ADMINISTRATIVE PROCEEDING
FILE NO. 3-2178

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

In the Matter of	
NORMAN F. DACEY & ASSOCIATES, INC.	
(8-8730)	
NORMAN F. DACEY	

INITIAL DECISION

(Private Proceedings)

Warren E. Blair
Hearing Examiner

Washington, D.C.
April 3, 1970

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APPEARANCES: Herbert E. Milstein and Paul R. Huard, for the Division of Corporate Regulation.

Norman F. Dacey, pro se and for Norman F. Dacey & Associates, Inc.

BEFORE: Warren E. Blair, Hearing Examiner.

These private proceedings were instituted by an order of the Commission dated October 6, 1969, pursuant to Sections 15(b) and 15A of the Securities Exchange Act of 1934 ("Exchange Act") to determine whether Norman F. Dacey & Associates, Inc. ("registrant") and Norman F. Dacey ("Dacey"), individually and collectively, wilfully violated and wilfully aided and abetted violations of Sections 5(b) and 17(a) of the Securities Act of 1933 ("Securities Act"), and whether remedial action pursuant to Sections 15(b) and 15A of the Exchange Act is necessary.

The Division alleged, in substance, that respondents' violations of Section 5(b) occurred in connection with an initial underwriting for shares of the Dacey Trust Fund ("Fund"), formerly the Dacey Composite Fund, when prospectuses which failed to meet the requirements of Section 10 of the Securities Act were mailed to various members of the general public by respondents. The Division further alleged that respondents violated Section 17(a) by making untrue statements and omitting statements of material facts concerning the risks involved in the Fund's investment policy, the safety of an investment in Fund shares, the prospective increase in the value of Fund shares, and the past performance of the Fund. A general denial of the alleged misconduct was filed by respondents.

At the hearing on this matter Dacey declined counsel and appeared and participated during the course of the hearing on his own behalf and that of registrant. As part of the post-hearing procedures, successive filings of proposed findings, conclusions, and supporting briefs were specified. Timely filings thereof were made by the Division and by respondents.

The findings and conclusions herein are based upon the preponderance of the evidence as determined from the record and upon observation of the witnesses.

Respondents

Registrant has been registered as a broker-dealer under the Securities Exchange Act since August, 1960, and is a member of the National Association of Securities Dealers, Inc. ("NASD"). Dacey, registrant's president, has been in the securities business for 34 years, and from about January, 1949 until registrant was incorporated in 1960 was a broker-dealer operating as a sole proprietorship under the name of Norman F. Dacey & Associates.

Violations of Securities Act

The Fund was formed as a common law trust under the laws of Connecticut on April 1, 1968 and has been registered as a management open-end diversified company under the Investment

Company Act of 1940 since August 19, 1968. Dacey, the chairman of the Fund, is also its sole shareholder.

On December 26, 1968 a registration statement under the Securities Act was filed by the Fund covering a proposed offering of 1,000,000 shares to be offered to the public at $10 per share. Amendments to that registration statement were filed on May 8, 1969 and on August 6, 1969.[1/]

Word about the proposed offering by the Fund apparently was routinely published in financial journals or newspapers shortly after the Securities Act registration statement was filed, and as a result respondents received inquiries about the Fund from a number of strangers during the period from January through July, 1969. In order to reduce the time necessary for answering those inquiries, Dacey composed two substantially similar form letters. One or the other of these form letters was mailed to approximately 87 individuals and companies geographically

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1/ Respondents differ with the Division over whether a delaying amendment to the Securities Act registration statement was filed on December 26, 1968; but whether the registration statement became effective, as asserted by the Division, by operation of law on January 15, 1969 is immaterial to the issues herein. However, it may be noted in passing that the amendment which respondents claim delayed the effectiveness of the Securities Act registration statement is part of a filing made by the Dacey Fund on December 26, 1968, under the Investment Company Act of 1940.

distributed throughout the United States and abroad with more than half being sent during the first three months of 1969.

Respondents concede that the form letters were not accompanied by a prospectus meeting the requirements of Section 10 of the Securities Act and make no contention that such a prospectus preceded the sending of the form letters, but assert that the letters in question were not prospectuses nor were they intended to be anything more than " . . . simply a courteous response to unsolicited inquiries from persons unknown to the Respondents, some of whom asked specific questions, . . ." The Division argues that the form letters amounted to prospectuses which did not meet the requirements of Section 10 and contained false and misleading representations about the Fund.

The form letters at issue must be considered prospectuses within the meaning of the Securities Act.[2/] Each of the letters indicates in some particularity the characteristics of the operation of the Fund, methods of investing in the Fund,

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2/ Section 2(10) of the Securities Act defines the term "prospectus" to include "any . . . letter . . . which offers any security for sale . . .," and under Section 2(3) the term "offer for sale" includes ". . . every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security, for value."

the scheduled trustees' fee to be charged, the period of operation and the relative success of the Fund in comparison with "all other mutual funds," and as contrasted with the performance of the market in terms of the Dow-Jones Industrial Average. The letters further recite that until registration of the Fund is completed, respondents are investing new clients' funds in one or another of "the ten funds in our portfolio with the understanding" that when the Fund "becomes publicly available, we will accept the shares purchased by the client, add them to our portfolio and issue shares. . . ." of the Fund having an equal value, without any sales charge. As concluding representations the letters set forth:

> We think that this unique new arrangement will revolutionize investment management and estate administration in America. Frankly, we designed it to solve our own problem: the fact that no mutual fund which we could name would stay good indefinitely perplexed us, nor were we satisfied with the standards of bank trusteeship available. We designed what has seemed to us to be the perfect solution.

As noted by the Commission heretofore, the definitions of "offer to sell" under Section 2(3) and of "prospectus" under Section 2(10) of the Securities Act are "not limited to communications which constitute an offer in the common law contract sense, or which on their face purport to offer a security. . . .

[T]hey include 'any document which is designed to procure orders for a security.'"[3/] While it is true that the Dacey form letters did not in specific terms offer Fund shares, there can be little doubt that they were intended to whet the appetite of the recipients for such an investment, and did, in fact, present them with a specific means for obtaining participation in the Fund through a purchase of shares in any one of ten funds then held in the portfolio of the Fund, coupled with an assurance that such shares would be exchanged without charge for Fund shares as soon as publicly available. It is clear therefore that the form letters constituted a first step of an effort to sell Fund shares, and as such were "prospectuses" as that term has been defined and interpreted under the Securities Act.[4/] Since the requirements of Section 10 were not met by these form letters, it follows that respondents violated Section 5(b) of the Securities Act in mailing these letters to the 87 individuals

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3/ Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843, 848 (1959).

4/ See Gearheart & Otis, Inc., Securities Exchange Act Release No. 7329 (June 2, 1964); G. J. Mitchell, Jr., Co., 40 S.E.C. 409 (1960); Carl M. Loeb, Rhoades & Co., supra; First Maine Corporation, 38 S.E.C. 882 (1959).

and companies.

Respondents' argument that the form letters were merely replies to inquiries from the public and cannot be regarded as prospectuses seems to be predicated upon the misconception that before a letter can be considered a prospectus, the communication must contain a specific offer of a security. As indicated above, a "prospectus" within the meaning of the Securities Act is not so limited, and for good reason. Such limitation as respondents suggest would frustrate Congressional intent, allowing a distributor of securities to avoid the full disclosures required under the Securities Act by disclaiming making an offer while furnishing whatever information he judges expedient to supply.[5/] Moreover, the respondents' contention that the form letters were no more than a reply to letters received is not supported by the example that Dacey adverted to in his testimony. The letter of Peter Zanini requesting a prospectus and asking whether the Fund would only be investing in other mutual funds did not call for the two-page form response. Under the circumstances, it must be concluded that respondents had in mind

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5/ Cf. Carl M. Loeb, Rhoades & Co., supra.

not only a "courteous reply" but also a sales effort that would lead to purchases of Fund shares by the recipients of the form letters. Nor does respondents' statement in the form letters that recipient would be sent "a prospectus as soon as one is available" change the character of those letters. Indeed, even a statement to the effect that Fund shares would be offered only by the prospectus which was to be furnished would not accomplish that result.[6/]

In addition to the two form letters, five personal letters that registrant sent in corresponding with four of its customers[7/] fall within the definition of "prospectus" within the meaning of the Securities Act and fail to meet the requirements of Section 10 of that Act. Each of these letters advises the addressee to retain existing investments or to invest in other mutual funds and further refers to the potential for exchanging those investments for Fund shares, and does so in a context that compels the conclusion that the five letters include offers to sell Fund shares to the addressees. By including those offers to sell, registrant

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6/ 1 Loss, Securities Regulation 225-26 (2nd Ed. 1961).

7/ Division Exhibits: DX 4, DX 5 at 1, 3, DX 7, DX 9.

caused the letters in question to become prospectuses.[8/]

With respect to respondents' argument that "they are privileged to talk about their fund to their heart's content -- . . ." under their right of free speech guaranteed by the United States Constitution, it appears that respondents ignore the fact that such right is not unconditional, but subject to control by Congress through the exercise of its constitutional powers.[9/] One of the controls upon the right of free speech was imposed by the Securities Act, which requires full and fair disclosure of material facts in the offer and sale of securities in accordance with the provisions of that Act.

It further appears that the form letters used by respondents do not conform to the standards set forth in the Commission's Statement of Policy[10/] relating to sales literature used in the sale of investment company shares. In particular, the form letters are materially misleading in that they imply an assurance that an investor's capital will increase, but do

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8/ Carl M. Loeb, Rhoades & Co., supra.

9/ See Donaldson v. Read Magazine, 333 U.S. 178, 190-91 (1948).

10/ Investment Company Act Release No. 2621 (Oct. 31, 1957).

not point out the market risks inherently involved in an investment in Fund shares.[11/] The comparison of the Fund's performance with that of the market as represented by the Dow-Jones Industrial Average included in the form letters is also misleading in that the letters fail to point out (1) that the particular index or average and period were selected by respondents; (2) that the results disclosed should be considered in the light of the Fund's investment policy and objectives, the characteristics and quality of the Fund's investments, and the period selected; (3) the material differences or similarities between the subjects of comparison; and (4) what the comparison is designed to show.[12/]

In view of the foregoing, it is concluded that registrant, together with, or wilfully aided and abetted by Dacey, wilfully violated Sections 5(b) and 17(a) of the Securities Act.

Wilfulness

Respondents argue that a characterization of the violations as wilful is without foundation. Their position, however, which appears to be based upon the assumption that an intent to violate must be proved before a wilful violation is established,

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11/ Id. at 2.

12/ Id. at 3.

is contrary to well-established principles on this point. The Commission and the courts have ruled consistently that for purposes of Section 15(b) of the Exchange Act, wilfulness does not require that a person know that he is breaking the law but only that he intended to do the act that resulted in the violation.[13/] Measured by such standard, there is no question that respondents' violations were wilful.

Public Interest

While respondents' violations cannot be condoned, it does not appear necessary or appropriate in the public interest to impose ninety-day suspensions as proposed by the Division. The letters upon which the charges against respondents were predicated were not part of a sales campaign, but responses to unsolicited inquiries, and there were no sales of the Fund shares actually effected. The record also reflects that respondents did not appreciate the full scope of the definition of a "prospectus" within the meaning of the Securities Act, and acted out of ignorance of the law in that regard, rather than with intent to evade the regulatory provisions of that Act.

Cognizance is taken of the fact that respondents were censured and fined in March, 1965 by a District Business Conduct

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13/ Tager v. SEC, 344 F. 2d 5 (2d Cir. 1965); Hughes v. SEC, 174 F. 2d 969, 977 (D.C. Cir. 1949); Churchill Securities Corp., 38 S.E.C. 856, 859 (1959), and cases cited therein.

Committee of the NASD. However, the impact of that decision is largely vitiated by a memorandum of March 29, 1965 regarding that action in which the NASD's then Secretary and Associate General Counsel informed the NASD National Business Conduct Committee that:

> There was considerable feeling on the part of the Chairman and Vice-Chairman that the member had been subjected to harassment in the handling of the investigation, complaint and Decision. The Statement of Policy violation charges (24) included some letters going back as far as 1957 and were said to have arisen from some 15,000 pieces of literature over a 10-year period.

Under the circumstances, and in view of the indicated excellent reputation that Dacey enjoys in as well as outside of the financial community, it is concluded that censure will suffice to cause respondents to recognize their shortcomings in the interpretation of the securities laws and to seek appropriate assistance to avoid further inadvertent violations of the Securities Act.[14/]

Accordingly, IT IS ORDERED that Norman F. Dacey & Associates, Inc. and Norman F. Dacey be, and they hereby are censured.

14/ All proposed findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this initial decision, they are accepted.

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

Pursuant to Rule 17(f) of the Rules of Practice, 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.

Warren E. Blair
Hearing Examiner

Washington, D. C.
April 3, 1970