(Investment Company Act Release No. 6243)

ADMINISTRATIVE PROCEEDING
FILE NO. 3-2256

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
November 16, 1970

In the Matter of INTERMARK INVESTING, INC. Prospect Center Building 1020 Prospect Street La Jolla, California 92037 (811-1041) Investment Company Act of 1940	ORDER ACCEPTING OFFER OF SETTLEMENT

This proceeding, involving an application by Intermark Investing, Inc. ("Intermark") for deregistration under Section 8(f) of the Investment Company Act of 1940 ("Act"), is now before us for review of the Hearing Examiner's Initial Decision. The issues raised on the petitions for review filed by both the Division of Corporate Regulation (the "Division") and Intermark, relate to (1) whether certain "earn-outs"[1/] issued by Intermark violated Sections 18 and 23 of the Act; and (2) whether the proxy soliciting material for the shareholders meeting, at which a change in the fundamental policy of Intermark to that of an operating holding company was defective in certain respects invalidating the prior shareholder approval required for such action under Section 13(a)(4) of the Act.[2/]

1/ Intermark acquired certain companies by the "earn-out" method, i.e., contracts providing that in exchange for all the capital stock of the company to be acquired, Intermark would agree to issue to the selling shareholders a fixed amount of Intermark common stock at the Closing, and additional shares of common stock in three annual installments; the amount of stock to be issued in each installment, if any, to depend upon the earnings of the acquired company in the year prior to the installment.

2/ Among the issues raised concerning the proxy soliciting material was a claim that the staff had full knowledge of the facts, and processing the material without requiring disclosure, thus estopping the staff and the Commission from

[footnote continued on following page]

In the light of our decisions in In the Matter of The Equity Corporation of March 5, 1970 and September 23, 1970 (Investment Co. Act Releases Nos. 6000, 6194) Intermark has filed an Offer of Settlement ("Offer") which states that Intermark proposes to present to its stockholders an alternative plan, which has been approved by the Intermark Board of Directors and which provides that, if it is approved by a majority of the outstanding voting securities,[3/] Intermark will sell or otherwise dispose of all operating assets

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2/ [footnote continued from preceding page]
raising the question. This contention was properly rejected by the Hearing Examiner. Another issue before the Hearing Examiner was whether a controlling individual acted as a director within the meaning of Section 2(a)(12) of the Act without shareholder approval. Because this question is now moot because of the new solicitation, we do not address outselves to the Hearing Examiner's proposed findings other than to note a controlling shareholder may overreach the limits established by a legitimate controlling stock interest thus requiring shareholder approval of his participation in corporate affairs.

3/ Section 2(a)(40) of the Act provides:

> "'Voting security' means any security presently entitling the owner or holder thereof to vote for the election of directors of a company. A specified percentage of the outstanding voting securities of a company means such amount of its outstanding voting securities as entitles the holder or holders thereof to cast said specified percentage of the aggregate votes which the holders of all the outstanding voting securities of such company are entitled to cast. The vote of a majority of the outstanding voting securities of a company means the vote, at the annual or a special meeting of the security holders of such company duly called, (A) of 67 per centum or more of the voting securities present at such meeting, if the holders of more than 50 per centum of the outstanding voting securities of such company are present or represented by proxy; or (B) of more than 50 per centum of the outstanding voting securities of such company, whichever is the less."

and securities of controlled companies within a period of one year (or such longer period as we may grant upon a showing of good cause); invest all of the proceeds in investment securities as defined in Section 3(a) of the Act, and operate as a closed-end diversified investment company in accordance with specified investment objectives and fundamental policies to be adopted under such plan.

The Offer provides that if the plan is rejected by a majority of the outstanding voting securities, we will--upon appropriate application--enter an order granting deregistration. As in Equity, the management of Intermark will recommend disapproval of the plan by the stockholders because it believes that there is a greater economic potential for the company in continuing to operate as an operating holding company.

Intermark's Offer further states that none of the earn-outs issued by Intermark remain outstanding.4/

After careful consideration of the alternative plan, and the recommendation of the Division of Corporate Regulation that we accept the offer of settlement, we have concluded that it satisfies the conditions set forth in our opinions in Equity, and that we would view rejection by the shareholders as authorization for a change of status under the Act as required by Section 13(a)(4).

Accordingly, we accept the Offer of Settlement, and if a majority of the outstanding voting securities should vote, following the transmission to the stockholders of a proxy statement setting forth the terms of the plan and including appropriate details, to reject that plan, we will--upon appropriate application--enter an order granting deregistration.

Intermark, in its Offer, has consented to our issuing at a later date an opinion on the question whether the earn-outs issued by Intermark, while

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4/ An affidavit submitted by Intermark states that of the 12 companies which Intermark acquired by the earn-out method, the shareholders of four companies have been--on the basis of earnings of the acquired companies--issued the maximum number of additional shares to which they are entitled under these contracts. Further, Intermark has--pursuant to the agreements with the selling shareholders of all of the remaining eight companies--issued to such selling shareholders an agreed number of Intermark shares in fulfillment of Intermark's obligation to issue additional shares pursuant to these agreements.

outstanding, constituted a security under Section 18 of the Act and whether under certain circumstances an earn-out may violate Section 23 of the Act. We reserve the right--if so advised--to issue an opinion on these matters at a later date.

By the Commission.

Orval L. DuBois
Secretary