ADMINISTRATIVE PROCEEDING
FILE NO. 3-3261

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	:
FRANK J. CRIMMINS	:
	:

INITIAL DECISION

(Private Proceeding)

August 31, 1973
Washington, D.C.

David J. Markun
Administrative Law Judge

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APPEARANCES: William Nortman, Thomas R. Beirne, and Mark N. Jacobs, attorneys, for the Division of Enforcement.

Donald Stuart Bab and Seymour Swidler, of Spear and Hill, New York, New York, for Respondent.

BEFORE: David J. Markun, Administrative Law Judge

THE PROCEEDING

This private proceeding was instituted by an order of the Commission dated September 22, 1971 ("Order") against Respondent Frank J. Crimmins ("Crimmins", or "Respondent") and three other

respondents [1] pursuant to Sections 15(b), 15A, and 19(a)(3) of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether the Respondents other than Crimmins committed various charged violations of the antifraud provisions of Section 17(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. 77q, and of Section 10(b) of the Exchange Act, 15 U.S.C. 78j and Rule 10b-5 promulgated thereunder, [2] whether Respondent Crimmins failed reasonably to supervise persons under his supervision with a view to preventing the antifraud violations allegedly committed by the other Respondents, [3] and the remedial action, if any, that might be appropriate in the public interest.

1/ The other respondents named in the Order were Walston & Co., Inc., a broker-dealer firm and Respondent Crimmins' employer during the relevant period; Abraham Farber; and Thomas J. Brennan. Respondents other than Crimmins have entered into compromise settlements with the Commission: Securities Exchange Act Release No. 10028, March 5, 1973.

2/ The composite effect of these provisions, as applicable here, is to make unlawful the use of the mails or instrumentalities of interstate commerce or of any facility of any national securities exchange in connection with the sale of any security by means of any untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.

3/ Section 15(b)(5)(E) of the Exchange Act, 15 U.S.C. 78o, establishes as a basis for the imposition of sanctions failure ". . . reasonably to supervise, with a view to preventing violations of [specified securities laws, rules, and regulations], another person who commits such a violation, if such other person is subject to his supervision." Section 15(b)(5)(E) goes on to provide:

> ". . . . For the purpose of this clause (E) no person shall be deemed to have failed reasonably to supervise any person, if —
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> (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and
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> (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with."

As already noted above[4], the proceeding has been resolved as to all respondents other than Respondent Crimmins. Thus, this initial decision has application only to Respondent Crimmins; nevertheless, the decision necessarily includes certain findings respecting the other Respondents as well as findings respecting other personnel of Walston & Co., Inc. since, as noted above,[5] proof of the failure-to-supervise charge against Respondent Crimmins requires, among other things, proof that persons subject to his supervision wilfully committed the charged violations.[6]

A private hearing respecting the charge against Respondent Crimmins was held in New York, New York from November 27, 1972 through November 30, 1972. Thereafter the parties filed successive proposed findings of fact, conclusions of law, and supporting briefs pursuant to Rule 16 of the Commission's Rules of Practice, 17 CFR 201.16.

On January 15, 1973, the same date on which it filed its proposed findings, conclusions, and supporting brief, the Division filed a motion under the Commission's Rule 6(d), 17 CFR 201.6(d), to amend the Order for Proceeding by the addition of a new allegation charging Crimmins with having aided and abetted the antifraud violations that

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4/ See footnote 1 above.

5/ Footnote 3 .

6/ Violations by the corporate respondent, Walston & Co., Inc., insofar as here pertinent, involve actions of personnel of the firm (for whose conduct the firm was responsible under the concept of respondeat superior, Armstrong, Jones & Co., v. S.E.C., 421 F.2d 359, 362 (C.A. 6, 1970)) who were subject to Crimmins' supervision.

other respondents were charged with in the Order. The Division urged that this amendment is necessary to conform the pleadings to the proof and argues, under an analogy to Rule 15(b) of the Federal Rules of Civil Procedure, that the issue of aiding and abetting, though not charged against Respondent Crimmins in the Order, was tried by express or implied consent of the parties.

Respondent strongly argues that the motion to amend should be denied, citing not only its lack of timeliness but noting also that at the outset of the hearing Division's counsel expressly affirmed on the record that the only charge against Crimmins was that he failed properly to supervise employees under his direction.[7/] From this, Respondent correctly argues further that he could not have "consented" to the trial of new or additional charges against him since he had a right to rely on the Division counsel's express representation that only supervision was in issue. Moreover, as Respondent also argues, the facts alluded to by the Division as supporting an allegation of aiding and abetting on Crimmins' part were also relevant on the issue of supervision since they related to his overall knowledge of the factual situation involved in the question of supervision, and such evidence was offered and received on that basis.

7/ R. p. 8. This assurance was given in the context of a summarization on the record of salient points that had been covered in an off-the-record pre-hearing conference held at the commencement of the hearing.

In view of the foregoing, it is concluded that to allow Division's motion to amend under all the facts and circumstances here involved would constitute a violation of the requirements of due process and fundamental fairness.[8/] Accordingly, the motion to amend is denied.

The findings and conclusions herein are based upon the record and upon observation of the demeanor of the various witnesses. Preponderance of the evidence is the standard of proof applied.

FINDINGS OF FACT AND LAW

Respondent Crimmins

Respondent Frank J. Crimmins ("Crimmins", or "Respondent") was branch manager of the Sperry Rand branch office ("SRB") in New York, New York of Walston & Co. Inc. ("Walston") from December 1965 to the summer of 1970. This included the period of time during which he is charged with having failed reasonably to supervise, i.e. September 1, 1968 to June 30, 1969 ("the relevant period"). Before becoming branch manager of SRB for Walston, Crimmins had been a branch manager for Shields & Co. for six years, and before that he had been a registered representative for about two and one-year periods, respectively, with Merrill, Lynch, Pierce, Fenner and Smith and Newberger, Loeb & Co. Crimmins is currently a vice-president

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8/ Cf. In re Ruffalo, 390 U.S. 544, 551 (1968); Jaffee & Co. v. S.E.C., 466 F.2d 387, 394 (C.A. 2d 1971).

in the Institutional Sales Department of Walston, the Sperry-Rand Branch office having been merged with another office in 1971. Crimmins is now, and was during the relevant period, a voting stockholder of Walston, in which he held about a 1% stock interest. This status, however, did not give him a voice in establishment of overall company compliance procedures or policies, as distinct from his authority as branch manager.

Walston, a Delaware corporation registered as a broker-dealer with the Commission since January 26, 1956, had its principal offices in New York, New York during the relevant period and had about 100 branch offices 9 or 10 of which were in the New York "Division". It is a member of the New York and American Stock Exchanges, the National Association of Securities Dealers, Inc. ("NASD"), and other national securities exchanges.

Crimmins had between 13 to 17 registered representatives, or, as the firm prefers to call them, account executives, subject to his supervision during the relevant period. Although Crimmins had an assistant to help him with some of the office-management tasks, the assistant, Norman Mossberg, was not authorized to exercise supervision over the registered representatives.[9/]

Crimmins was not a salaried manager devoting himself exclusively to branch management; rather, he was a "producing" manager whose compensation depended primarily upon the sales commissions he himself

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9/ The assistant's compensation came out of the net profits of the SRB, which were also the source of Crimmins' compensation.

generated for the branch. The record shows that he was a very high "producer". Crimmins produced over twice as much in commissions as any other registered representative in the branch. During trading hours the bulk of Crimmins' time was spent attending to his customers; he attempted to compensate for this by lengthening his working day to allow time for his supervisory and other managerial duties.

The Sperry Rand Branch had a reputation for going into more high risk securities than most Walston branches, and it included, as Crimmins testified, a substantial number of registered representatives who had substantial experience in the securities business and who, like himself, were "big producers."

Three of the registered representatives who were under Crimmins' supervision during all or most of the relevant period testified at the hearing.

Abraham Farber ("A. Farber") is currently the president of Farber Commercial Corporation, a company that deals in second-mortgage financing. He was in the securities business continuously from 1957 through June 1971. From about 1966 through June, 1971 he was a registered representative with Walston at the SRB.

Stanley Farber ("S. Farber"), A. Farber's brother, is currently president of Rusco Industries. He was a registered representative at the SRB from 1966 to March, 1969, and had been, prior to his coming to Walston, a partner in a member firm of the New York Stock Exchange.

Thomas J. Brennan ("Brennan"), a graduate of the Walston training program for account executives, was a registered representative at the SRB from 1967 to 1971.

Educational Sciences Programs, Inc.

Crimmins's charged failure to supervise concerns sales to customers of registered representatives at the SRB during the relevant period of the stock of Educational Sciences Programs, Inc. ("ESP").[10/]

ESP was incorporated on November 22, 1967 as a Delaware Corporation with its principal place of business in New York, New York.

ESP did not commence operations until April 5, 1968, when it merged with Napthalene Manufacturing Corp.[11/] ("Napthalene"). Napthalene earlier, i.e. on November 17, 1967 (it then having been a dormant public company), had acquired all the outstanding stock of National Home Study School, Inc., in exchange for 35,000 shares of capital stock. Until February, 1969, when it acquired Delehanty Institute, Inc.[12/] ("Delehanty"), ESP was engaged in education through its correspondence school ("National School") and in manpower training of the "hard-core" unemployed, primarily through contracts with the U.S. Department of Labor.

10/ During the relevant period, 17 registered representatives at SRB (including Crimmins) purchased a total of 50,675 shares of ESP for their customers.

11/ ESP was orginally named Educational Sciences Programs Corporation. After the merger with Napthalene the name was changed to Educational Sciences Programs, Inc. On December 28, 1970, after its earlier acquisition of the Delehanty Institute, Inc., the stockholders of ESP voted to change the company's name to Delehanty Educational Systems, Inc.

12/ See footnote 11 above. Delehanty was established in 1913 and trained up to 20,000 students annually in its vocational training schools in automotive mechanics, drafting, high school, radio, electronics, television, and civil service.

ESP never earned a profit from its operations and never paid a dividend. It operated with a continually increasing deficit from the time it began operations. The 1968 Annual Report to stockholders, distributed in March, 1969, reported a net loss for the year ending December 31, 1968, of $217,040.68. This increased ESP's accumulative deficit of $283,075.44 as of January 1, 1968 to $500,116.12 as of December 31, 1968. In the first 6 months of 1969 ESP lost $319,134.98, resulting in an accumulated deficit of $819,251.10 as of June 30, 1969.

The price history of ESP from November, 1968 through 1970 and for the first two months of 1972 is set forth in the footnote below. 13/

13/

Month	High Bid	Low Bid	High Offer	Low Offer
Sep. 1968	16½	9½	18	10
Oct. 1968	20½	16	22	17½
Nov. 1968	34	17½	38	19¼
Dec. 1968	50	24	55	27
Jan. 1969	52	35	55	39
Feb. 1969	55	42	64	45
Mar. 1969	52	31	57	35
Apr. 1969	49	34	56	38
May 1969	48	32	53	37
Jun. 1969	37	20	41	20
Jul. 1969	32	22	35	26
Aug. 1969	39	26	43	30
Sep. 1969	38	32	42	36
Oct. 1969	39½	33	42	35
Nov. 1969	39	27	41	30
Dec. 1969	32	28	35	31
Jan. 1970	33	23	36	27
Feb. 1970	24	21	30	24
Mar. 1970	22	17	25	19
Apr. 1970	19	7	21	9
May 1970	7	3	9	4
Jun. 1970	5	2¼	7	3
Jan. 1972	2-3/8	1-3/8	2-7/8	1-7/8
Feb. 1972	2-1/8	1-3/4	2-1/2	2-1/4

ESP first came to the attention of personnel at the SRB of Walston as a possible stock to be recommended to their customers through S. Farber, who heard about it in the Fall of 1968 from John Eagan ("Eagan"), a securities analyst with another firm. S. Farber arranged for himself and Crimmins [14/] to meet with James Feeney, the then president of ESP. At that meeting the business activities, actual and prospective, of ESP were discussed, but its financial condition was not.

Later in 1968, S. Farber met with Thomas Souran ("Souran"), chairman of the board of ESP, who indicated, among other things, that ESP had a need for additional working capital. Thereafter, S. Farber introduced Souran to personnel of the Value Line Special Situations Fund ("Value Line") which later, on November 9, 1968, purchased $975,000 worth of "letter" stock of ESP.

Meanwhile, A. Farber also learned of ESP, and of its need for additional capital, from his brother S. Farber and from conversations with Eagan. [15/] In February, 1969, S. Farber and A. Farber collaborated in arranging a "loan" of $1.1 million to ESP from Majestic Trading Corp. ("Majestic"), a finance company privately owned by members of the Farbers' family. This uncollateralized "loan" [16/] was taken by

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14/ Going back at least as far as December 5, 1968, Walston has expressed in writing in a compliance bulletin addressed to officers, branch managers, and account executives, a policy requirement that registered representatives not confer with corporate insiders concerning business matters relating to the corporation without prior approval of the branch manager.

15/ Later he also talked to Souran and other ESP officers.

16/ The arrangement involved the purchase by Majestic of $1.1 million worth of convertible debentures (convertible at $25 per share of common stock).

ESP in order to finance its purchase of Delehanty in February, 1969.[17]

As compensation for his efforts in arranging the purchase of private-placement shares of ESP by Value Line, S. Farber was permitted to purchase, and did purchase from Souran, 4,000 shares of ESP letter stock at $6 per share, a price that was substantially lower than the then market price of the stock. It was agreed that these shares would be registered the next time that ESP had occasion to register any of its shares.

In December, 1969, A. Farber purchased 10,000 shares of restricted ESP shares from Souran of which number 2,500 shares were for his own account and 7,500 for the account of his father.

In consideration for having arranged the "loan" from Majestic to ESP, S. Farber and A. Farber each received 2,000 shares of ESP restricted stock. It was agreed that this stock would be registered on the first occasion that ESP would have to register any of its stock.

In late April, 1969, after ESP had earlier acquired Delehanty, Crimmins also acquired ESP private placement stock.[18] He bought 10,000 shares at $15 per share, a substantial reduction from the then market price of about $51.00.

17/ See footnotes 11 and 12 above.

18/ Subsequent to his meeting with the then-president of ESP in the company of S. Farber, Crimmins met several other officers of ESP and asked to be put on ESP's mailing list. He also acquired further information on ESP through conversations with the Farbers.

The record does not disclose any personal interest in the stock of ESP on the part of Brennan or the other registered representatives at Walston's SRB, all or most of whom sold ESP to their customers during the relevant period.

Fraudulent Statements and Omissions of Material Fact in Sale of ESP Stock

The record establishes a number of untrue statements of material fact and of omissions to state material facts necessary to make statements that were made not misleading that were made or omitted by registered representatives of the SRB of Walston to their customers in the sale of ESP stock during the relevant period.

On January 21, 1969, Victor Kurnit ("Kurnit") purchased 200 shares of ESP at $40 a share and another 200 shares at $41 per share on the basis of A. Farber's glowing recommendation. A. Farber told Kurnit over the telephone that ESP was a good company whose stock was "terrific" and had "potential", that it was a "hundred dollar stock" whose price would at least double, and that Kurnit should buy the shares as soon as possible. Kurnit made it clear to A. Farber that to finance a purchase of ESP shares he would have to sell shares of U.S. Leasing International, a stock then listed on the American Exchange and now listed on the New York Stock Exchange. A. Farber in effect urged Kurnit to do that by commenting that Kurnit had probably by then gotten all the rise in U.S. Leasing International that he was going to get.

A. Farber did not tell Kurnit that ESP has a substantial deficit before it commenced operations in 1968 nor that it substantially

aggravated that deficit as a result of losses during 1968. Neither was Kurnit told that A. Farber had acquired 2,500 shares of ESP in a private placement, at a cost substantially below market price, in December, 1968, nor that his brother, S. Farber, and his father, had likewise purchased private placement ESP stock in December, 1968. All of the foregoing were material facts that should have been disclosed.[19/] Additionally, the salesman never told Kurnit the source of the information upon which his recommendation was based.

Sometime after the purchase, when ESP had risen about $10 in value, A. Farber recommended to Kurnit that he not sell at that price because the stock would rise further and that, instead, he should buy additional shares. Several months later, Kurnit learned that the stock had dropped to $18 or $20 a share and, upon calling A. Farber, was advised to hold the stock because the price would go back up. Kurnit still holds his 400 ESP shares, on which he has an unrealized loss of approximately $15,000.

On the same day that Kurnit purchased his ESP shares, i.e. January 21, 1969, Ellis Nichols ("Nichols"), Kurnit's business partner and a long-time friend of A. Farber's, purchased 500 shares of ESP after A. Farber recommended the stock to him on the phone. A. Farber's

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19/ Kurnit testified that as a businessman (textiles) he would never have purchased the ESP stock had he known of the deficit. This testimony is credited. The test of materiality in non-disclosure cases is whether a reasonable man in the position of an investor might well decide not to purchase the security if the fact or facts were disclosed. Affiliated Ute Citizens v. U.S., 406 U.S. 128 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970).

conversation with Nichols preceeded his phone conversation with Kurnit and after the two conversations occurred Nichols and Kurnit discussed with one another their respective conversations with A. Farber. The record establishes that A. Farber conveyed essentially the same information, and omitted to state essentially the same material facts, in connection with recommending the stock to Nichols as he had done or failed to do in connection with recommending the stock to Kurnit.

On December 19, 1968, Samuel Topaz ("Topaz"), a claims examiner for the New York State Department of Labor, purchased 50 shares of ESP on the basis of Brennan's highly optimistic recommendation. In a phone call, Brennan told Topaz that ESP would be "another Four Seasons"[20/] and that the president of ESP was a former member of the Johnson Cabinet in the "Education Department" and that he "should be getting most of the government contracts regarding education for the company."

On January 16, 1969, Brennan again called Topaz and recommended purchase of 100 additional shares of ESP, stating that ESP would be a "runaway". Brennan purchased an additional 50 shares of ESP on that date at $49 a share. On February 18, 1969, Topaz purchased another 25 shares of ESP on the basis of Brennan's renewed recommendation that he purchase an additional 100 shares.

In none of the recommendations Brennan made to Topaz did he mention the highly-material financial condition of ESP, e.g. its accumulated deficit, its lack of operating profits during 1968, and

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20/ Topaz had earlier purchased Four Seasons stock on Brennan's recommendation, and the stock had done very well for him, having gone from 20 to 150 and split two for one. Brennan conceded in his testimony that he also told some other customers that ESP could be "another Four Seasons".

its continuing need for additional working capital.[21/]

Topaz still holds his ESP stock, on which he has an unrealized loss of approximately $5,500.

At the office in which Topaz worked, Brennan had four other customers who bought ESP stock at about the same time Topaz bought his first shares.[22/] Brennan talked to them on Topaz's phone after talking to Topaz. The record suggests that Brennan's representations to these other four customers were in substance similar to those he made to Topaz in recommending ESP stock and indicates that he failed to relate to them the same material facts he omitted to tell Topaz.

From the record it does not appear that any customer who purchased ESP stock during the relevant period from registered representatives at the SRB of Walston was told of the financial condition of the company, e.g. its deficit before commencing operations in 1968, its operating losses during 1968 and its consequent worsening cumulative deficit, its failure to earn a profit during the first part of 1969, and its continuing need for additional capital. The registered representatives who testified at the hearing (A. Farber, S. Farber, Brennan, and Respondent Crimmins) all seemed to think, in effect, that it was enough to tell the customer that ESP was a "new company." From this, they implied, the customer could have been expected to know that it had no profits. This reasoning is not convincing. Not all new companies fail to show a profit during their first year or so of operation. But beyond that, here there was not only a lack of profits but a

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21/ This was evident from a number of private placements of stock made by ESP, noted elsewhere in this decision.

22/ They, too, had earlier bought Four Seasons stock through Brennan and were much pleased with the results.

substantial, and mounting, deficit, which should have been disclosed to customers because of its high degree of materiality.

The record further shows that customers who purchased ESP from registered representatives at the SRB of Walston during the relevant period and after acquisition of restricted stock interests in ESP by S. Farber and A. Farber, the Farber brothers' father, and by Crimmins himself, were not told of the existence of, or of the nature of, such personal interests in ESP. [23/] These were highly material facts in the sense that a prospective purchaser of the stock might reasonably have inferred, had such information been disclosed to him, that the favorable recommendation he received was prompted by the fact that such personnel at the SRB had a personal interest in the success of the stock rather than by research into the inherent merit of the stock.

In recognition of this personal-interest factor, Walston's written manual for registered representatives, entitled "Duties and Responsibilities of Account Executives", [24/] provided, during the relevant period, in pertinent part,

> ". . . When an Account Executive has any interest in a security, it must be disclosed to a customer if the account Executive is recommending its purchase or sale. . . ."

23/ See footnote 19 above.

24/ It is not without some significance that the Farbers testified they could not recall with any degree of certainty having seen this manual.

S. Farber testified that he told his customers of the restricted ESP stock that he purchased, after arranging the Value Line deal, when he recommended the stock to such customers. There is no testimony to the contrary.[25/] However, it appears from the record that S. Farber did not advise such customers of the restricted ESP stock he was given for arranging the Majestic "loan" or of the restricted ESP stock held by his brother, A. Farber, or his father. In view of the relationship that existed between S. Farber and these others, and in light of all the circumstances disclosed by this record, it is concluded that the existence of such holdings and the manner and price at which the shares were acquired were material facts that should have been disclosed to S. Farber's customers when he recommended the stock to them.

A. Farber testified that he told some of his customers to whom he recommended ESP[26/] that he held restricted ESP shares. Thus, there were others of such customers whom he did not so advise. In addition, A. Farber did not disclose to his customers to whom he recommended ESP that his brother (S. Farber), his father, and Respondent Crimmins held restricted ESP shares. For reasons already noted above in connection with S. Farber's failure to disclose, such holdings and the circumstances (including price) of their acquisition, were material facts that should have been disclosed to such customers of A. Farber.

25/ None of S. Farber's customers were called to testify. Excluding relatives, over 20 customers purchased ESP through S. Farber.

26/ Some 15 to 20 of A. Farber's 50 to 60 customers bought ESP on his recommendation.

The foregoing predictions of dramatic price increases for ESP for which there was no adequate basis,[27] the failures to disclose ESP's financial condition, and the failures to disclose the personal interests of S. Farber and A. Farber and their father, and that of Respondent Crimmins, in ESP, under all the circumstances here present, constituted wilful[28] violations of the antifraud provisions of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.[29] Such violations were committed by the individual registered representatives involved and by Walston, which is responsible for their conduct under the concept of respondeat superior.[30]

Crimmins' Failure Reasonably to Supervise

The issue of whether Crimmins failed reasonably to supervise persons under his supervision with a view to preventing the violations found above to have been committed by them comes down basically to the question whether Crimmins ". . . reasonably discharged the duties and obligations incumbent upon him by reason of [Walston's system and procedures for supervision] without reasonable cause to believe that such

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27/ No study of projected earnings had been made to warrant the predictions.

28/ All that is required to support a finding of willfulness is proof that a respondent acted intentionally in the sense that he was aware of what he was doing and either consciously, or in careless disregard of his obligations, knowingly engaged in the activities which are found to be illegal. Hanley v. Securities and Exchange Commission, 415 F.2d 589, 595-6 (2d Cir. 1969); NEES v. Securities and Exchange Commission, 414 F.2d 211, 221 (9th Cir. 1969); Dlugash v. Securities and Exchange Commission, 373 F.2d 107, 109-10 (2d Cir. 1967); Tager v. Securities and Exchange Commission, 344 F.2d 5, 8 (2d Cir. 1965).

29/ The mails and telephones were utilized in effecting the transactions which gave rise to the violations.

30/ Armstrong, Jones & Co. v. S.E.C., supra, footnote 6 .

procedures and system were not being complied with." [31/] This statement of the issue presupposes that Walston's established formal compliance procedures, had they been properly carried out, were such as could "reasonably be expected to prevent and detect, insofar as practicable, any such violation by any such person . . . ." The record indicates that, in essence, this was so: i.e. the fault lay not in how the compliance procedures were set up but in how they were carried out and applied.

Walston's compliance system, as here pertinent, was three-tiered. At the top it included a Compliance Department, staffed by attorneys and others working full time on compliance matters, which established compliance policies and procedures for the whole firm and monitored the firm's activities by examining daily, weekly, and monthly transactions and commission runs.

In the middle, the New York Division had management supervision, including compliance functions, over the nine or ten New York branches, including SRB, that were embraced within the Division. The Division reviewed the weekly and monthly computer runs of its branches and the Division head held periodic meetings with his branch managers on matters that included compliance subjects. Compliance questions raised by the Compliance Department were normally channeled through the Division to the Branch Manager.

At the initial level of Walston's compliance procedures were the branch managers, whom the firm regarded as the key to the effectiveness

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31/ See footnote 3 above and text thereto.

of its compliance program. Crimmins, as the branch manager, received the same daily, weekly, and monthly computer runs of trading activity for the SRB as the New York Division did. Crimmins conceded that the Branch Manager, being on the scene and thus having familiarity with his registered representatives and being charged under the compliance memoranda and procedures with learning as much as he could about their customers' investment objectives, was in the best position (of the three compliance levels) to ensure that compliance procedures were carried out properly.

Crimmins' managerial and compliance functions included, among other things, approval of new accounts, conducting weekly sales meetings that included review and discussion of compliance questions and policies, review of each registered representative's production reports, review of the monthly customers' statements, review of the $200 commission run, and holding periodic consultations with his registered representatives. Thus Crimmins was well aware of the fact that substantially all of his salesmen had transactions in ESP and was aware of the volume of ESP sold through each of his registered representatives. 32/ Moreover, Crimmins became aware of S. Farber's special interest in ESP as early as the fall of 1968 and he learned of the acquisition of restricted stock by S. Farber and A. Farber, at the latest, shortly after those acquisitions were made. Moreover, he knew from his own conversations with ESP

32/ The New York Division head of Walston testified that the volume of trading in ESP at the SRB by January 1969 was "significant" in terms of number of shares and number of account executives and should have been sufficient to cause the branch manager to make appropriate compliance inquiries.

management personnel that ESP was not an established company with a record of net earnings and that it had a recurring need for the infusion of new capital. He knew or should have known of its deficits.

All of the foregoing were circumstances which should have alerted Crimmins to be especially careful to inquire of his registered representatives to make sure that in recommending the stock they were not making any unsupported predictions or other statements or omitting to state any relevant facts. Yet, the record establishes that Crimmins never asked his salesmen what they were telling the customers to whom they were recommending ESP.[33/] Crimmins merely assumed that they were saying the right things and abstaining from saying any wrong things.

In the light of facts which Crimmins knew or should have known, his failure to make inquiry of his salesmen constituted a failure reasonably to supervise.

Crimmins testified, and contends in his brief, that he was not aware of ESP's cumulative deficits and of its failure to earn a profit during 1968 operations until ESP's annual report for calendar 1968 was released in March or April, 1969. While it is difficult to believe that he would not have earlier learned such facts from his discussions with ESP management, or from one of the Farbers, with whom he generally

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33/ Even after Crimmins questioned the extent of Brennan's transactions in ESP, after noting that ESP accounted for 65% of Brennan's purchase transactions for his customers in January, 1969, he did not ask Brennan what he was telling or failing to tell his customers about the stock. He merely told Brennan to "just go slow in that situation", i.e. to cease his over-concentration on ESP.

drank coffee each morning and discussed stocks, including ESP,[34] if Crimmins did not in fact learn these vital aspects of ESP's financial condition until after the annual report was released, the fact must be attributed to his failure to make reasonable further inquiry in light of the facts he did know about ESP and to his failure to inquire into the bases that personnel at SRB had for recommending the stock.[35] The record is clear that purchasing customers were not given such material information prior to that date, and perhaps not even thereafter, and the fault lies largely with Crimmins' failure reasonably to supervise.[36]

Because of Crimmins' personal interest in ESP and because of his closeness to the Farbers,[36] who also had personal interests in ESP, Crimmins should have been especially mindful of the need to ensure

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34/ Crimmins has known A. Farber for 12 to 13 years, going back to a time about 6 years before A. Farber came to Walston and has known S. Farber since 1957, including some social contact; after Crimmins organized the SRB he invited A. Farber and S. Farber to join him there. Both S. Farber and A. Farber regularly skipped Crimmins's weekly branch meetings and were allowed to get by with it. Crimmins testified he would cover the salient points with them the next day.

35/ Walston's compliance bulletin #34 of 10-3-68, addressed to officers, branch managers and account executives, provides in pertinent part as follows:

> "In recommending stocks to your customers you have a responsibility to avoid purchase of stocks purely because of tape action or because of an exciting story irrespective of the basic values involved. It is your responsibility to recommend only stocks whose purchase can be justified for sound fundamental reasons at a price which bears a reasonable relationship to potential future earnings."

Inquiry into the account executives' bases for recommending ESP should certainly have uncovered ESP's substantial and growing deficits.

36/ Significantly, Crimmins did not tell his own customers of the ESP deficit, a clear indication that he regarded, erroneously, that fact as not material.

37/ See footnote 34 above.

that such personal interests were fully disclosed to customers to whom the stock was being recommended. Instead, very surprisingly, Crimmins was of the quite erroneous belief that such personal holdings did not have to be disclosed. Thus, at the Commission's investigation preceding the institution of this proceeding, Crimmins testified (on September 23, 1969) as follows:

> "Q. Mr. Crimmins, did you tell any of your customers that you had a position of private placement stock in the company?"
>
> "A. No, sir, I felt I made a long term investment and that was again my particular business, that was germane to my investment. I don't discuss -- I think that is a person's own affair if he wants to make an investment."

While Crimmins at the hearing herein contradicted his prior testimony and testified that he had advised his customers of his stock interest in ESP, his subsequent testimony is not credited, based upon his demeanor and the lack of any logically satisfactory explanation for his prior contrary testimony.

Since Crimmins had been operating under the erroneous notion that a registered representative had no obligation to disclose his personal holdings of restricted stock in a company whose stock he is recommending, it is quite obvious that he could not have carried out the responsibilities that the circumstances called for of making sure that his registered representatives were making such disclosures during the relevant period.

As already found, Crimmins never asked his registered representatives what they were telling their customers abour ESP. In part

Crimmins seek to justify this by urging that the Farbers and various other registered representatives at the SRB were experienced in the securities business and that therefore no such specific inquiry was indicated.[38] This argument has several weaknesses. Firstly, experience is no guarantee against, e.g., the making of unfounded predictions of dramatic price increases. Secondly, Brennan, as well as some of the other registered representatives of SRB, did not have the length of experience upon which the argument is based. While there can be no assurance if Crimmins had asked his salesmen what representations they were making about the future price of ESP that he would have gotten straightforward answers, at least he would have had made a reasonable effort to carry out his compliance responsibilities[39] under the facts he then knew or should have known.

From the foregoing findings the conclusion is unavoidable that Crimmins, within the meaning of Section 15(b)(5)(E) of the Exchange Act failed reasonably to supervise, with a view to preventing the anti-fraud violations found above to have been committed by persons subject to his supervision, and that he is therefore subject to the imposition of such appropriate sanctions as may be required in the public interest under Section 15(b)(7) of the Exchange Act.

38/ A. Farber testified that Crimmins didn't really exercise any supervision over him because he didn't have to, except for reviewing production figures and the like. See also footnote 34 above.

39/ Walston had no procedures for monitoring the telephone conversations of their salesmen with their customers nor would it seem reasonable to expect Crimmins ordinarily to contact customers directly in absence of an inquiry or complaint. But here Crimmins was on notice of enough facts to have alerted him to the need to make inquiry, e.g. the Farbers' personal interest, Brennan's overconcentration in the stock (see footnote 33 above), the fact that numerous account executives in his branch were recommending the stock, and the branch volume.

PUBLIC INTEREST

The key role that proper supervision plays in the enforcement of the securities laws is self evident. Congress gave supervision express legislative recognition when it made failure reasonably to supervise an independent basis for the imposition of sanctions, including the maximum sanction of a bar from employment in the securities industry, in enacting the 1964 amendments to the Securities Act. 40/

Respondent Crimmins urges that there should be considered as a mitigating circumstance the fact that he personally sustained a loss of some $130,000 in his purchase of ESP stock. While this is taken into consideration, it is difficult to attribute substantial weight to it because the record does not really show any meaningful connection between this event and the Respondent's duty properly to supervise. The record does disclose, however, a far more significant mitigative factor, i.e. the circumstance that the way in which he was compensated by Walston it made Crimmins' compensation and his record of performance turn much more on how much business the branch generated than upon how effectively he supervised and carried out compliance procedures. Walston has since recognized in effect that a "producing" branch manager charged with supervisory responsibilities as well is an invitation to disaster; supervision is almost certain to be neglected where a producing manager must choose between attention to supervision and his self interest. 41/ While this does not excuse Crimmins' neglect

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40/ See footnote 3 above.

41/ Today any branch office of Walston having as many registered representatives as the SRB had during the relevant period has a full-time salaried manager.

of his supervisory responsibilities, it must be accorded significant weight in determining sanctions.

It does not appear that Respondent Crimmins, who has been in the securities business since 1954, has been sanctioned by any governmental or self-regulatory body heretofore.

In light of the various mitigative factors, an assessment of the Respondent's demeanor at the hearing, and on the basis of the entire record herein, it is concluded that the public interest will be adequately protected by suspending Respondent's association in the securities industry in a supervisory capacity for a period of one year and by suspending him from association in the securities industry in any capacity for a period of one month.

ORDER

Accordingly, IT IS ORDERED that Respondent Frank J. Crimmins is hereby suspended from association with a broker-dealer in a supervisory capacity for a period of one year from the effective date of this order, and

IT IS FURTHER ORDERED that Respondent Crimmins is suspended from assocation with a broker-dealer in any capacity for a period of one month from the effective date of this order.

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 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. 43/

David J. Markun
Administrative Law Judge

August 31, 1973
Washington, D.C.

43/ 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. Certain proposed findings and conclusions have been omitted as not relevant or as not necessary to a proper determination of the issues presented. To the extent that the testimony of the Respondent or of other witnesses is not in accord with the findings herein it is not credited.