ADMINISTRATIVE PROCEEDING
FILE NO. 3-6148

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
JOSEPH EUGENE POLK, Individually and doing business as EQUITY INVESTMENTS, LTD.	:
(801-11790)	:
	:

INITIAL DECISION

April 29, 1983
Washington, D.C.

Jerome K. Soffer
Administrative Law Judge

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APPEARANCES: J. Timothy Lawlor, of the Atlanta Regional Office, for the Division of Enforcement of the Securities and Exchange Commission.

Joseph Eugene Polk, pro se.

BEFORE: Jerome K. Soffer, Administrative Law Judge

On July 20, 1982, the Commission issued an Order for Public Proceedings (Order) pursuant to Sections 203(e) and (f) of the Investment Advisers Act of 1940 (The Act) naming Joseph Eugene Polk, individually and doing business as Equity Investments, Ltd., of Jackson, Mississippi, as respondent.

The Order is based upon allegations of the Division of Enforcement (Division) that Polk was convicted of mail fraud arising out of transactions with an advisory client; that he was permanently enjoined from engaging in violations of certain sections of The Act and Rules promulgated thereunder; that Polk and his company willfully violated the anti-fraud provisions of The Act and Rules thereunder; and that he committed other violations of said Act with respect to segregating the funds of clients and reporting to them with respect to their accounts, and having these accounts verified by an accountant's examination; that Polk and his company willfully violated the provisions of The Act with respect to the filing of a registration and amendments thereto; and that respondent refused to permit representatives of the Commission to examine records he was required to keep.

The order directed that a public hearing be held before an administrative law judge to determine the truth of the allegations set forth and what, if any, remedial action is appropriate in the public interest for the protection of investors. Although no answer was filed by respondent, Polk did submit a letter asking for an oral hearing at which he could be present.

Such a hearing was held on December 7, 1982, at the Federal Prison Camp, Maxwell Air Force Base, Montgomery, Alabama, at which the Division appeared by counsel and respondent appeared pro se.

At the hearing, respondent neither cross examined the witnesses for the Division nor offered any evidence or testimony on his behalf, although offered repeated opportunities to do so.

Following the close of the hearing, the Division filed its proposed findings of fact, and conclusions of law, together with its supporting brief. Although offered an opportunity to do so both at the hearing and subsequently, respondent chose not to submit any post-hearing pleadings. Instead, he addressed a letter to the administrative law judge containing certain information outside of the scope of the record.

The findings and conclusions herein are based upon the evidence as determined from the record and upon observation of the demeanor of the witnesses. The preponderance of evidence standard of proof has been applied. See Steadman v. S.E.C., 450 U.S. 91 (1981); and Herman and MacLean v. Huddleston, 459 U.S. ___, 74 L.Ed. 2d 548, 103 S.Ct. 683 (1983).

Respondent filed an application (Form ADV) for registration with the Commission as an investment adviser on June 11, 1976, which was duly granted by the Commission on July 26, 1976. From this form it appears that respondent is about 45

years of age and holds a business administration degree from Rutgers University and a Masters of Business of Administration from the University of Chicago; that his prior employment involved 8 years as an officer in the United States Air Force working in medical administration, followed by more than 4 years as a financial analyst and a branch controller for an office products firm; and that "Equity Investments Ltd." is a sole proprietorship of Polk.

Respondent's registration states that respondent does not maintain custody or possession of funds or securities belonging to investment advisory clients. No other Form ADV or amendment to the original registration has been filed at least until October 21, 1982, the date of certification by the Commission's Records Officer.

Ruth Douglas Lay, now age 78 and retired, met respondent in 1975. In December of that year, she gave him $10,000 in his capacity as an investment adviser for investment on her behalf. Thereafter in that same month, she gave him an additional $5,000, followed by payments to him in October 1976 of $15,000, in October of 1977 of $5,000, and in November of 1977 of additional $5,000, making a total of $40,000 entrusted to him for investment on her behalf. During the period December 1975 through November 1977, Polk advised that her investment was growing, that he was turning it over and

making money for her, and that it was increasing in value all the time. Respondent never provided Mrs. Lay with a written statement of her account. Upon her demand, however, in December of 1977 he sent her a statement to the effect that her original investment of $40,000 had grown to a value of $47,232 as of November 31, 1972.

In December of 1978 Mrs. Lay asked respondent for her money. He advised that since her account was doing so well she should not draw it out, and offered to send her a small check every month in the amount of $100. He subsequently made these payments by mail. In late January or early February of 1981, Polk told Mrs. Lay that he had embezzled her money for his own use and that there was nothing left of her funds. As a result, Mrs. Lay lost approximately $33,100, which represented about 60% of her life's savings.

Larry Painter and Associates Advertising, Ltd., is an advertising agency in Jackson, Mississippi, of which Mr. Lawrence G. Painter is president. Mr. Painter caused $23,500 of his company's profit sharing plan to be turned over to respondent for investment on October 13, 1980. Subsequently, on November 14, 1980, respondent mailed to Painter a receipt for the sum deposited, which stated that the funds were "to be invested in common stocks by Equity Investments Ltd." At the same time he also sent a notice that he had purchased 600 shares of "Gulf Resources/Chemicals, Inc." on behalf of

the profit sharing plan on November 7, 1980 for the sum of $12,678.42 including commissions. During a later conversation, respondent advised Painter that he was looking into other situations in which to invest the rest of the money.

Thereafter, Painter caused a letter to be sent to respondent requesting proof as to the disposition of the money invested, such as a broker's receipt for the stock purchased, and a deposit slip showing where the remainder of the money was placed. In about the first week of December 1980, respondent offered to return the money received from Painter. He issued a check payable to the profit sharing plan in the amount of $23,500, requesting that it not be deposited for a few days. When it was finally presented for payment, it was returned by respondent's bank because of "insufficient funds".

In a conversation shortly thereafter, respondent acknowledged to Mr. Painter that he had embezzled the monies received from the profit sharing plan along with much more money from a number of others for the total sum of about $400,000. To date, none of the $23,500 deposited with respondent was ever recovered.

Following a call to the Atlanta Regional Office during the latter part of January in 1981 from an attorney representing Mrs. Lay, James F. Angelos, a securities compliance examiner employed by this Commission, visited the offices of respondent

on February 2, 1981 and asked to examine the records of his business. Respondent refused to permit the examination without consulting his counsel. On February 6, 1981 the examiner again sought the production of respondent's books and records but was refused on 5th Amendment grounds. Thereafter, no examination of these records was ever made.

On February 26, 1982, respondent was convicted on his guilty plea in the United States District Court for the Southern District of Mississippi to violating Section 1341, Title 18, U.S.C., for having committed mail fraud, as charged in the information, in that between December 1975 and January 1981, he devised and perpetrated a scheme and artifice to defraud and obtained monies by means of fraudulent pretenses while acting an an investment adviser. 1/ Specifically, the scheme involved the conversion of monies received from clients to his own personal use, and with periodically informing them that investments had been made on their behalf and that their accounts were doing very well. Based upon this guilty plea, respondent was sentenced to imprisonment for two years and a fine of $1,000.

On February 6, 1981 a permanent injunction was entered against respondent in the United States District Court for the Southern District of Mississippi, based on his consent,

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1/ U.S. v. Joseph Eugene Polk, Crim. No. J82-0009(N).

enjoining him from violations of the anti-fraud and other provisions of The Act and rules promulgated thereunder, and requiring him to render an accounting of all funds received from clients and paid out to them commencing with December 1, 1975. 2/

DISCUSSIONS AND CONCLUSIONS

I.

The conviction of respondent for mail fraud on February 26, 1982 arose out of his conduct as an investment adviser and involved the embezzlement of his clients' funds. Hence, this is a violation of Section 203(e)(2)(B) and (C) and is grounds for the imposition of the sanction called for in Section 203(e) of The Act. 3/

II.

The entry of a judgment of permanent injunction on February 6, 1981 by the District Court against respondent is a violation of Section 203(e)(3) of the Act and is sufficient grounds for the imposition of the sanctions set forth in Section 203(e) of The Act.

2/ S.E.C. v. Joseph Eugene Polk, individually and d/b/a Equity Investments, Ltd., Civ. No. J81-0070(R). His attorney apparently attempted to comply with the rendering of an accounting.

3/ The provisions of the statutes and the Commission's rules thereunder are set forth in the appendix attached hereto.

III.

It is clear from respondent's conduct in embezzling the funds of his clients and in making false statements to them concerning the status and value of their accounts and the alleged purchase of securities for their accounts, that he has violated the anti-fraud provisions of The Act as set forth in Section 206(1)(2) and (4) thereof. His conduct involved the employment of a device, scheme or artifice to defraud his clients out of their investments and his conduct in embezzling their monies was in furtherance of this fraudulent scheme. This conduct empowers the Commission to invoke the sanctions set forth in Section 203(e) and Paragraph (4) thereunder.

IV.

It is also concluded that respondent's failure to deposit his clients' funds in one or more bank accounts that contained only clients' funds, his failure to notify each client in writing immediately after accepting custody of the funds of the place and manner in which they will be maintained and to notify them of changes in the maintenance arrangements, and his failure to send each client an itemized statement showing the funds in custody and without having the clients' accounts verified by an accountant's examination and without having said accountant's certificate filed with

the Commission, is a violation of Section 206(4) of The Act and Rule 206(4)-2 promulgated pursuant thereto. This fraudulent conduct empowers the Commission to impose the sanctions set forth in Section 203(e) and Subparagraph (4) thereof.

V.

The Registration Form ADV filed by respondent on June 11, 1976 contained an untrue statement of a material fact, to wit, that he did not have custody or possession of clients' funds. At that time, he already had at least $15,000 of the funds of Mrs. Lay in his possession and control. Moreover, he did not thereafter file an amendment to his original registration to show that he did take possession of funds of this client as well as of others. Therefore, it is concluded that he has violated Sections 204 and 207 of The Act and Rule 204-1(b) thereunder. Moreover, he failed to file the amended forms ADV in accordance with Rule 204-1(a) and (c) as well as the Form ADV-S as therein required. Consequently, justification exists for the imposition of the statutory sanctions against him.

VI.

Finally, his refusal to permit a representative of the Commission to examine his company's records, was a violation of Section 204 of the Act. This conduct, again, justifies the imposition of the sanctions set forth in the Act. Roman S. Gorski, 43 S.E.C. 618, 622 (1967).

WILFULNESS AND SCIENTER

Each of the violations set forth above were "willfull" in the context of the Federal Securities Laws. It is well established that a finding of willfulness does not require an intent to violate the law; it is sufficient that the one charged with the duty consciously performs the acts constituting the violation. See Tager v. S.E.C., 344 F.2d 5, 8 (2d Cir., 1965); and Arthur Lipper & Co. v. S.E.C., 547 F.2d 171, 180 (1976).

The Supreme Court has held, in a case involving alleged violations of the anti-fraud provisions of the Securities Exchange Act of 1934 charging a scheme to defraud, that a finding of an intent to defraud, i.e., "scienter," is necessary.[4/] There can be no question that respondent was intentionally taking his clients' funds and providing them with false statements to avoid detection. These acts were done with an intent to deceive and therefore show the requisite scienter in carrying out his fraudulent scheme in violation of The Act.

PUBLIC INTEREST

The record having established a number of grounds for the imposition of a sanction against respondent under The Act, it becomes necessary to determine what sanction, if any,

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4/ Aaron v. S.E.C., 446 U.S. 680 (1980).

should be imposed upon him.

The Division asks that the investment adviser registration of respondent be revoked and that he be barred from future association with an investment adviser, broker or dealer, or investment company. It contends that the type of fraud perpetrated by respondent was blatant and without compassion and points to the taking of the savings of a 78-year old widow for his own personal benefit.

As noted, respondent offered no defense, and no testimony or evidence of any kind in mitigation of the acts that he has been found to have committed, although afforded several opportunities to do so. However, he did send to the Administrative Law Judge, following the service of the Division's post-hearing pleadings upon him, a letter dated February 5, 1983 in which he states among other things: "I did not during my hearing, nor do I now wish to proclaim a melodramatic act of contrition nor 'religious experience' in my defense. While there were mitigating circumstances, they are personal and I prefer that they remain so."

Attached to this letter is a copy of the contents of a petition for sentence reduction to the District Court in which he was convicted for mail fraud. In this petition, he points out that he had attempted to liquidate his personal assets in order to make restitution, that he has been placed in bankruptcy and that he has suffered severe personal and

business injuries. The statement contains allegations concerning his divorce and custody of a minor child. 5/

It has long been held that in imposing sanctions due regard must be given to the facts and circumstances of each particular case, since sanctions are not intended to punish respondent but to protect the public interest from future harm. See Burko v. S.E.C., 316 F.2d 137, 141 (2d. Cir. 1963); and Leo Glassman, 46 S.E.C. 209, 211-212 (1975). Additionally, consideration must be given to the likely deterrent effect the sanction will have on others in the industry. Arthur Lipper Corp. v. S.E.C., 547 F.2d 171 (2d Cir. 1976), cert. denied 434 U.S. 1009.

It has recently been held that when the Commission imposes the type of sanction recommended herein by the Division barring someone from the securities industry, described as the most drastic sanction at its disposal, there is a duty to articulate carefully the grounds for such a sanction including an explanation of why a lesser sanction will not suffice. Steadman v. S.E.C., 603 F.2d 1126, 1143 (5th Cir. 1979).

5/ The letter also asks that an allegation in the Division's proposed findings of fact (p. 2-3) that the reason respondent sought to be present at a hearing in which he made no attempt at a defense was his impression that he would obtain a trip away from the prison for a day or two. Respondent challenges and asserts that his only intent was to be afforded his right to a hearing. This matter is totally irrelevant to any of the issues herein and will be disregarded.

The violations found to have been committed by respondent are of the utmost seriousness. There can be no excusing the deliberate conversion of clients' funds to one's own personal use together with attempts at misleading and misrepresenting the status of their accounts. These, plus all of the other violations found to have been committed by respondent, for which there has been shown no justification or mitigation, requires the conclusion that he is unfit to serve in any capacity in the securities business.

An investment adviser is a fiduciary whose actions must be governed by the highest standards of conduct and in whom clients must be able to put their trust. S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 191-192 (1963); and Joseph P. D'Angelo, 46 S.E.C. 736, affirmed without opinion, 559 F.2d 1202 (2d Cir. 1977). It is an occupation which can cause havoc unless engaged in by those with appropriate backgrounds and standards. Marketlines, Inc., v. S.E.C., 384 F.2d 264, 267 (2d Cir. 1967), cert. denied, 390 U.S. 947 (1968).

Finally, this record is devoid of any proof that respondent regrets what he has done and, if permitted to remain in the securities business, would not in the future do the same things over again. In an industry that presents so many opportunities for abuse and over-reaching and depends so heavily on the integrity of its participants, Polk's

presence poses a substantial threat and cannot be countenanced. His actions militates strongly against any grant of leniency. In the view of this Judge, the public interest requires that his investment adviser registration be revoked and that he be permanently barred from association with any investment adviser in the future. See James S. Doyle, SEA Release No. 19533, 27 SEC Docket 508 (Feb. 24, 1983).

ORDER

Under all the circumstances herein IT IS ORDERED:
(1) The registration of Joseph Eugene Polk, individually and doing business as Equity Investments Ltd., be revoked; and
(2) That Joseph Eugene Polk be barred from being associated with any investment adviser.

This order shall become effective in accordance with and subject to Rule 17(f) of the Commission's Rules of Practice, 17 CFR 201.17(f).

Pursuant to 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.

Jerome K. Soffer
Administrative Law Judge

Washington, D.C.
April 29, 1983

APPENDIX

APPENDIX

Investment Advisers Act of 1940

REGISTRATION OF INVESTMENT ADVISERS

Sec. 203. (a) Except as provided in subsection (b), it shall be unlawful for any investment adviser, unless registered under this section, to make use of the mails or any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser.

* * *

(e) 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—

(1) has willfully made or caused to be made in any application for registration or report required to be filed with the Commission under this title, or in any proceeding before the Commission with respect to registration, any statement which was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, or has omitted to state in any such application or report any material fact which is required to be stated therein.

(2) has been convicted within ten years preceding the filing of any application for registration or at any time thereafter of any felony or misdemeanor which the Commission finds—

(A) involves the purchase or sale of any security, the taking of a false oath, the making of a false report, bribery, perjury, burglary, or conspiracy to commit any such offense;

(B) arises out of the conduct of the business of a broker, dealer, municipal securities dealer, investment adviser, bank, insurance company, or fiduciary;

(C) involves the larceny, theft, robbery, extortion, forgery, counterfeiting, fraudulent concealment, embezzlement, fraudulent conversion, or misappropriation of funds or securities; or

(D) involves the violation of sections 152, 1341, 1342, or 1343 or chapter 25 or 47 of title 18, United States Code.

(3) is permanently or temporarily enjoined by order, judgment, or decree of any court of competent jurisdiction from acting as an investment adviser, underwriter, broker, dealer, or municipal securities dealer, or as an affiliated person or employee of any investment company, bank, or insurance company, or from engaging in or continuing any conduct or practice in connection with any such activity, or in connection with the purchase or sale of any security.

(4) has willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, this title, or the rules, or regulations under any such statutes or any rule of the Municipal Securities Rulemaking Board, or is unable to comply with any such provision.

* * *

APPENDIX

Investment Advisers Act of 1940

(f) The Commission, by order, shall censure or place limitations on the activities of any person associated or seeking to become associated with an investment adviser, or suspend for a period not exceeding twelve months 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 censure, placing of limitations, suspension, or bar is in the public interest and that such person has committed or omitted any act or omission enumerated in paragraph (1), (4), or (5) of subsection (e) of this section or has been convicted of any offense specified in paragraph (2) of said subsection (e) within ten years of the commencement of the proceedings under this subsection, or is enjoined from any action, conduct, or practice specified in paragraph (3) of said subsection (e)

* * *

ANNUAL AND OTHER REPORTS

Sec. 204. Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 203(b) of this title), shall make and keep for prescribed periods such records (as defined in section 3(a)(37) of the Securities Exchange Act of 1934), furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors

PROHIBITED TRANSACTIONS BY REGISTERED INVESTMENT ADVISERS

Sec. 206. It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

* * *

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative

APPENDIX

Investment Advisers Act of 1940

MATERIAL MISSTATEMENTS

Sec. 207. It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 203 or 204, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

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Advisers Act Rules

Amendments to Application for Registration

Reg. § 275.204-1. (a) Every investment adviser whose registration is effective or whose application for registration is pending July 31, 1979, shall then file as an amendment to the application a complete Form ADV (§ 279.1 of this chapter) as revised as of July 31, 1979, unless it shall have prior thereto so amended its application.

(b)(1) If the information contained in the response to questions 2, 4, 6, 10, 12(a), 12(b) and 14 of Part I of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate for any reason, or if the information contained in the response to questions 5, 7, 8, 9 and 11 of Part I, or any question in Part II (except question 13), of any application for registration as an investment adviser, or in any amendment thereto, become inaccurate in a material manner, the investment adviser shall promptly file an amendment on Form ADV (§ 279.1 of this chapter) correcting such information.

(2) If the information contained in response to questions 5, 7, 8, 9 and 11 of Part I, or any question in Part II (except question 13), of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate but not in a material manner, or the information contained in response to questions 12(c), 13, 15 and 16 of Part I of any application for registration as an investment adviser, or in any amendment thereto, becomes inaccurate for any reason, the investment adviser shall file an amendment on Form ADV (§ 279.1 of this chapter) correcting such information within 90 days of the end of its fiscal year. In addition, a balance sheet, as required by question 13 of Part II, shall be filed within 90 days of the end of applicant's fiscal year.

(3) If the information contained in response to question 3 of Part I becomes inaccurate, the investment adviser shall file an amendment on Form ADV correcting such information within 90 days of the end of the applicant's fiscal year. However, if the investment adviser's registration or license in another jurisdiction has been restricted, suspended, terminated (either voluntarily or involuntarily) or withdrawn, the investment adviser shall promptly file an amendment.

(c) Every investment adviser whose registration is effective on the last day of its fiscal year shall file a Form ADV-S (§ 279.3 of this chapter) within 90 days of the end of its fiscal year unless its registration has been withdrawn, cancelled or revoked prior to that date.

* * *

APPENDIX

Advisers Act Rules

Books and Records to Be Maintained by Investment Advisers

Reg. § 275.204-2. (a) Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to Section 203(b) of the Act) shall make and keep true, accurate and current the following books and records relating to his investment advisory business:

* * *

Reg. § 275.206(4)-2. (a) It shall constitute a fraudulent, deceptive or manipulative act, practice or course of business within the meaning of Section 206(4) of the Act, for any investment adviser who has custody or possession of any funds or securities in which any client has any beneficial interest, to do any act or take any action, directly or indirectly, with respect to any such funds or securities, unless:

(1) all such securities of each such client are segregated, marked to identify the particular client who has the beneficial interest therein, and held in safekeeping in some place reasonably free from risk of destruction or other loss; and

(2) (A) all such funds of such clients are deposited in one or more bank accounts which contain only clients' funds, (B) such account or accounts are maintained in the name of the investment adviser as agent or trustee for such clients, and (C) the investment adviser maintains a separate record for each such account which shows the name and address of the bank where such account is maintained, the dates and amounts of deposits in and withdrawals from such account, and the exact amount of each client's beneficial interest in such account; and

(3) such investment adviser, immediately after accepting custody or possession of such funds or securities from any client, notifies such client in writing of the place and manner in which such funds and securities will be maintained, and thereafter, if and when there is any change in the place or manner in which such funds or securities are being maintained, gives each such client written notice thereof; and

(4) such investment adviser sends to each client, not less frequently than once every 3 months, an itemized statement showing the funds and securities in the custody or possession of the investment adviser at the end of such period, and all debits, credits and transactions in such client's account during such period; and

(5) all such funds and securities of clients are verified by actual examination at least once during each calendar year by an independent public accountant at a time which shall be chosen by such accountant without prior notice to the investment adviser. A certificate of such accountant stating that he has made an examination of such funds and securities, and describing the nature and extent of such examination, shall be filed with the Commission promptly after each such examination.

* * *