered, by consent, a Final Judgment of Permanent Injunctive and Other Equitable Relief against Frankel which enjoined Frankel from future violations of Section 10(b) of the Exchange Act and Rule 10b-5, and ordered him to pay: (a)

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[7]Respondent Frankel concedes in his proposed findings of fact that "he is collaterally estopped by reason of these convictions from disputing the essential elements of the offenses of the conviction. [Frankel P.F.F. ¶ 11] Respondent Frankel's conviction was affirmed on appeal. See note 4, supra.

[8]The co-defendants were Teicher, Teicher & Co., and Carmel Partners. [Div. Ex. 10]

disgorgement of $8,714, constituting insider trading profits; (b) prejudgment interest on the disgorgement amount; and (c) a civil penalty under ITSA of $8,714.[9] [Div. Ex. 13]

Respondent Frankel's Violative Conduct

From on or before February 18, 1986, until at least March 17, 1986, Paul Weiss provided legal advice to BAT Industries, PLC (BAT) regarding BAT's contemplated acquisition of American Brands. [Div. Ex. 1 ¶¶ 13-15; Frankel Answer § II, ¶ 66] As part of this attorney-client relationship, BAT provided Paul Weiss with material non-public information on a confidential basis. [Div. Ex. 1 ¶¶ 13-15; Div. Ex. 2 Tab 1B]

In or about late February or early March 1986, David, knowingly or recklessly in breach of his fiduciary duty or other duty of trust or confidence to Paul Weiss and its client, BAT, misappropriated material, non-public information concerning American Brands from Paul Weiss and BAT, and conveyed it to Salsbury. On or about March 10, 1986, Salsbury told his supervisor, Frankel, the substance of this information and that it was coming from David. [Div. Ex. 1 ¶¶ 13-15; Div. Ex. 2 Tab 4K, 2303-2306]

At the time Frankel received the American Brands information from Salsbury, Frankel knew that the information conveyed to him by Salsbury was disclosed in breach of a fiduciary duty or other duty of trust or confidence David owed to his employer, Paul Weiss, and its client, BAT. [Div. Ex. 1 ¶¶ 14-15] From March 10, 1986, through March 27, 1986, while in possession of the material non-public information concerning American Brands, Frankel, with intent to defraud, purchased and sold, and caused the purchase and sale, of American Brands securities. [Div. Ex. 1 ¶ 15]

Paul Weiss suffered tangible and reputational injury as a result of the conspiracy of which Frankel was a part. In stipulated testimony, Arthur Liman, Esq., a senior partner of the firm, attested to his own "sense of embarrassment and anguish at the theft by Michael David

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[9]Respondent Frankel asserts in his proposed findings of fact that he "has complied with all his obligations under the final judgment and has paid in full the disgorgement, interest and civil penalty." [Frankel P.F.F. ¶ 15]

of Paul Weiss client information and his passing it on to others." [Div. Ex. 23, 2] Not only was Paul Weiss embarrassed by this activity, but it actually lost a longtime client -- BAT, the company whose information was stolen by David and conveyed through Salsbury to Frankel. [Div. Ex. 23, 3; Div. Ex. 2 Tab 1A, Tab 1B] Insider trading like that engaged in by Frankel also harms the companies involved in the potential takeover deals. The theft of confidential information of companies involved in takeover deals could harm the companies by making their deals more expensive, or even prevent the deal from being consummated. [Div. Ex. 23, 2; Div. Ex. 2 Tab 2, Tab 3]

Frankel, through Salsbury, received information from co-conspirator David on other companies in addition to American Brands. At various times throughout the course of the conspiracy, Frankel received confidential information regarding American Can Company, Inc., Allegheny International, Inc., and Avondale Mills, Inc. [Div. Ex. 1 ¶¶ 13(11), 13(14); Div. Ex. 10 ¶ 44]

Frankel was not merely a passive tippee. Indeed, Frankel actively directed Salsbury to obtain more information from David [Div. Ex. 2, Tab 4I at 2267, Tab 4K at 2305] and solicited updates from David, again through Salsbury, regarding the information Frankel had already received on American Brands. [Div. Ex. 2 Tab 4M at 2335-2336]

Frankel warned David, through Salsbury, that David should be careful when obtaining information from Paul Weiss about its clients, including the information about American Brands. [Div. Ex. 2 Tab 4I at 2267, Tab 4K at 2305] Frankel also told Salsbury to warn co-conspirator Teicher not to allow David to be seen in Teicher's office. [Div. Ex. 2 Tab 4L at 2314]

During the course of the conspiracy, Frankel took steps to reward Salsbury for his illegal acts, while at the same time concealing Salsbury's involvement. On or about March 10, 1986, Frankel and Salsbury agreed that Frankel would allow Salsbury to buy American Brands call options in Frankel's account at Drexel, allowing Salsbury the ability to profit from the

inside information Salsbury possessed. [Div. Ex. 1 ¶¶ 13(23), 13(28), 13(32)-(34); Div. Ex. 2 Tab 4K at 2307-2310, Tab 4M at 2336, Tab 4N at 2340-2341; Div. Ex. 10 ¶¶ 76-78]

In furtherance of this agreement, on March 10, 1986, Frankel purchased twelve $75 American Brands call options in the "Ross Frankel" account at Drexel. Frankel purchased ten call options for himself, at a cost of $4,158, and the other two, for the benefit of Salsbury, at a cost of $693. [Frankel Answer § II ¶¶ 82, 83; Div. Ex. 2 Tab 4K at 2307-2310, Tab 4N]

On March 12, 1986, Frankel sold ten of the American Brands call options for a profit of $7,374. On June 19, 1986, the remaining two call options, originally purchased for Salsbury, were sold for a profit of $1,340. Frankel kept the profits intended for Salsbury. [Frankel Answer § II ¶ 83; Div. Ex. 10 ¶ 77; Div. Ex. 11 ¶ 6]

On March 13, 1986, Frankel purchased eight June $85 American Brands call options for Salsbury's benefit. On March 25, 1986, Frankel purchased ten June $85 American Brands call options in his Drexel account. Eight of the ten call options Frankel purchased on March 25, 1986, were for Frankel's benefit and two were for the benefit of Salsbury. All 18 of the June $85 American Brands call options were sold on April 21, 1986, for a loss of $516.97. [Div. Ex. 10 ¶ 78; Frankel Answer § II ¶ 84]

Frankel's illegal trades in American Brands securities yielded trading profits of $8,714. [Div. Ex. 10 ¶ 77; Div. Ex. 11 ¶ 6] These overt acts formed the bases for the substantive securities laws convictions of Frankel's co-defendants at the criminal trial. [Div. Ex. 1 ¶¶ 13-15; Div. Ex. 3]

Frankel, when he was taking part in the conspiracy, was not a mere clerical, but was fully aware of what he was doing and of its illegality. [Div. Ex. 1 ¶ 1; Div. Ex. 9] Frankel occupied a position of considerable responsibility at Drexel -- he was an officer of the company, head of arbitrage research, and on the "fast track" to head Drexel's arbitrage department. [Frankel Answer § II ¶ 28; Tr. 82-83] Frankel also was a lawyer, and understood the ethical responsibilities of attorneys such as his co-conspirator David to maintain client

confidences. [Div. Ex. 4, 30-31] The fact that Frankel warned his co-conspirators to be careful shows that he knew his activity, and that of his co-conspirators, was illegal. [Div. Ex. 2 Tab 4I at 2267, Tab 4K at 2305, Tab 4L at 2314]

Immediately after learning of the Commission's investigation, Frankel knowingly and willfully destroyed documents for the purpose of impeding the Commission's investigation. [Div. Ex. 1 ¶¶ 28-29]

Frankel directed an employee of Drexel under his supervision, David Geffen, to retrieve, from the margin department, two documents -- a margin slip and check -- which showed the purchase of American Brands options by Frankel and Salsbury. [Div. Ex. 2 Tab 4C, Tab 4F at 4282-4285, Tab 4O at 2373-2376] When Geffen returned with the documents, Frankel destroyed them, or caused them to be destroyed. [Div. Ex. 2 Tab 4F at 4282-4285] Frankel also directed Geffen to remove a page from Frankel's office calendar which showed that Salsbury owed Frankel money for the purchase of American Brands options. [Div. Ex. 2 Tab 4F at 4297-4299, 4300-4301, 4313-4314, Tab 4O at 2384-2385] As a result of Frankel's causing these documents to be destroyed, no record of this attempted purchase of American Brands options existed. [Div. Ex. 2 Tab 4D at 5234-5235]

Also for the purpose of obstructing the Commission's investigation, Frankel knowingly lied during his June 3, 1986 investigative testimony before the Commission. [Div. Ex. 1 ¶¶ 28-29]

In addition to these activities, Frankel also tried to discourage others from giving truthful testimony to the Commission. After learning of the Commission's investigation, Frankel discussed with Salsbury their purchases of American Brands options and Frankel plotted to, and did, manufacture explanations to justify the purchases. [Div. Ex. 2 Tab 4O at 2370-2373, Tab 4Q] Frankel threatened to "track down" Salsbury to keep Salsbury from cooperating with the government's investigation. [Div. Ex. 2 Tab 4O at 2386-2387]

During his testimony at the criminal trial, Frankel admitted receiving checks from Salsbury to pay for American Brands options bought in Frankel's account on March 10, 1986. [Div. Ex. 2 Tab 4D at 5227-5228, 5233-5235] Frankel also admitted this fact in his answer to the Commission's complaint in the civil action against him. [Div. Ex. 10 ¶ 77; Div. Ex. 11 ¶ 6] Finally, Frankel admitted that he sold the options that he had purchased for Salsbury on June 19, 1986. [Div. Ex. 10 ¶ 77; Div. Ex. 11 ¶ 6] In his answer to the Order, Frankel denies that he purchased options on March 10, 1986, for the benefit of Salsbury. [Frankel Answer § II, ¶¶ 81-83]

Frankel's answer to the Order also contains inconsistencies. In succeeding paragraphs, Frankel first denies that he purchased options for Salsbury on March 10, 1986, then admits that, on June 19, 1986, he sold two call options "originally purchased for Salsbury." [Frankel Answer § II ¶¶ 81, 83]

Frankel continues to deny the nature of his criminal activity. In his answer to the Order, Frankel denies that he was engaged in a conspiracy as alleged in the indictment and for which he was criminally convicted. [Frankel Answer § II ¶ 45; Div. Ex. 1 ¶¶ 8, 9]

Frankel was asked by the undersigned whether he believed his conduct was wrong. [Tr. 109] Frankel asserted his Fifth Amendment rights and refused to answer. [Id.] Indeed, Frankel also asserted his Fifth Amendment rights and refused to answer questions by the undersigned as to whether Frankel believed that insider trading was wrong. [Tr. 115-18] Counsel for the Division asked Frankel whether he purchased his American Brands options based on rumor, and whether he had violated the oath he took upon being admitted to practice law in New York State to uphold the laws of the United States. [Tr. 124] Frankel asserted his Fifth Amendment rights and refused to answer these questions. [Id.] Finally, the undersigned asked Frankel whether, as a result of his convictions, he had changed in his perspective regarding complying with the securities laws. [Tr. 139] Again, Frankel refused to answer and asserted his Fifth Amendment rights. [Id.]

Frankel remains an active investor, making trading profits of between $50,000 and $100,000 in the previous year. [Tr. 106] Most of his trading involved buying stock in savings and loan associations when these institutions converted from mutual ownership to stock ownership. [Tr. 106-7] Frankel testified that he opened bank accounts at various savings and loan associations with the intention of capitalizing on their conversion from mutual ownership to stock ownership. [Tr. 106-7] He stated that he opened accounts based on articles regarding mutual savings and loan conversions. [Tr. 125]

Frankel claims to have no present intention of associating with an investment adviser [Tr. 104, 119] and is not currently associated with the securities industry. [Frankel Answer § II, ¶ 29; Tr. 107] Frankel testified, however, that he might, in the future, associate with an unregistered investment adviser, in which capacity he would be entrusted with client funds. [Tr. 136]

Final Conclusions

It is well established that insider trading is unfair and destructive of investor confidence. Cady Roberts, & Co., 40 S.E.C. 907 (1961); SEC v. Texas Gulf Sulfur Co., 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); Schoenbaum v. Firstbrook, 405 F.2d 215 (2d Cir. 1968), cert. denied, 395 U.S. 906 (1969).

As stated in the House Report on the Insider Trading Sanctions Act of 1984, insider trading threatens the securities markets "by undermining the public's expectations of honest and fair securities markets where all participants play by the same rules." And, with respect to the misappropriation of material, non-public information, "conversion for personal gain of information lawfully obtained abuses relationships of trust and confidence and is no less reprehensible than the outright theft of non-public information." H.R. No. 355, 98th Cong., 1st Sess. 2 (1983).

Frankel was associated with a broker or dealer at the time of his illegal conduct and was criminally convicted of six felony counts. The conspiracy and securities fraud counts involved

the purchase or sale of securities. These conviction,s therefore, are bases for sanctioning Frankel under Section 15(b)(6)(A)(ii) of the Exchange Act. The perjury, obstruction of justice, and mail fraud convictions are also bases for sanctioning Frankel under Section 15(b)(6)(A)(ii) of the Exchange Act.

Frankel was enjoined, by consent, by the Untied States District Court for the Southern District of New York from further violations of Section 10(b) of the Exchange Act and Rule 10b-5. This injunction is a basis for sanctioning Respondent under Section 15(b)(6)(A)(iii) of the Exchange Act, because it was issued by a court of competent jurisdiction and enjoins Frankel from "conduct ... in connection with the purchase or sale of any security."

Frankel willfully violated Section 10(b) of the Exchange Act and Rule 10b-5, by, directly or indirectly, in connection with the purchase or sale of securities, by use of the means or instrumentalities of interstate commerce or the mails, or any facility of any national securities exchange, employing devices, schemes and artifices to defraud, making untrue statements of material facts, omitting to state material facts necessary in order to make statements made, in light of the circumstances under which they were made, not misleading, and engaging in acts, practices and courses of business which operated as a fraud or deceit. Specifically, Frankel purchased securities of American Brands while in possession of material, non-public information that he knew had been communicated to him in breach of a fiduciary or other similar duty arising out of a relationship of trust or confidence. Frankel's willful violation of a provision of the Exchange Act and of a rule promulgated thereunder constitutes conduct under Section 15(b)(6)(A)(i) of the Exchange Act for which he may be sanctioned.

Once a respondent has been found to be subject to sanction, it becomes necessary to consider what sanctions, if any, would be in the public interest.

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. SEC, 316 F.2d 137, 141 (2d Cir. 1963); Leo

Glassman, 46 S.E.C. 209, 211-212 (1975). Sanctions also should serve as a deterrent to others. Richard C. Spangler, Inc., 46 S.E.C. 238, n.67 (1976).

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

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that his occupation will present opportunities for future violations.

Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff'd on other grounds, 450 U.S. 91 (1981).

The Division requests that Frankel be permanently barred from associating with any broker, dealer, investment company, investment adviser (both registered and unregistered), municipal securities dealer or member of a national securities exchange or registered securities association. [Div. P.F.F. ¶ 55] By contrast, Frankel requests lesser sanctions.[10] In his answer [Frankel Answer ¶ III] and during argument at the hearing [Tr. 20], he indicated on the one hand his willingness to be permanently barred from any association with any broker, dealer, investment company, or municipal securities dealer but not from associating with an investment adviser. On the other hand, in his proposed findings of fact [Frankel P.F.F. ¶ 55], Frankel now only proposes that he be barred only from associating with a broker or dealer for 10 years. What follows is a discussion of appropriate sanctions, keeping in mind the Steadman principles.

The conduct of Respondent Frankel was particularly egregious in this case. He not only facilitated the theft of confidential material from a law firm but when discovered, he destroyed evidence, lied under oath, and otherwise obstructed justice in an attempt to escape liability. These acts, among others, resulted in a felony conviction with a prison sentence. Further, Respondent Frankel was disbarred from the practice of law. Perhaps, if Frankel had committed

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[10]In his filings, Frankel has changed his position with respect to sanctions.

the isolated act as an inside trader, an argument might be raised in mitigation. However, his extravagant efforts to avoid responsibility for the violation of the security laws using illegal means to cover up his acts, supports a finding that his conduct was particularly egregious.

Given that Frankel was a lawyer, there is no question that he acted with the highest degree of scienter. Respondent Frankel failed to offer sufficient evidence to refute the Division's assertion that he acted with full knowledge, and wilfully committed violations of the securities laws. Willfully means only intentionally committing the act which constitutes the violation. Arthur Lipper Corp. v. SEC, 547 F.2d 171, 180 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978) ("All that is required is proof that the broker-dealer acted intentionally in the sense that he was aware of what he was doing," quoting 2 Loss, Securities Regulation 1309 (1961)); Tager v. SEC, 344 F.2d 5, 8 (2d Cir. 1965). It means "no more than that the person charged with the duty knows what he is doing." Hughes v. SEC, 174 F.2d 969, 977 (D.C. Cir. 1949), quoting Dennis v. U.S., 171 F.2d 986, 990 (1948). Willfulness does not require proof of evil motive. See International Shareholders Services Corp., 46 S.E.C. 378 (1976). No showing of an intention to violate the law need be made in order to support a finding of willfulness in an administrative proceeding under the Exchange Act. Id.; A.J. White & Co., 45 S.E.C. 459, 460 n.5 (1974).

In questioning Respondent Frankel during the hearing, he offered no firm assurances that he would not commit future violations, although he was given a number of opportunities to offer such assurances. Rather, for the most part, he took the Fifth Amendment and largely declined to answer questions. His lawyer argued that the declination to answer was on account of Frankel's perjury conviction in this case and by implication that he would be in further jeopardy. [Tr. 109] This excuse is insubstantial.[11] It appears that at the least, Frankel could

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[11]Frankel, when questioned by his counsel, indicated that his prison experience had caused him a great amount of discomfort. [Tr. 132] However it is not considered that such a statement rose to the level of an assurance not to commit future violations of the securities laws. Further, even if one assumed arguendo that the sum total of Frankel's testimony amounted to such an assurance against future violations, these statements, given the nature of his acts in this

have, without jeopardy, put an assurance on the record that he would in the future obey the securities laws. His failure to do so permits a negative inference that he was not contrite about his acts here and that he might, given the opportunity, commit future violations.

Respondent Frankel's willingness to be permanently barred from association with any broker, dealer, investment company or municipal securities dealer [Frankel Answer § III] is considered to be in the nature of a conclusive admission. Balloch v. Hooper, 146 U.S. 363 (1892), affirming 6 Mackey 421 (D.C. 1887). That he has now limited his position to express willingness to only a 10 year bar from association with a broker or dealer [Frankel P.F.F. ¶55] should not relieve him from the effects of the earlier admission. This is especially so given that there has been no rationale provided for the change in position.

In its proposed findings of fact and conclusions of law, the Division, as indicated, additionally requests by way of a sanction, that Frankel be permanently barred from associating with an investment adviser. Not having cited Frankel under the Advisers Act, but rather under the Exchange Act, the Division now argues, in effect, that the legislative history of the Exchange Act and the language in Section 15(b)(6) that the Commission may "place limitations on the activities or functions of such persons" affords the Commission an extension of jurisdiction so it also may impose a bar from associating with investment advisers. This position might be tenable and recourse to historical materials might be warranted if the statutes were in some manner interchangeable[12] or in any respect unclear as to their jurisdictional limits. However, the statutes are not interchangeable and they are clear as to their jurisdictional limits. As Randall v. Loftsgaarden, 478 U.S. 647, 656 (1986) reflects, it is the plain language of the statute that is the starting point for statutory interpretation and that language is controlling here.

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case, do not necessarily alleviate the need for remedies to assure that he is no longer in a position to violate the laws. SEC v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994).

[12]The Exchange Act and the Advisers Act.

Additionally, it is considered that a respondent is entitled to proper notice in the order of reference stating the statutory authority for the proceeding. In Dan King Brainard, 47 S.E.C. 991 (1983), the administrative law judge concluded that the respondent should be barred from associating with a municipal securities dealer. In reversing the judge on this point the Commission stated that "[s]ince these proceedings were not instituted pursuant to Section 15B(c)(4) of the Exchange Act which authorizes this Commission to sanction persons associated with ... a municipal securities dealer, there is no basis for the law judge's bar of respondents from any such association." 47 S.E.C. at 1001 n.31. By analogy, the undersigned has no authority to bar Respondent Frankel from associating with an investment adviser since the proceedings against him were not instituted pursuant to the Advisers Act.

As indicated at the outset of this decision, the Order cites Respondent Teicher under the Advisers Act and the Division reasonably requests that Teicher be barred from associating with an investment adviser. If the Division's argument that there was a substantial basis to extend the reach of the Exchange Act to investment advisers were correct, then there would have been no reason to have cited Teicher under the Advisers Act. However, there is no substantial basis for such an argument and it would not be consistent to sanction Frankel based only on Exchange Act jurisdiction.

It is, therefore, appropriate and in the public interest that Frankel be permanently barred from association with any broker, dealer, investment company, municipal securities dealer, member of a national securities exchange or registered securities association as conceded in his answer. [Frankel Answer § III]

ORDER

IT IS ORDERED that Respondent Victor Teicher, pursuant to Section 15(b) and 19(h) of the Exchange Act and Section 203(f) of the Advisers Act, be remedially sanctioned in the form of a bar from associating with any broker or dealer, investment company, investment

adviser (both registered and unregistered), or municipal securities dealer. These sanctions are imposed as necessary and appropriate in the public interest, for the protection of investors.

FURTHER ORDERED that Respondent Teicher & Co. is barred from association with any broker or dealer, investment company, investment adviser (both registered and unregistered), or municipal securities dealer. This sanction is imposed as necessary and appropriate in the public interest, for the protection of investors.

FURTHER ORDERED that Ross S. Frankel, pursuant to Sections 15(b) and 19(h) of the Exchange Act, be remedially sanctioned in the form of a bar from associating with any broker, dealer, investment company, municipal securities dealer, member of a national securities exchange or registered securities association. This sanction is imposed as necessary and appropriate in the public interest, for the protection of investors.

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 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.

Glenn R. Lawrence

Glenn Robert Lawrence
Administrative Law Judge

Washington, D.C.
February 27, 1995