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ADMINISTRATIVE PROCEEDING
FILE NO. 3-3734

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of
OPPENHEIMER & CO.
(8-1756 & 801-1177)

INITIAL DECISION

(Private Proceedings)

Washington, D.C.
January 14, 1974

Warren E. Blair
Chief Administrative Law Judge

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APPEARANCES: John F.X. Peloso, of the Commission's New York Regional Office, for the Division of Enforcement.

Alfred Berman, of Guggenheimer & Untermyer, and Arnold J. Weinberg, of Oppenheimer & Co., for respondent.

BEFORE: Warren E. Blair, Chief Administrative Law Judge

These private proceedings were instituted by an order of the Commission dated May 24, 1972 ("Order") pursuant to Sections 15(b), 15A, and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act") and Section 203 of the Investment Advisers Act of 1940 ("Advisers Act") to determine whether the respondent wilfully violated and wilfully aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and failed reasonably to supervise persons subject to its supervision who committed such violations.

The Division alleged, in substance, that in connection with services respondent performed with respect to institutional customers respondent, directly and indirectly, caused institutional customers and selected persons to receive advance notice that a forthcoming Wall Street Journal ("Journal") article would reflect the views of one of respondent's research analysts in a manner that would adversely affect the market price of AMF, Inc., common stock which is traded on the New York Stock Exchange ("NYSE"). Allegedly, on November 11, 1971 the research analyst, with respondent's approval, was interviewed by a Journal columnist and the following day the views expressed by the analyst during the interview appeared in the "Heard on the Street" column of the Journal. It is further alleged that respondent's institutional customers and others were told of the interview and the adverse nature of the impending article and were advised to sell long positions of AMF and to sell AMF securities short. Persons receiving such information from respondent are alleged to have sold AMF securities on November 11 and 12, 1971 without disclosing to purchasers of those securities

the information received from respondent.

Respondent appeared through counsel, who participated throughout the hearing. Successive filings of proposed findings, conclusions, and supporting briefs were specified as part of the post-hearing procedures and timely filings thereof were made by the parties.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record, and upon observation of the witnesses.

Respondent

Respondent Oppenheimer & Co., a partnership located in New York, New York, is registered as a broker-dealer under the Exchange Act and as an investment adviser under the Advisers Act, and is a member of the National Association of Securities Dealers, Inc., and of various national securities exchanges. As part of its business, respondent distributes research and market information to its institutional and retail customers and in return for that service receives commission business from those customers.

In November, 1971, the time here in question, respondent's institutional salesmen were divided into two groups, the Institutional Sales Department, which serviced large institutions, and the Institutional Services Department ("ISD"), which served various smaller financial institutions. The Institutional Sales Department, sometimes referred to as the "maxi department," was under the operational charge of Charles Arlington, one of respondent's partners, and ISD, also known as

the "mini department," was under the direct supervision of another of respondent's partners, Michael Schaenen.

Violation of Rule 10b-5

In early November, 1971 Joel Price, then one of respondent's research analysts, prepared a research report on Brunswick Corp. ("Brunswick"), a manufacturer of leisure-time products, and respondent distributed that report to its customers and others on its mailing list. One of the persons who received a copy of that report prior to November 10, 1971 was Dan Dorfman, then an employee of the Journal, who on occasion authored a column appearing in that newspaper entitled "Heard on the Street."

On November 10, 1971 Dorfman telephoned Price, mentioned the Brunswick report, and said that he would like to do a story on Japanese bowling. Price told Dorfman that any story on bowling would have to include AMF because its market share was as large as Brunswick's, and further stated that without the permission of one of the respondent's partners he could not be interviewed. Price suggested Charles Brunie, respondent's senior partner in charge of research, as the person Dorfman should contact for approval. Dorfman exercised considerable influence in the financial community and because of his insistence on the interview and Brunie's desire not to offend him, Brunie reluctantly consented to the meeting and arrangements were made for Price to be at the Journal's offices the next morning.

The early part of the hour-long interview on November 11, 1971 related to Japanese bowling and Price's opinions about its prospects,

and later turned to the different methods of accounting utilized by AMF and Brunswick. Price expressed the views that Japanese bowling would fall off in 1973 and that Brunswick's accounting approach would add a measure of protection to its earnings during the downturn while AMF's accounting method would not. At the close of the interview Price responded to Dorfman's pressure for a conclusion by saying that he would not be an aggressive buyer of AMF stock at that time, and was told by Dorfman just before leaving the Journal offices, "AMF is going to go down tomorrow." 1/

While returning to his own office, Price became worried that Dorfman's column would be coming out in the immediate future and that he would be quoted negatively on AMF. Upon reaching his office Price telephoned Dorfman, seeking assurance that he would not be so quoted. Dorfman told Price not to worry and went on to say that he had already spoken to people at AMF and Brunswick. Far from reassuring him, the conversation with Dorfman left Price convinced that he would be quoted in Dorfman's column the next day and that contrary to his actual views he would appear to be negative on AMF.

Alarmed over the possibility that Dorfman would distort the interview and the danger that respondent and its clients might be misled into precipitate sales of AMF stocks by Dorfman's anticipated column, Price sought out and alerted Arlington to the situtation that was facing the Institutional Sales Department. Arlington reacted to

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1 / Tr. 71.

Price's information by calling an impromptu conference of the staff members of the Institutional Sales Department, an action consistent with the usual practice followed when information or developments of particular interest to institutional clients occurred between regular departmental meetings. In addition to Arlington and Price, those attending the meeting on November 11 were Burt Fingerhut, manager of respondent's Institutional Research Department, and 10 of the institutional salesmen. All of the salesmen were members of the Institutional Sales Department except one, Bruce Kallenberg, who was with ISD. 2/

Arlington opened the half-hour meeting with a brief statement to the effect that Price had been interviewed by Dorfman on Japanese bowling, that Price feared that the resulting article, which could appear in the next day's Journal, would be negative, and that the salesmen should call institutions that might be interested in the information that Price was about to furnish. Price then stated that he was optimistic about AMF's near term and was raising his estimate to $2.70 over his $2.55 of a week earlier, but that he was concerned the peaking of Japanese bowling would cause AMF's earnings to show only a modest increase, if any, in 1973. Because of the imminence of the Dorfman article, Price stressed the negative aspects of AMF's prospects he anticipated would be highlighted by Dorfman. By doing so Price felt that the information conveyed by the salesmen would nullify the possibility that respondent's

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2/ All of the ISD salesmen were to have attended the meeting but partially because of a "secretarial fluke," only one was present.

interested institutional clients would be surprised by the Dorfman article and the concommitant negative impact it would have on AMF stock. Price further advised the salesmen that his position was that AMF stock was a "hold," and that he was not recommending a sale of AMF stock nor modifying his earlier "buy" recommendation on Brunswick.

After Price had finished his presentation Arlington again spoke, emphasizing that institutional clients with an interest in AMF or in bowling equipment stocks generally should promptly receive Price's analysis and conclusions from the salesmen servicing their accounts rather than from reading the Journal. He also repeated his earlier admonition that no mention should be made by the salesmen regarding Price's interview with Dorfman or the possibility of the anticipated Journal article.

Following the meeting the attending salesmen immediately communicated with institutional customers they believed would be interested in the bowling equipment companies. Three of the salesmen with the Institutional Sales Department made no calls, and of the six with that department who did, Monroe Firestone made four, John Martinson and Robin Prince each made two, and Albert Hetrick, Francis Houghten and Jeffrey Loewy made one apiece. Arlington and Price each made one call.

When Kallenberg returned to his department after the meeting he reported to the other salesmen in his group, Nathan Gantcher, Erich Sokolower, and Howard Shawn, the information he had just received. They were told that Dorfman had interviewed Price, that the Journal might

well carry a negatively slanted article on AMF the next day, and that Price had adopted a more cautious view with respect to AMF's future. Kallenberg further stated that they were permitted to call their customers, but that under no circumstances was the Dorfman interview or the anticipated Dorfman article to be mentioned. The four ISD salesmen then set about contacting certain of their customers, with Kallenberg speaking to one, Gantcher calling three, Sokolower talking to six, and Shawn, who also tried to sell 500 shares of AMF short as soon as he heard that Price was negative on AMF, reaching three.

Some of those who spoke to the institutional customers observed Arlington's injunction against referring to the Dorfman interview or the forthcoming Journal article, but in a number of instances customers, including the one to whom Price spoke, were given that information. It further appears from the record that customers called by respondent's personnel on November 11 accounted for a significant amount of the trading in AMF stock on November 11, 1971 and for at least 13,800 of a total of 15,700 shares, or 87% of the AMF stock sold short that day on the NYSE.

Price felt that it was incumbent upon him to call John Rubin, a security analyst and investment officer with Wells Fargo Bank, because he had given Rubin a preliminary indication on November 3, 1971 that AMF had a measure of attraction. In the course of the conversation with Rubin on November 11, Price discussed not only the information that he expected to appear in Dorfman's article but also referred to the

likelihood that the Journal would publish the Dorfman article the next day. Price and Rubin agreed during the conversation that the article would have a negative impact upon AMF stock for a day or two, but at the conclusion it was Rubin's opinion, with which Price agreed, that Wells Fargo should continue to hold its position in AMF stock. However, after Rubin discussed Price's call with the Wells Fargo research director and his assistant and the Price information had been considered later in the day at a meeting of the bank's portfolio managers, the bank's classification for AMF stock was changed from "purchase" to "sell," and one of the portfolio managers decided to sell the 115,000 shares of AMF stock under his control. That sale was accomplished early next morning, November 12, at prices of $38 per share and better.

Martinson's two calls were made to Morgan Guaranty Trust, which he found did not own AMF or Brunswick stock, and to CNA Financial Services, which his records indicated was a substantial owner of AMF. In speaking to Robert Powell, CNA's manager of equity securities, Martinson first presented Price's views and concluded with the observation that based upon the negative factor involved in AMF's accounting for Japanese sales, AMF stock could be a sale, but that Powell should make a further check on it. Immediately after his conversation with Martinson, Powell had a meeting with one of his associates and they concluded, on the basis of information available on AMF, including that just furnished by Martinson, that CNA should sell 60,000 of its 112,000 shares of AMF. The sale of those shares was accomplished on November 11, 1971 at prices of 40 3/8 and 40 1/2, with 20,000 of the

shares being sold on the Pacific Coast Stock Exchange and the other 40,000 on the Philadelphia-Baltimore-Washington Stock Exchange.

The credible evidence discloses that Hetrick failed to honor the spirit of Arlington's restriction on disclosure of the Dorfman article by informing James Bell, portfolio manager for the Bank of Southwest, that Oppenheimer preferred Brunswick over AMF and that there was a possibility an unnamed publication would run an article containing Oppenheimer comments which could be construed as adverse to AMF. In a second conversation with Bell about thirty minutes later, Hetrick repeated Oppenheimer's preference for Brunswick over AMF and also mentioned that a switch from AMF to Brunswick might be a good investment. While Bell considered Hetrick's information to be of significance, that information did not lead to sales of AMF stock by Bank of Southwest.

None of the other calls by salesmen of the Institutional Sales Department resulted in sales of AMF, but several occurred after ISD salesmen reached their customers. Moreover, it appears that Kallenberg's report on the meeting he had attended persuaded Sokolower, Gantcher and Shawn to recommend short sales of AMF. A call by Kallenberg also had the effect of triggering a short sale.

Sometime during the week prior to November 11, 1971 Kallenberg informed Stephen Swid of Swid Investors that AMF should be considered a "buy" on the strength of Price's then existing views. Because Kallenberg interpreted Price's remarks at the November 11 meeting to be

tantamount to a "sell" recommendation on AMF he felt obligated to call Swid, but limited himself to telling Swid that Japanese bowling was slowing down, that Price had tempered his enthusiasm for the stock, and that in view of market conditions he didn't consider that AMF should be purchased. After that call Swid reasoned that Oppenheimer was a "powerful marketing company," that others had probably bought AMF on Price's earlier opinion, and that the quick change to slight negativeness by Price would cause weak holders to liquidate their positions. In line with that deduction Swid sold 5,000 shares of AMF short on November 11 and took a profit of $12,340 when he covered on November 16, 1971.

When Sokolower called James Rippey, director of research for Columbia Management Company, he learned that the company owned AMF stock. He then informed Rippey that Oppenheimer's analyst was predicting that the Japanese bowling boom was turning down and that Japanese bowling represented an important part of AMF's improvement in earnings. Understanding from that conversation that Oppenheimer was negative on AMF and was making a sale recommendation, Rippey consulted with his partners in Columbia Management, discussing with them the information received from Sokolower. All were in agreement that Columbia Management should sell AMF stock in its discretionary accounts and recommend sales of AMF positions to its other clients. As a result, Rippey sold or caused to be sold a total of 4,150 shares of AMF on November 11 and another 250 shares on November 12.

David Campbell, portfolio manager with Berkey, Dean & Company, whom Sokolower knew to be interested in short sale candidates, also received a call from Sokolower on November 11. Sokolower suggested that

AMF might be a good short sale, referred to the weakness in the bowling industry, and told Campbell about the Price interview and the probability of a negative Dorfman column on AMF. Campbell then did some research on AMF in his firm's library and an hour or so after Sokolower's call, having satisfied himself that the suggested short made sense, Campbell sold 500 shares of AMF short at 45 5/8 per share for the account of International Investors Fund, a fund managed by Berkey, Dean & Company.

Gantcher was also responsible for two of Oppenheimer's customers selling 5,200 shares of AMF short on November 11. In one instance he recommended a sale of AMF to Louis Rice, portfolio manager of the Harding International Fund, causing Rice to place an order to sell short 3,000 shares no more than five minutes later. The other short sale of 2,200 shares of AMF occurred after Gantcher made the same recommendation to Gary Gastineau, a friend who managed a portfolio for Strand & Co. Both the interview that Price had and the possibility of a Dorfman column negative on AMF were factors considered by Gantcher in making his short sale recommendations. Further, it appears that although Gantcher elected not to reveal those factors to Rice, he did tell his friend Gastineau about them and voiced his expectation that the Dorfman article might appear as early as the next day.

Shawn made similar recommendations in calls to two of his customers, who then sold short 3,100 shares of AMF stock. In those conversations with Marvin Sirot, a general partner in an investment partnership named The Round Hill Group, and Walter Nisbet, manager of another investment

partnership named Consilium Associates, Shawn made no mention of the Price interview or Dorfman article and limited his conversations almost entirely to his recommendation of AMF as a good short sale. In reaching that conclusion Shawn took into consideration the fact that AMF was selling near its high in a bearish market and the possibilities that Price was correct in his prediction of a slowdown in Japanese bowling and that those views would appear in the Journal. The latter possibility impelled Shawn to make his calls immediately after Kallenberg's report to the ISD group in order to give his customers an advantage he felt would be dissipated by the publication of Dorfman's column the next day.

One other short sale of note that took place on November 11, 1971 was occasioned by knowledge of the possible publication of the Dorfman column. Jack Handsman, Price's brother-in-law and an Oppenheimer retail salesman, happened to be in Price's office after Price returned from his interview, learned of the interview and the possible publication of a negative article in the Journal, and promptly telephoned a customer, Michael Bristol, informing him of those facts and indicating that AMF stock would be a good short sale. Based upon the frequency with which the market had previously responded to items in Dorfman's column, Bristol concluded that a short sale of AMF would be "a reasonable gamble" and sold 1,000 shares short, covering on November 16, 1971 for a profit of $2,000.

It is clear from the record that the noted long and short sales of AMF stock by respondent's customers on November 11 and 12, 1971 were stimulated by the telephone calls made and the information supplied by respondent's salesmen, and also that the action of respondent in causing its salesmen to undertake that activity resulted in respondent's customers receiving an unwarranted and unfair advantage over the purchasers of their AMF stock. Under these circumstances, it is concluded that respondent wilfully violated and wilfully aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder by engaging in an act, practice, and course of business which operated as a fraud or deceit upon buyers of the AMF stock who purchased from respondent's customers on November 11 and 12, 1971. 3/

Respondent contends that it was wholly justified in communicating the work-product of its research staff, and further that respondent's institutional customers had a priority claim to its research product. Respondent also asserts that the price information necessarily had to be given to interested institutional customers because of the known tactics of Dorfman. Those views cannot prevail.

The basic thrust of respondent's arguments is that its paramount duty is owed to its customers and not to members of the investing public who might deal with those customers. That thesis must be rejected

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3/ Based upon the findings and conclusions herein, respondent's Motion to Dismiss is hereby denied.

for the same reason that the Commission, in Cady, Roberts & Co.,[4/] refused to limit responsibilities of corporate insiders to the corporation's existing stockholders. "It ignores the plight of the buying public -- wholly unprotected from the misuse of special information." Moreover, the Supreme Court has stressed that the antifraud provisions of the federal securities laws must be construed "not technically and restrictively, but flexibly to effectuate . . . [their] remedial purposes."[5/]

Here the respondent, through its partners, set in motion a series of events that culminated in its institutional customers being assured of a short-term profit from sales of AMF if they but gave heed to the information passed on by respondent's salesmen. It was not necessary for the salesmen to refer to the Dorfman article for this to be so, although obviously specific mention of the article's imminence would impress the customer even more forcefully with the idea that a quick profit could be turned on such sales. There are two readily apparent and persuasive rationales that support that conclusion.

First, an institutional customer receiving a call would know that respondent's salesman had good reason to telephone and that it was likely that the information would be of such character that acting on it would be beneficial. Since Price's reevaluation of AMF was essentially negative, respondent could have reasonably expected that the salesmen's calls would result in sales of AMF for the short-term regardless of the

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4/ 40 SEC 907, 913 (1961).

5/ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195 (1963).

observance of Arlington's injunction of silence concerning the Dorfman piece. And it may be added that the salesmen, knowing that a negative Dorfman article was on the horizon, were in a position to speak with greater confidence about the value of the Price information and thereby further impress their customers with the importance of their calls.

Second, it was known to respondent's personnel that Dorfman's column in the Journal was regularly read by the financial community and that the column had a definite market impact on a short-term basis, with stocks receiving favorable mention in the column going up on the day of publication and those having unfavorable notices reacting on the downside. Further, respondent knew or should have known that its reputation as a highly-regarded investment adviser would tend to assure that readers of the anticipated Dorfman column would by their sales cause AMF to drop in price on the day Dorfman published Price's negative views. Combining these factors makes it apparent that respondent's salesmen were in possession of material market information at the time that they placed their calls and that regardless of whether the pendency of the Dorfman article was disclosed, respondent should not have caused its salesmen at the time and under the circumstances to telephone its institutional customers. By doing so, respondent gave and must be held accountable for furnishing those customers with a forbidden advantage over purchasers of the AMF stock they sold.[6/]

6/ Cf. Courtland v. Walston & Co., Inc., 340 F. Supp. 1076 (S.D.N.Y. 1972).

While respondent agrees that if it had caused Price to go to Dorfman with the intent of having the Journal publish a negative article and of advising its customers of that scheme a fraud would have been perpetrated, it argues that without the element of intent there can be no finding of a violation of Rule 10b-5. Respondent further asserts that negligent conduct unaccompanied by bad faith cannot support a finding of such violation. In support of those views, respondent places great store in the recent decision in Lanza v. Drexel & Co.[7/]

The Lanza case does not have the reach that respondent attributes to it. As a private action it cannot be accorded a controlling weight in these proceedings which involve protection of the public interest under mandate from Congress. It would defeat the Congressional intent to proscribe abuses inherent in manipulative and deceptive devices to allow a person to escape liability in a Commission enforcement action because he was only negligent. This need for distinction between private rights of action and Commission enforcement actions is in fact acknowledged in the Lanza case.[8/] Further authority for the recognition of the distinction is found in S.E.C. v. Manor Nursing Centers, Inc.,[9/] where the Second Circuit ruled:

> It is now well established that "[b]efore there may be a violation of the securities acts there need not be present all

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7/ 479 F.2d 1277 (2d Cir. 1973).

8/ Id. at 1304.

9/ 458 F.2d 1082, 1096 (2d Cir. 1972).

> of the same elements essential to common law fraud. . . ." Globus v. Law Research, Inc., 418 F.2d 1276, 1290-91 (2 Cir. 1969). Accord, SEC v. Capital Gains Bureau, supra, 375 U.S. at 193-95. Moreover, in an enforcement proceeding for equitable or prophylactic relief, such as the one here, we have held that mere negligence is a sufficient basis for liability. [Citations omitted].

More recently, the negligence standard was utilized in SEC v. Lums, Inc.,[10/] to impose liability in an injunctive action based upon violations of Rule 10b-5.

In an effort to avoid the impact of decisions recognizing the negligence standard as applicable to the Commission's enforcement proceedings, respondent suggests that these proceedings which seek to evaluate respondent's past conduct and to determine the sanction, if any, to be imposed are more comparable to private "damage" actions than to the Manor Nursing Centers and Lums cases which sought injunctive relief prospective in nature. That approach is wholly devoid of merit, ignoring as it does the fact that the Commission's proceedings are not punitive in nature but rather are instituted as a means to determine whether the public interest requires protection through remedial action against a named respondent.[11/]

That respondent's negligent conduct resulted in the Rule 10b-5 violation is evident from the record. As the Division points out, the purposes of the institutional sales meeting on November 11 upon

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10/ CCH Fed. Sec. L. Rep. ¶94,134 at 94,562-563 (S.D.N.Y. September 13, 1973).

11/ Blaise D'Antoni & Associates, Inc. v. S.E.C., 289 F.2d 276 (5th Cir. 1961); Pierce v. S.E.C., 239 F.2d 160, 163 (9th Cir. 1956).

Price's return from the Dorfman interview were to acquaint the salesmen with Price's changed thinking about AMF and to afford them an opportunity to inform their customers before the information was published in the Journal. Arlington gave no consideration to the use to which those customers might put Price's information nor to the market advantage they would receive from having the information prior to its publication by Dorfman. While his concern for the welfare of respondent's customers is understandable, he should have known under the circumstances that respondent had an obligation not to benefit its customers unfairly at the expense of the investing public. Nor would a reasonable person reflecting upon the situation not have realized that disclosure of the imminence of the Dorfman article would lead in turn to disclosure of that fact by some of the salesmen whose concern was for most effective servicing of their customers and not for respondent's legal obligations.

It is no answer for respondent to say that its sales personnel had to be told about the Dorfman interview and impending article because they would have asked Arlington why Price's information justified immediate telephone calls. Not only does that thought miss the point that given the particular circumstances here in question Arlington should not have caused telephone calls to be made, but it fails to take into account that he should have reasonably anticipated that his injunction would not preclude the possibility of disclosure of material information regarding the Dorfman interview.

This is not to suggest that under all circumstances an investment adviser is required, if one of its analysts or other personnel is

interviewed by the press, to remain silent until the information given to the press has been publicized. That would, as respondent argues, be an unwarranted restriction upon the flow of information vital to the financial community. But respondent's situation on November 11 was and should have been recognized as highly unusual, if not unique. Price did not merely respond to questions of a reporter and conclude the interview without knowing, as would ordinarily be the case, how his information would be used. Dorfman's parting remark at the conclusion of the interview gave Price good reason to believe that negative views attributed to him would appear in the Journal and upon return to his office he confirmed that suspicion and the fact that the article would appear on November 12. Arlington came to share those convictions so strongly that he decided action by respondent's salesmen was necessary if respondent's customers were not to be taken by surprise by the Dorfman article. It is in that context that the propriety of the telephone calls must be considered and not in the abstract of circumstances ordinarily encountered in press interviews. It is in the light of the specific and unusual knowledge that Price and Arlington had regarding the Dorfman article that Rule 10b-5 called for silence on the part of respondent until publication of that article.

The Division also urges that respondent be found to have violated Rule 10b-5 because of the failure of respondent on November 11 to properly disseminate the Price information, arguing that only a few selected customers received that valuable research assistance by telephone. Respondent counters by asserting that such issue was not raised

by the Order for Proceedings but, in any case, denying that the record supports the Division's position.

Although a reading of the Order for Proceedings makes clear that the issue raised by the Division was within the ambit of its allegations, in particular those under paragraph 8 of Section II, it does not appear that the Division can prevail on this point. As earlier found, respondent had an obligation to remain silent until the Dorfman article was published. This being so, it cannot be said that having violated Rule 10b-5 by communicating with a selected few customers, respondent was obligated to aggravate the violation by making a disclosure to all of its customers. Under the circumstances it must be concluded that were it true — and the record is, as respondent contends, inconclusive regarding the question — that an unjustifiable discrimination between customers occurred in the selection of those to be called, there could not be a finding of violation of Rule 10b-5 predicated upon such discrimination.

Another theory upon which the Division bases its case involves an asserted duty of respondent toward all readers of the Journal arising out of respondent's affirmative action in consenting to have its research opinion disseminated in the public press. No authority is cited for this position, which goes beyond any precedent that has been reviewed in connection with the consideration of the issues in these proceedings, and respondent denies that such obligation exists. Respondent further implies that the Division is attempting to introduce rule-making into this adjudicatory proceeding and refers to the fact that

since the institution of these proceedings an inquiry, still under way, was initiated by the Commission staff in which comments from the securities industry and the investing public have been requested concerning, inter alia:

> (5) the appropriateness of utilizing nonpublic material information directly related to the future market for a given security which does not emanate from or concern the issuer of that security. 12/

In view of the earlier findings herein that respondent wilfully violated Rule 10b-5 and the fact that the Commission staff has in the last few months undertaken an inquiry into issues which appear to encompass the validity of the theory the Division has here advanced regarding the obligations of an investment adviser who consents to have his research opinion disseminated in the public press, it does not appear necessary or desirable to determine the merits of that theory in these proceedings.

Failure to Supervise

The Division argues that respondent failed reasonably to supervise persons subject to its supervision who violated Rule 10b-5 in that respondent did not maintain a proper system of control to prevent such violations. The Division's argument in this regard is unacceptable.

In determining respondent's responsibility in these proceedings the acts of Arlington, who decided the course to be followed by the institutional salesmen, and the acts of those salesmen and of Price

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12/ Securities Exchange Act Release No. 10316 (August 1, 1973).

must be imputed to respondent.[13/] Respondent therefore must be recognized as a principal actor in the violation of Rule 10b-5 rather than one inattentive to its supervisory role. Having found that respondent wilfully violated and wilfully aided and abetted violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, it would entail a confusion of concepts and be inconsistent to hold respondent responsible for failure to supervise in connection with its own misconduct.[14/]

Public Interest

Respondent's wilful violations of the Exchange Act and Rule 10b-5 thereunder require consideration of the remedial action necessary in the public interest. In this connection the Division suggests that respondent's Institutional Sales Department be suspended for a period between fifteen and thirty days and respondent be required to formulate, implement, and supervise a set of policies designed to prevent repetition of the acts here in question. On the other hand, respondent does not address itself to the necessity for remedial action, contenting itself with assertions of its innocence of wrongdoing and the need for "invocation of the Commission's rule-making powers and procedures, if not the alternative of submission to Congress of effective legislative proposals."

Upon careful consideration of the factors bearing upon the public interest, including the testimony of Professor Homer Kripke concerning

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13/ Armstrong, Jones & Co. v. S.E.C., 421 F.2d 359 (6th Cir. 1970), cert. denied 398 U.S. 958 (1970).

14/ Cf. Anthony J. Amato, Securities Exchange Act Release No. 10265 (1973); Fox Securities Company, Inc., Securities Exchange Act Release No. 10475 (1973).

his opinion that respondent could not have reasonably known that the acts alleged by the Division constituted a violation of Section 10(b) of the Exchange Act or Rule 10b-5, it is concluded that a suspension of the activities of respondents Institutional Sales Department is unnecessary but that respondent's wilful violations warrant imposition of censure. As to the proposal that respondent adopt and implement rules and policies for the purpose of preventing a repetition of the acts involved in these proceedings, it seems likely that respondent would of its own volition take such steps as needful to avoid again being charged with similar violations. For that reason, respondent will not be directed to take any specific action in that regard.

The conclusion that censure rather than more drastic remedial action will suffice is based primarily upon the belief that Arlington, and through him respondent, acted hastily, without plan to launch a fraudulent scheme and without intent to do more than to protect respondent's reputation and service respondent's clients. Further, it appears that respondent has not been subject to previous disciplinary action since its inception, and that the publication of the decision in this matter will serve to impress upon respondent the need for utmost care in considering its activities in the light of the requirements of Section 10(b) of the Exchange Act and Rule 10b-5. 15/

Accordingly, IT IS ORDERED that Oppenheimer & Co. be, and it hereby is, censured.

15/ 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 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.

Warren E. Blair

Warren E. Blair
Chief Administrative Law Judge

Washington, D.C.
January 14, 1974