ADMINISTRATIVE PROCEEDING
FILE NO. 3-6938

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
PHILIP S. WILSON, d/b/a WILSON ASSOCIATES	:
	:

INITIAL DECISION

Washington, D.C.
December 29, 1988

Max O. Regensteiner
Administrative Law Judge

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APPEARANCES: Mary H. Weiss, of the Commission's Chicago Regional Office, for the Division of Enforcement.

Philip S. Wilson, pro se.

BEFORE: Max O. Regensteiner, Administrative Law Judge

In November 1987, Philip S. Wilson, d/b/a Wilson Associates, filed an application for registration as an investment adviser on Form ADV. The Commission subsequently instituted proceedings pursuant to Sections 203(c)(2) and 203(f) of the Investment Advisers Act of 1940 ("the Act") to determine whether, as alleged by the Division of Enforcement, the Form ADV and the amended Form ADV of a registered investment adviser of which Wilson was a control person were incomplete and inaccurate with respect to Wilson's history, in willful violation of Section 207 of the Act, and, if so, whether registration should be denied to Wilson and whether a remedial sanction should be imposed on him. 1/

1/ Section 203(c)(2) requires a proceeding instituted to determine whether investment adviser registration should be denied to be concluded within 120 days of the date when the application was filed, but provides for extension as consented to by the applicant. Here Wilson waived the statutory time period, and an order was issued extending the time for conclusion of the proceedings until the Commission's final determination whether to grant or deny registration.

Section 203(c)(2) further provides that registration shall be denied if the Commission finds that if the applicant were registered, his registration would be subject to suspension or revocation under Section 203(e). Under that section, a registration may be suspended or revoked if such action is in the public interest and the registrant, inter alia, committed willful violations of any provision of the Act (203(e)(4)).

Under Section 203(f), a person associated, seeking to become associated, or, at the time of the alleged misconduct, associated or seeking to become associated with an investment adviser may be subjected to sanctions ranging from censure to a bar from association with an investment adviser if it is found that a particular sanction is in the public interest and that he willfully violated any provision of the Act.

In the course of the proceedings, Wilson stated that he was withdrawing his application on the basis that his firm was not engaged in any investment advisory functions and had no intention of so engaging in the future. I advised him that withdrawal was not a matter of right.[2/] Thus, an additional issue presented is whether withdrawal should be permitted.

Following hearings, the Division filed proposed findings of fact and conclusions and a supporting brief, Wilson filed a response, and the Division filed a reply brief. The findings and conclusions herein are based on the preponderance of the evidence as determined from the record and upon observation of the witnesses.

The Allegations

In April 1987, SDS Investment Advisors, Inc., a registered investment adviser, filed an amendment to its Form ADV. Wilson was listed as a controlling shareholder and consultant and came within the Form's definition of an "advisory affiliate." Both the SDS amendment and Wilson's Form ADV answered in the affirmative the questions whether a self-regulatory organization had ever found the applicant or an advisory affiliate to have been involved in a violation of its rules or had ever disciplined the applicant or an advisory affiliate by expulsion

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2/ See Peoples Securities Company v. S.E.C., 289 F.2d 268, 274 (5th Cir. 1961).

or suspension of membership or by bar or suspension from association with other members. Form ADV requires a description of each such regulatory action. A schedule keyed to the above questions and included in the Wilson and SDS Forms ADV failed to describe or even list disciplinary actions taken by the Chicago Board Options Exchange ("CBOE") against Wilson in 1979 and 1983. The Division further alleged that the description in the two forms of action taken against Wilson by the CBOE in 1984 and affirmed by the Commission in 1986, barring him from membership and from association with any member, was false and misleading. Wilson's Form ADV, while answering affirmatively the question whether he had "failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt," failed to provide further requisite detail. The SDS form falsely answered this question in the negative. The Division alleged that in the above respects Wilson willfully violated Section 207 of the Act, which prohibits the willful making of an untrue statement of a material fact or the willful omission of a material fact required to be stated in any registration application.

Wilson admitted that the two Forms ADV were incomplete, but denied that they were inaccurate or misleading. He also denied that he had committed any willful violation.

Wilson's Background and Disciplinary History

Wilson, who is 45 years old, has been involved in various aspects of the securities business since about 1965. In 1974 he filed a bankruptcy petition and was subsequently declared bankrupt. For several years in the 1970's and early 1980's, he was a marketmaker on the CBOE. According to Wilson's Form ADV, Wilson Associates was to function principally as a provider to investment professionals of computer software relating to asset allocation. The Form further states, however, that the firm furnishes investment advice through consultations and provides a timing service. In his letter seeking to withdraw the application, Wilson stated that he had changed the services being offered to exclude consulting and timing services, so as to be certain that registration was not required. Wilson terminated his association with SDS in December 1987.

The first disciplinary action against Wilson was a CBOE decision in 1979 accepting his offer of settlement providing for a censure, a $7,500 fine and a one-month suspension from Exchange membership. Without admitting or denying the charges against him, Wilson consented to findings that he violated various Exchange rules as well as broker-dealer registration and credit extension requirements of or under the Securities Exchange Act of 1934 ("Exchange Act") in the following respects:

(1) Wilson entered into a partnership with one N. Schieber to deal in options when neither Schieber nor the partnership was a member of the CBOE and the partnership was not registered with the Commission as a broker-dealer. Wilson failed to report the partnership to the Exchange until eight months after its formation; (2) Wilson failed to inform the Exchange that Schieber had provided the partnership's capital; and (3) while Schieber furnished the capital to Wilson in two checks, there was no record of the second one being deposited in Wilson's marketmaker account. However, there was a record of a larger deposit made at a later time.

The 1983 CBOE decision was directed both against Wilson and the Phoenix Group, Ltd., a partnership of which Wilson was a managing general partner. Wilson and Phoenix submitted a settlement offer in which, without admitting or denying the alleged violations, they consented to certain findings and sanctions. The Exchange found that, in violation of Exchange rules and broker-dealer registration and net capital requirements of or under the Exchange Act, (1) Phoenix conducted a securities business with insufficient net capital; (2) Wilson in several instances violated the Exchange's position limit rule and in over 50 instances improperly executed opening transactions in the partnership's marketmaker account when

the account was in a deficit position; (3) for several months Phoenix operated and Wilson permitted it to operate as a member organization without being registered as a broker-dealer; and (4) Phoenix operated with only one general partner and failed to maintain with the Exchange a current and accurate list of general and limited partners; Wilson permitted or caused these violations. Wilson and Phoenix were censured and were fined $10,000 jointly and severally, and Phoenix was fined an additional $2,500.

In 1984, the CBOE's Board of Directors affirmed findings of a Business Conduct Committee that in 1982 Wilson had misappropriated funds from his partners in the Phoenix partnership and had improperly switched securities between accounts to his advantage and at the expense of the partnership, in willful violation of an Exchange rule proscribing acts and practices inconsistent with just and equitable principles of trade and of the antifraud provisions of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder. However, the Board increased the sanction from a three-year suspension from Exchange membership and from association with an Exchange member to a permanent bar. On appeal, the Commission affirmed the finding that Wilson had converted partnership funds to his own use. It found that he had withdrawn a total of $343,000 from an account that belonged to the Phoenix

partnership, thereby violating just and equitable principles of trade, and it affirmed the sanction imposed by the CBOE. 3/ The Commission rejected Wilson's contention that the account in question actually belonged to him. The Commission further stated that since the Exchange's finding that Wilson had also violated Section 10(b) and Rule 10b-5 was merely cumulative, it need not reach the issue of whether Wilson had violated those provisions. And it set aside, as not supported by the evidence, the CBOE's finding of improper switching of trades between accounts. In nevertheless affirming the sanction, the Commission said:

> . . . we consider that the bar imposed by the CBOE is entirely justified. Wilson's misconduct could hardly be more serious. He betrayed the trust of his partners, and misappropriated a very substantial amount of their funds. In a business that presents so many opportunities for fraud and overreaching, and depends so heavily on the integrity of its participants, such behavior cannot be countenanced. Public investors and the Exchange community must be protected against any recurrence of such egregious dishonesty.

The Commission also noted the fact that this was the third time that the CBOE had disciplined Wilson.

Wilson included a statement regarding the latest proceeding in his Form ADV and submitted a statement concerning it to SDS for inclusion in its April

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3/ Philip S. Wilson, Securities Exchange Act Release No. 23348 (June 19, 1986), 35 SEC Docket 1604.

1987 amendment. The two statements are substantially the same. They noted that the CBOE had barred Wilson from membership for "alleged" violations of Exchange rules including misappropriation of funds from a partnership in which Wilson was a general partner and went on to quote the Commission's finding setting aside the CBOE's finding of improper switching of trades between accounts. The SDS Form ADV then continued that "those" were the allegations on which the CBOE had based its findings and quoted a Commission footnote, attached to its conclusion that the sanction imposed by the CBOE was fully warranted, to the effect that in reaching this conclusion it had excluded from consideration the CBOE's finding that Wilson violated Section 10(b) and Rule 10b-5. This footnote, of course, referred back to the Commission's determination that it was not necessary to reach the issue whether Wilson had violated those provisions.

Both Forms ADV went on to state that the Commission nevertheless affirmed the sanction, "ascerting (sic) that Wilson traded in a personal account that, while opened in his name, was registered to the Phoenix Group, and that having failed to renew his registration after assigning it to the Phoenix Group he was not entitled to have a personal trading account. . ." The statements concluded with the representation that Wilson intended to seek judicial review.

Conclusion as to Violations of Section 207

Wilson denies that the description of the CBOE disciplinary action in the Forms ADV was false or misleading. While admitting that he omitted required information, he argues that he did not do so willfully. These contentions must be rejected. The description of the Commission's decision gave the impression that the Commission had set aside the CBOE's most serious findings, and that the findings it made against Wilson involved essentially the failure to renew a registration. Nowhere was it indicated that the Commission had found that Wilson engaged in deliberate misappropriation and conversion of his partners' money. Moreover, by the time the SDS amendment was filed and, a fortiori, when Wilson filed his own Form ADV, the 60-day period for seeking judicial review had long expired. Thus, the Forms ADV contained materially misleading statements.

In denying that the omission of required information concerning Wilson's bankruptcy and earlier CBOE sanctions was willful, Wilson claims that he had forgotten about the 1974 bankruptcy and was not aware of, or had forgotten, the 1983 CBOE action. He asserts that there was no attempt to mislead the Commission and that the failure to include required information was not deliberate. Since Wilson checked the pertinent box in his Form ADV,

he obviously had not forgotten about his bankruptcy at that time. In any event, however, his arguments are based on a misconception concerning the meaning of the term "willful" in the Act. As interpreted by the Commission and the courts, it does not require an intent to violate the law or even knowledge that the law is being violated. It is enough that there be an intent to perform the acts that resulted in the violation.[4/] Perhaps even more directly to the point, the Commission has repeatedly held that failure to make a required report, even though inadvertent, constitutes a willful violation.[5/]

Accordingly, I find that Wilson willfully violated Section 207 of the Act. Thus, there is a statutory basis for denial of registration under Section 203(c)(2), and for the imposition of a remedial sanction under Section 203(f), provided such action is in the public interest.

Public Interest

The Division urges that it is in the public interest to deny Wilson's request for withdrawal of his

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4/ Tager v. S.E.C., 344 F.2d 5, 8 (2d Cir. 1965).

5/ See Jesse Rosenblum, d/b/a Harbine Financial Service, Investment Advisers Act Release No. 913 (May 17, 1984), 30 SEC Docket 857, 860, aff'd in unpublished opinion, (3rd Cir. March 25, 1985), and cases there cited.

application, to deny registration and to bar him from association with an investment adviser. It contends that his misstatements and omissions in the two Forms ADV reflect a propensity to conceal or obfuscate past misconduct and that his disciplinary history, in particular the misconduct that was the subject of the Commission opinion, demonstrates that he is not fit to be, or to be associated with, an investment adviser. Wilson, on the other hand, asserts that deficiencies in the Forms ADV were inadvertent and not due to any intent to hide anything. He maintains that he could not have attempted to mislead the Commission about his disciplinary history, since it had complete files regarding that history. Wilson points out that from the outset of the proceedings, he has expressed a willingness to amend his disclosures to include everything that the staff deemed appropriate. 6/ And he states that in the future he intends to comply fully with all of the Commission's requirements. Wilson urges that he be permitted to withdraw his application or, alternatively,

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6/ At the hearing Wilson offered what purported to be a copy of an amended Form ADV dated December 18, 1987, which he claimed he had mailed to the Commission (Wilson Exh. H). The form disclosed the 1979 and 1983 CBOE actions and gave the requisite information about the bankruptcy. However, the Commission's records do not reflect receipt of this amendment. Moreover, this form contains the same inaccurate description of the CBOE action affirmed by the Commission as the earlier Form ADV.

that registration be granted subject to any additional requisite disclosure.

The Commission has stressed in the past that the application for registration is a basic and vital element in its regulation of investment advisers. 7/ As it has stated,

> It is essential in the public interest that the information required by the form be kept current and accurate since it is designed to make publicly available significant facts bearing on the registrant's background. 8/

I accept Wilson's testimony that he did not intend to conceal the earlier CBOE sanctions or his bankruptcy. But his characterization of his conduct in this respect as "unnecessarily casual" (Wilson Response, fifth page) is too benign. More accurately, it reflects an inexcusable carelessness suggesting indifference to regulatory requirements. There is also no reasonable excuse for the way Wilson minimized and distorted the Commission's findings in the CBOE case that he did disclose. Wilson is not a lawyer. No legal skills were required, however, to discern the essential findings and conclusions of the

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7/ See Jesse Rosenblum, d/b/a Harbine Financial Service, Investment Advisers Act Release No. 913 (May 17, 1984), 30 SEC Docket 857, 859, aff'd in unpublished opinion (3rd Cir. March 25, 1985); Marketlines, Inc., 43 S.E.C. 267, 271 (1967), aff'd 384 F.2d 264 (2d Cir. 1967, cert. denied 390 U.S. 947 (1968).

8/ Jesse Rosenblum, supra.

Commission. Moreover, the fact that the Commission of course had an "institutional" knowledge of its decision does not excuse or mitigate Wilson's misconduct. 9/ Also without mitigating effect is Wilson's expressed willingness, after proceedings had been instituted, to amend his disclosures as specified by the staff. He could not shift his responsibility for compliance with applicable requirements to the Commission or its staff. 10/ When, in addition to Wilson's reporting violations, consideration is given to the violations found by the CBOE and the Commission and in particular the Commission's conclusion that Wilson engaged in "egregious dishonesty," the only appropriate conclusion is that the public interest requires his exclusion from the investment advisory

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9/ Cf. Joseph P. D'Angelo, 46 S.E.C. 736 (1976), aff'd without opinion, 559 F.2d 1202 (2d Cir. 1977). There the applicant's president had been enjoined in a Commission action, but failed to disclose the injunction in the registration application even after the staff had alerted him to the deficiency in a prior application. The Commission agreed with the administrative law judge's characterization of the president's conduct as at least "inexcusable carelessness." Based on the injunction and its non-disclosure, the Commission barred him from association with an investment adviser.

10/ See Jesse Rosenblum, supra, 30 SEC Docket at 863, and cases there cited.

business. 11/

Accordingly, IT IS ORDERED that the request to withdraw the application for registration of Philip S. Wilson, d/b/a Wilson Associates, and such application are hereby denied and that Wilson is hereby barred from association with an investment adviser.

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

Pursuant to that rule, this initial decision shall become the final decision of the Commission as to each party who has not filed a petition for review pursuant to Rule 17(b) within fifteen days after service of the initial decision upon him, unless the Commission, pursuant to Rule 17(c), determines on its own initiative to

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11/ I have not taken into consideration the Division's arguments that Wilson engaged in misconduct in other respects not alleged in the order for proceedings. See International Shareholders Services Corporation, 46 S.E.C. 378, 386, n. 19 (1976). As to Wilson's assertion that he repaid losses that his former partner Schieber sustained, the record is not clear regarding the extent of such losses or of repayment. Even assuming that Wilson repaid whatever Schieber lost, it would not affect my conclusion.

All proposed findings and conclusions and all contentions have been considered. They are accepted to the extent they are consistent with this decision.

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.

Max O. Regensteiner
Administrative Law Judge

Washington, D.C.
December 29, 1988