ADMINISTRATIVE PROCEEDING
FILE NO. 3-2267

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of

SECURITIES PLANNERS ASSOCIATES, INC.
L. DEXTER FLOUNCE
HOWARD SMOLAR

(8-8934)

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SECURITIES & EXCHANGE COMMISSION

INITIAL DECISION

(Private Proceedings)

Ralph H. Tracy
Hearing Examiner

Washington, D. C.
May 7, 1971

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APPEARANCES: Edward P. Delaney and Willis H. Riccio
of the Boston Regional Office of the Commission
for the Division of Trading and Markets

Sumner H. Woodrow and Harold Fisher
of Balliro and Woodrow, for respondents

BEFORE: Ralph H. Tracy, Hearing Examiner

THE PROCEEDING

This is a private proceeding instituted by an order of the Commission, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether, as alleged by the Division of Trading and Markets ("Division"), Security Planners Associates, Inc. ("registrant"), wilfully violated the Exchange Act and rules thereunder, and whether L. Dexter Faunce ("Faunce") and Howard Smolar ("Smolar") failed reasonably to supervise persons under their supervision with a view to preventing such violations, and the remedial action, if any, that might be appropriate in the public interest.

On December 17, 1970, at the commencement of the hearing, the Division's motion to amend the order for proceeding was granted. Under the order, as amended, the Division alleged registrant violated Section 17(a) of the Exchange Act and Rules 17a-3 and 17a-5 thereunder by failing to keep current and proper books and records and by failing to file a report of financial condition for the calendar year 1969, and violated Section 7(c)(1) of the Exchange Act and Regulation T. Faunce and Smolar were charged with a failure to properly supervise.

The Commission's Order for proceeding provided there be determined first the question whether suspension of the registration of the registrant on an interim basis, pending final determination of the issues presented by the Order, was necessary or appropriate in the public interest or for the protection of investors. However,

the necessity for such preliminary determination was mooted by Registrant's suspension of operations in September 1970 and only the remaining issues were considered at the hearing herein.

Respondents were represented by counsel throughout the proceedings. Proposed findings of fact and conclusions of law and briefs were filed by the parties, as was a letter from respondents' counsel in response to the Division's reply brief which is accepted as part of the record.

The findings and conclusions herein are based upon the record and upon observation of the witnesses.

FINDINGS OF FACT AND LAW

The Respondents

Security Planners Associates, Inc. ("registrant") became registered pursuant to Section 15(b) of the Exchange Act on November 2, 1960. Registrant, which is a member of the National Association of Securities Dealers, is located at 33 Broad Street, Boston, Massachusetts. Faunce was president and owner of about 34% of the voting stock of registrant until November 30, 1969 when he resigned and arranged for the disposition of his stock.[1/]

Howard Smolar obtained a B. S. degree from Massachusetts

1/ At the commencement of the hearing, the Division stated that because Faunce, through his counsel, had elected to submit an offer of settlement with respect to the allegations against him the Division would not submit evidence as to Faunce. Accordingly, findings herein are made only as to registrant and Smolar and not as to Faunce.

College of Pharmacy in 1953 and a M.B.S. from Boston University in 1954. He joined registrant in 1961 and acquired about 34% of registrant's stock in 1963 at which time he became executive vice-president and a director. He was named treasurer in June of 1965 and on December 1, 1969 he succeeded Faunce as president while remaining as treasurer and a director.

Bookkeeping Violations

The record establishes that during the period from about September 25, 1968 until December 10, 1969, registrant, as charged in the order for proceeding, committed a number of violations of Section 17(a) of the Exchange Act and Rule 17a-3 thereunder by failing to maintain and keep accurate and current certain required books and records. 2/ At the time of an inspection of the books and records of the registrant conducted by an investigator of the Commission on June 13, 1969 a number of deficiencies existed. The general ledger had been posted only to April 30, 1969; the customers' ledger had been posted to June 9, 1969; broker-dealer accounts had been posted to June 9, 1969 and stock record position cards had not been made and maintained. The dividend record had

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2/ Section 17(a) of the Exchange Act, as applicable here, requires registered brokers and dealers to keep such books and records as the Commission by rule or regulation may prescribe as necessary or appropriate in the public interest or for the protection of investors. Rule 17a-3 specifies the books and records that must be maintained and kept current.

been posted only to May 31, 1969 and had not been made and kept properly because, due to the absence of a position record, the registrant could not know when to claim a dividend or to prepare a dividend record.

Registrant's records were also deficient in that the last trial balance of customer and broker-dealer accounts was April 30, 1969. Also, there was an unaccounted for difference between the customer general ledger control accounts and subsidiary accounts for customers of $74,600.88.

On July 17, 1969 a follow-up inspection revealed that registrant's general ledger was posted only to May 31, 1969; the customer ledger accounts did not show receipt and delivery of securities; dividend transactions were not recorded on the customer accounts; broker-dealer ledger accounts did not reflect dividend transactions; and the securities position record commingled positions for the registrant and its subsidiary, Security Planners Limited.[3/] In addition, the securities positions were not being kept properly in that the long positions did not have offsetting short positions. The trial balance of the subsidiary accounts for customers and broker-dealers exceeded the general ledger control account by a debit amount of $76,239.57.

3/ Security Planners, Limited was formed in February 1969 for the purpose of holding a membership on the Philadelphia-Baltimore-Washington Stock Exchange and is additionally the investment advisor, underwriter, and contractual plan sponsor for the Technical Fund, Inc., a small open-end investment company.

On September 29, 1969 a third inspection disclosed that customer ledger accounts and broker ledger accounts were posted only to September 17, 1969, and the registrant's securities ledger reflected 34 securities that were out of balance as of September 29, 1969.

On March 6, 1970 a further inspection disclosed that registrant had a trial balance only as of January 30, 1970, that the last bank reconciliation was as of November 30, 1969 and that as of January 30, 1970 the individual customer accounts, the individual broker-dealer fail-to-deliver accounts, and the individual broker-dealer fail-to-receive accounts were all out of balance with their respective general ledger control account. The registrant's head bookkeeper furnished the Commission investigators a sheet prepared by him entitled "stock differences" which contained 27 various securities known to be out of balance as of February 28, 1970 and the Commission investigators found 15 additional security positions out of balance as of that date.

Respondents do not argue that registrant's books and records were in order or maintained in such condition as to make the allegations unsupportable. Rather, respondents contend that books and records should be considered as being current if there is a time lag in posting not exceeding 2 or 3 days and that even this is applicable only to the daily blotter as it would be a practical impossibility to keep all records up to date.

What respondents overlook, or choose to ignore, is that in the above-described violations the required postings and entries were delinquent by from 4 to 45 days and that in many instances the necessary books and records were kept improperly or not at all.

The Commission has repeatedly stressed the importance in the regulatory scheme for strict compliance with the requirement that books and records be kept current.[4/] The requirement that records be kept embodies the requirement that such records be true and correct.[5/] Compliance with the rule relating to maintenance of books and records is regarded as an "unqualified statutory mandate" dictated by a broker-dealer's obligation to investors to conduct its securities business on a sound basis.[6/]

Failure to File Financial Report

Under the provisions of Section 17(a) of the Exchange Act and Rule 17a-5 thereunder, registrant's Form X-17A-5 report for the calendar year 1969 was due January 14, 1970, 45 days after the date of the financial statement which was November 30, 1969. In a letter

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4/ "It is obvious that full compliance with those requirements must be enforced and registrants cannot be permitted to decide for themselves that in their own particular circumstances compliance with some or all is not necessary": Olds & Company, 37 S.E.C. 23 (1956); Pennaluna & Company, Inc., Securities Exchange Act Release No. 8063, p. 13 (April 27, 1967).

5/ Lowell Niebur & Co., Inc., 18 S.E.C. 471, 475 (1945).

6/ Billings Associates, Inc., Securities Exchange Act Release No. 8217, p. 8 (December 28, 1967).

dated January 13, 1970, accountants for registrant requested an extension of time for filing until February 15, 1970. This request was received on January 14, 1970 and denied by order dated January 15, 1970. The Form X-17A-5 report was not received until February 25, 1970.

Respondents have termed their failure to timely file Form X-17A-5 as "merely a technical violation of Rule 17(a)-5" and admit that "there was uncontroverted evidence that the registrant filed its X17a-5 on February 25, 1970 when in fact it was due on January 14, 1970." However, respondents seem to argue that the Commission's failure to grant an extension, as it had on two previous occasions, contributed to the alleged violation and, also, that in a similar case where as here the extension was requested by the accountant it was granted.[7/]

That the respondents cannot avoid the responsibility placed on them for filing registrant's X-17A-5 report has been clearly expressed by the Commission in the case of John Munroe, 39 S.E.C. 308 (1959) where it stated:

> "The obligations to file financial reports annually, as well as other obligations set forth in the Act and the rules and regulations thereunder, are imposed upon registrants directly and are non-delegable. A registrant can obtain all the assistance he needs from clerks, accountants, attorneys, and others, but he cannot instruct anyone to see to it that he is brought into compliance with applicable rules and regulations and feel that he has thereby fully discharged his obligations."

7/ Hammill & Co., 28 S.E.C. 634 (1948).

Regulation T Violations

The order for proceeding charges that during the period from January 1, 1969 to August 1, 1970 the registrant extended credit to customers in wilfull violation of Section 7 of the Exchange Act and Section 4(c) of Regulation T. 8/

The record establishes that a random sampling of registrant's accounts for the charging period disclosed 95 transactions in the special cash accounts of 86 customers where purchases were not paid for within seven days after date of purchase and registrant failed to promptly cancel or otherwise liquidate the transaction or the unsettled portion thereof. These accounts were delinquent for periods ranging from 2 to 221 days.

Here again, while not openly disputing the fact that the violations occurred, the respondents argue that the Division's investigators erred in not taking into consideration that the customers' ledger accounts were posted on trade date rather than settlement date, that a number of the transactions came within a

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8/ Section 7, in effect, prohibits extension of credit to customers in violation of regulations prescribed by the Federal Reserve Board under Section 7 of the Exchange Act. Section 4(c)(2) of Regulation T (12 CFR 220.4(c)(2)), promulgated by the Board of Governors of the Federal Reserve System, requires that a broker or dealer promptly cancel or otherwise liquidate a transaction where a customer purchases a security in a cash account and does not make full cash payment within seven full business days.

so-called "new issue" exception provided for unissued securities,[9/] and that funds from one account controlled by an individual could be applied to another account under the same control.

If respondents' contentions were to be accepted at face value they would eliminate 30 violations because of trade date, 12 because of the new issue exception, and 13 for application of funds, or a total of 55, leaving 40 wholly uncontroverted violations of Regulation T.

However, the record does not support the respondents' position. The Commission investigator testified that he consulted with registrant's head bookkeeper concerning each one of the above points raised by respondents and, as a result, scheduled only those apparent violations which were not subject to refutation.

Concerning the new issue exception respondents take the position that registrant has no burden of supporting its claim of an exception. On the contrary, the general rule of law is that anyone claiming an exception must bear the burden of proving it.[10/]

9/ In this area Section 4(c)(3) of Regulation T provides:
"If the security when so purchased is an unissued security, the period applicable to the transaction under subparagraph (2) of this paragraph shall be 7 days after the date on which the security is made available by the issuer for delivery to purchasers." (12 CFR 220.4(c)(3); Emphasis added.)

10/ S.E.C. v. Ralston Purina Co., 346 U.S. 119, 126 (1953); S.E.C. v. Sunbeam Gold Mines Co., et al., 95 F. 2d 699 (C.A. 9, 1938); Schlemmer v. Buffalo, R. & P. R. Co., 205 U.S. 1, 10 (1907).

Failure to Supervise

The order for proceeding alleges that Smolar failed reasonably to supervise persons subject to his supervision with a view to preventing the violations committed by registrant. 11/

Respondents argue that Smolar cannot be held responsible for the violations found to have been committed by registrant as he had no operating authority in the back office while Faunce was with the firm and that when he succeeded Faunce as president he endeavored to correct the situation, and if there were any violations they were in existence at that time.

This renunciation of responsibility by Smolar is not acceptable. He was executive vice-president, director and major stockholder of registrant during the entire time embraced in this proceeding and by his own testimony was in charge of sales, public relations and training salesmen. In these circumstances he was under a duty to use reasonable care to see to it that the everyday operations of the firm's business were properly performed. 12/

11/ Section 15(b)(5)(E) of the Exchange Act, as added by the 1964 amendments, provides an independent ground for the imposition of a sanction against a broker or dealer or a person associated with a broker or dealer who ". . .has failed reasonably to supervise, with a view to preventing violations of such statutes, rules and regulations, another person who commits such a violation, if such other person is subject to his supervision."

12/ Madison Management Corp., Securities Exchange Act Release No. 7453, p. 3 (Oct. 30, 1964); General Investing Corporation, Securities Exchange Act Release No. 7316, p. 6 (May 15, 1964).

Public Interest

The violations evidenced by this record are numerous and varied and have persisted over a long period of time. They continued to occur after written admonitions from the Regional Administrator concerning the importance of compliance with the Federal securities acts. Although respondents have argued throughout, as indicated heretofore, that there were exculpatory circumstances concerning each and every alleged violation they have failed to substantiate them and, indeed, introduced evidence in which similar violations are admitted.[13/]

Each violation is a serious one. As has been stressed repeatedly, the requirement that books and records be kept current and accurate is at the heart of the regulatory scheme, particularly as it bears significantly on ability to determine whether other types of violations have occurred.[14/] Likewise, registrant's failure to file the required financial report on Form X-17A-5 must be considered

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13/ Respondents' Exhibit A: Notice of Decision, NASD District Business Conduct Committee, District No. 13 (Boston, Massachusetts, Nov. 9, 1970).

14/ Pennaluna & Company, Inc., et al., Securities Exchange Act Release No. 8063 (April 27, 1967); Palombi Securities Co., Inc., et al., 41 S.E.C. 266, 276 (1962); Midland Securities, Inc., et al., 40 S.E.C. 333, 339-340 (1960); Olds & Company, 37 S.E.C. 23, 26-27 (1956).

as being of equal significance.[15/]

Nor can the Regulation T violations, which were frequent and continuing, be viewed lightly. That Regulation, as the Commission has pointed out, is designed to protect the economy as a whole from the dangers that flow from an excessive use of credit in securities transactions to the detriment of industry and trade.[16/] Regulation T implements an important public policy that those in the securities business are charged with the duty to obey and this Commission is required to enforce.[17/]

Respondent Smolar occupied several important positions with registrant and such positions imposed on him the duty to conduct and supervise its business so as to satisfy all applicable standards.[18/]

All of the foregoing violations are found to have been wilfull. It is well settled that wilfullness within the meaning of Section 15(b) of the Exchange Act does not require an intent to violate, and that

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15/ As the Commission said in W. E. Leonard & Co., Inc., 39 S.E.C. 726, 727 (1960):

> "The requirement that annual financial reports be filed on time and in proper form is a keystone of the surveillance of registered broker dealers with which we are charged in the interest of affording protection to investors and full compliance with it is essential."

16/ John W. Yeaman, Securities Exchange Act Release No. 7527, p. 3 (Feb. 10, 1965).

17/ Albert E. Voelkel, Securities Exchange Act Release No. 7652, p. 4 (July 22, 1965).

18/ Merritt, Vickers, Inc. v. Securities and Exchange Commission 353 F. 2d 293, 298 (C.A. 2, 1965); Sutro Bros., Securities Exchange Act Release No. 7052, p.19 (April 1963); Reynolds & Co., 39 S.E.C. 902, 917 (1960).

it is sufficient if the person charged with a duty knows what he is doing. 19/

In view of the circumstances it is concluded that the number and character of the violations is such that the public interest requires revocation of the registrant's registration as a broker-dealer. With respect to respondent Howard Smolar it is concluded that the public interest requires that he be subject to adequate supervision if he is to continue in the securities industry and that the appropriate sanction is to bar him with the provision that after 30 days he may become employed by a broker-dealer in a supervised capacity. 20/

ORDER

Accordingly, IT IS ORDERED that the registration as a broker-dealer of Securities Planners Associates, Inc. is revoked, and the company is expelled from membership in the National Association of Securities Dealers, Inc.; and that Howard Smolar is barred from

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19/ Sutro Bros. See Securities Exchange Act Release No. 7053, p. 9 (April 10, 1963); Hughes v. Securities and Exchange Commission, 246 F. 2d 358 (C.A.D.C. 1958); Churchill Securities Corp., 38 S.E.C. 856, 859 (1959); Dunhill Securities Corporation, Securities Exchange Act Release No. 9066, p. 4 (January 26, 1971).

20/ The requirement of supervised association in any future employment would not necessarily be permanent. See Melvyn Hiller, Securities Exchange Act Release No. 8476, p. 6 (December 24, 1968), aff'd sub nom Gross v. Securities and Exchange Commission, 418 F. 2d 103 (C.A. 2, 1969); Vanasco v. Securities and Exchange Commission, 395 F. 2d 349, 353 (C.A. 2, 1968).

association with a broker-dealer, except that after a period of thirty days from the effective date of this order, he may become associated with a registered broker-dealer upon an appropriate showing to the staff of the Commission that he will be adequately supervised.

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

Pursuant to Rule 17(f), this initial decision shall become the final decision of the Commission as to each party who has not within fifteen days after service of this initial decision upon him, filed a petition for review of this initial decision pursuant to Rule 17(b), unless the Commission, pursuant to Rule 17(c) determines on its own initiative to review this initial decision as to him. If a party timely files a petition for review, or the Commission takes action to review as to a party, the initial decision shall not become final with respect to that party. 21/

Ralph H. Tracy
Hearing Examiner

Washington, D. C.
May 7, 1971

21/ To the extent that the proposed findings and conclusions submitted by the parties, and the arguments made by them, are in accordance with the views herein they are accepted, and to the extent they are inconsistent therewith they are rejected.