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UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

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In the Matter of :  
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FINANCIAL COUNSELLORS, INC. :  
Box 71, Church Street Station :  
90 Church Street :  
New York, New York :  
:  
File No. 8-11276 :  
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**FILED**

**MAY 27 1964**

SECURITIES & EXCHANGE COMMISSION

RECOMMENDED DECISION

Sidney Ullman  
Hearing Examiner

Washington, D. C.  
May 27, 1964

UNITED STATES OF AMERICA

before the

SECURITIES AND EXCHANGE COMMISSION

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In the Matter of :  
FINANCIAL COUNSELLORS, INC. :  
Box 71, Church Street Station :  
90 Church Street : RECOMMENDED DECISION  
New York, New York :

File No. 8-11276 :

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BEFORE: Sidney Ullman, Hearing Examiner.

APPEARANCES: William Lerner, Robert I. Kleinberg,  
Richard J. Blumberg and David P. Bicks, Esqs.,  
New York Regional Office, for the Division of  
Trading and Markets.

Ernest F. Boruski, pro se.

I. NATURE OF PROCEEDINGS

The issues under consideration in this Recommended Decision are:

- (1) Whether, pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), it is in the public interest for the Securities and Exchange Commission ("Commission") to revoke the registration as a broker and dealer of Financial Counsellors, Inc. ("registrant"),
- (2) Whether, pursuant to Section 15A of the Exchange Act, registrant should be suspended or expelled from membership in the National Association of Securities Dealers, Inc. ("N.A.S.D."), a registered national securities association, and
- (3) Whether, within the meaning of Section 15A(b)(4) of the Exchange Act, Ernest F. Boruski ("Boruski") is a cause of any order of revocation or of suspension or expulsion from the N.A.S.D. which may be issued by the 1/ Commission.

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1/ Section 15(b) of the Exchange Act, as applicable here, provides that the Commission shall revoke the registration of any broker or dealer if it finds that it is in the public interest and that such broker or dealer or any person directly or indirectly controlling such broker or dealer has willfully made any false or misleading statement in any application for registration or in any amendment thereto.

Section 15A(1)(2) of the Exchange Act provides that the Commission may suspend for not more than twelve months or expel from a registered securities association any member who has violated any provision of the Exchange Act or any rule thereunder, if it finds such action to be necessary or appropriate in the public interest or for the protection of investors.

Under Section 15A(b)(4) of the Exchange Act, in the absence of the Commission's approval or direction, no broker or dealer may be continued in membership in a national securities association if the broker or dealer or any controlling person of such broker or dealer was a cause of any order of revocation, suspension, or expulsion which is in effect.

On December 26, 1963 the Commission issued an order for public proceedings and a notice of hearing in this matter, pursuant to Sections 15(b) and 15A of the Exchange Act. The order asserted that the Division of Trading and Markets ("Division") had obtained information which tended to show that registrant was directly or indirectly controlled by Boruski and had willfully violated Section 15(b) of the Exchange Act and Rules 17 CFR 240.15b-1 and 17 CFR 240.15b-2 thereunder in making false and misleading statements in its application for registration as a broker-dealer and in amendments filed thereto by failing to name Boruski therein as a person who directly or indirectly controls the business of registrant. The order fixed the time and place for a public hearing before the undersigned on January 13, 1964.

Pursuant to the provisions of the order of December 26, 1963, hearings were held to determine whether it is necessary or appropriate in the public interest or for the protection of investors to suspend the registrant's broker-dealer registration pending final determination whether such registration should be revoked.<sup>2/</sup> Thereafter the Commission issued its findings, opinion and order dated April 22, 1964, suspending registrant's registration pending final determination of the issue as to revocation.<sup>3/</sup> The Commission's decision was

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2/ With respect to suspension, Section 15(b) provides:

"Pending final determination whether any such registration shall be revoked, the Commission shall by order suspend such registration if, after appropriate notice and opportunity for hearing, such suspension shall appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors."

3/ Securities Exchange Act Release No. 7296.

based upon a Recommended Decision of the undersigned filed February 3, 1964 recommending suspension, and on the Commission's review of the record in the proceedings on the issue of suspension.<sup>4/</sup> A hearing for the purpose of taking additional evidence on the remaining questions of revocation, of suspension or expulsion from the N.A.S.D. and of Boruski as a cause of any remedial action had previously been held on February 10, 1964. At this reconvened hearing the Division presented no additional evidence on these remaining issues, but relied on the evidence adduced at the earlier hearing. Boruski, however, gave testimony and introduced documentary evidence in an effort to refute the earlier evidence that he controlled the registrant.

Following the conclusion of the hearing on February 10, 1964, the Division and Boruski submitted proposed findings of fact, conclusions of law and briefs on the issues now under consideration. For the reasons indicated below, based upon the evidence adduced at the hearings, including the testimony of witnesses and the exhibits received, and based upon the findings in the decision of the Commission of April 22, 1964, which are adopted and incorporated herein by reference, the Hearing Examiner recommends that the registration should be revoked, that registrant should be expelled from the N.A.S.D., and that Boruski should be named a cause of any remedial action which may be taken by the Commission.

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<sup>4/</sup> The order of December 26, 1963 provided that hearings should be held on the issue of suspension of the registration pending final determination on the question of revocation, and that the hearing be adjourned and at a subsequent date reconvened for the purpose of taking additional evidence on the remaining questions, i.e., that of revocation, that of suspension or expulsion of registrant from the N.A.S.D., and that of Boruski as a cause of any Commission remedial action.

## II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Commission's decision of April 22, 1964 expressed agreement with the finding of the Hearing Examiner in his Recommended Decision of February 3, 1964, that the record on the suspension issue in this matter indicates that Boruski had the power to direct or cause the direction of the management and policies of the registrant, and that registrant's application for registration and the amendments thereto were false and misleading in failing to list Boruski as a controlling person. The Examiner, in adopting and incorporating by reference the findings of the Commission, deems it unnecessary to repeat the evidentiary basis for said findings. The Commission's decision on suspension is attached hereto as Appendix A.<sup>5/</sup>

2. No evidence was adduced at the reconvened hearing which contradicted or refuted the clear and convincing evidence at the earlier hearing that Boruski created, dominated and controlled the registrant corporation in all respects. On the contrary, testimony of Boruski on cross examination supported the evidence of his control of registrant at all times. His testimony reaffirmed the earlier proof that he created the registrant corporation for the purpose of seeking to avoid what he claimed would be the "confiscation" of commissions due to him personally as a broker-dealer from various mutual funds on account of sales made on behalf of these mutual funds. The Commission found, based on the evidence received during the earlier hearing

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<sup>5/</sup> By an order dated April 30, 1964 the Commission denied a request by registrant and Boruski for a stay of its order of suspension pending the determination of a petition for review of said order to be filed in the United States Court of Appeals. It is understood that such petition has since been filed.

on suspension, and stated in its April 22, 1964 decision, that:

" . . . Boruski admittedly conceived the idea of forming registrant to protect future concessions on sales of Keystone certificates previously effected by him from being 'confiscated' by Keystone in the event of revocation or withdrawal of his broker-dealer registration."

Cross examination of Boruski at the reconvened hearing disclosed even more clearly that in creating the registrant corporation Boruski was seeking to prevent a threatened "confiscation" of commissions due and to become due not only from Keystone but also from other mutual funds, and that he sought by subterfuge and artful design to conceal the fact that he, Boruski, was in any way connected with or in control of the registrant corporation.

3. Registrant's failure, as an integral part of this plan and subterfuge of Boruski, to disclose the latter's control in the application and in amendments thereto was willful and intentional, was a deliberate effort to thwart the regulatory scheme of the Act, and constituted a violation of Section 15(b) of the Act and Rule 240.15b-1 thereunder. Registrant's statements in the application and in amendments thereto were false and misleading with respect to a material fact, i.e., that no person not named in the application and amendments thereto directly or indirectly controlled the registrant.

4. Registrant willfully violated Section 15(b) of the Act and Rule 240.15b-2 thereunder in failing to file promptly an amendment to its application for registration as a broker-dealer in order to correct the inaccuracy of the above statements in the application and in amendments thereto filed with the Commission.

5. The above violations of the Act and Rules were caused by and resulted from the willful, deliberate and intentional actions of Boruski.

6. The importance of the truthful and accurate disclosure of the controlling persons in a broker-dealer's application was pointed out in the Commission's findings, opinion and order on suspension, and reiteration in this Recommended Decision appears to be unnecessary.

7. The effort by Boruski to conceal the true facts from the Commission by filing the false and misleading application was compounded by his continued efforts at the hearings in this matter to deceive and to obfuscate the issues under consideration. Boruski's plan to conceal the truth permeated his activities in connection with the registrant corporation from the time he organized the corporation in December 1962 through the submission of his proposed findings, conclusion and brief, following the termination of the hearing on February 10, 1964.

8. The manner in which Boruski, in attempting to deceive the Commission, the N.A.S.D., and the several mutual funds, organized the registrant corporation without revealing his interest and control thereof, is set forth in the Commission's decision. Repetition of the details of his plan would serve no useful or necessary purpose at this time.

### III. RECOMMENDATION

In view of the willful violations found above, the Hearing Examiner recommends that it is necessary in the public interest and for the protection



of investors that registrant's registration as a broker-dealer be revoked and that registrant be expelled from membership in the N.A.S.D. The Hearing Examiner further recommends that Boruski be named as a cause of <sup>6/</sup> any order of revocation or expulsion which may be entered herein.

Respectfully submitted,

  
Sidney Ullman  
Hearing Examiner

Washington, D. C.  
May 27, 1964

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6/ To the extent that the proposed findings and conclusions submitted to the Hearing Examiner are in accord with the views set forth herein they are accepted, and to the extent that they are inconsistent therewith they are expressly rejected.

(Securities Exchange Act Release No. 7296)

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION  
April 22, 1964

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In the Matter of	:
FINANCIAL COUNSELLORS, INC.	:
Post Office Box 71	:
Church Street Station	:
90 Church Street	:
New York 8, New York	:
File No. 8-11276	:
Securities Exchange Act of 1934 -	:
Sections 15(b) and 15A	:

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FINDINGS,  
OPINION  
AND ORDER  
SUSPENDING  
BROKER-  
DEALER  
REGISTRATION

The issue now before us is whether, under Section 15(b) of the Securities Exchange Act of 1934 ("Act"), it is necessary or appropriate in the public interest or for the protection of investors to suspend the registration as a broker and dealer of Financial Counsellors, Inc. ("registrant") pending final determination of whether such registration should be revoked. The order for proceedings alleges that registrant's application for broker-dealer registration filed in January 1963 and amendments thereto failed to disclose that Ernest F. Boruski controls registrant's business, and that no amendment was filed to disclose that fact.

Following hearings on the suspension issue our Division of Trading and Markets submitted proposed findings and a supporting brief, and Boruski, who became a party in the proceedings, filed briefs. The hearing examiner recommended that registrant's registration be suspended, and Boruski filed exceptions and a supporting brief.

On the basis of the recommended decision of the hearing examiner and of our review of the record, and for the reasons set forth herein and in the recommended decision, we make the following findings:

Boruski has been a registered broker-dealer since 1951. In 1956 he entered an agreement with The Keystone Company of Boston ("Keystone"), principal underwriter for the Keystone Custodian Funds ("Funds"), authorizing him to participate in the distribution of Certificates of Participation in the Funds on a concession basis, and commenced to effect transactions in these mutual fund securities. The agreement contained a representation by Boruski that he is registered with us and the National Association of Securities Dealers, Inc. ("NASD"), and recited that Keystone reserves the right to terminate the agreement at any time. In March 1962, Boruski was advised by Keystone that it would not accept new business from him, and on July 31, 1962 we instituted proceedings to determine whether to revoke his broker-dealer registration and expel or suspend him from NASD membership for alleged violations of the financial reporting requirements of the Act.

Thereafter, Boruski admittedly conceived the idea of forming registrant to protect future concessions on sales of Keystone certificates previously effected by him from being "confiscated" by Keystone in the event of revocation or withdrawal of his broker-dealer registration. Registrant was organized in December 1962 and became registered with us. It entered into an agreement with Keystone for its participation in the distribution of securities in the Funds, the agreement being signed on registrant's behalf by its president, Samuel H. Furman, and thereafter concessions were paid by Keystone to registrant. In July 1963, pursuant to Boruski's authorization and to registrant's request contained in a letter prepared by Boruski and signed by Furman which stated that Boruski had no connection with registrant, Keystone transferred the accounts in Boruski's name to registrant. 1/

Registrant had eleven initial stockholders, each holding one share representing a 9.09% interest in the company. Boruski had requested those stockholders to acquire the stock, and each stockholder signed a proxy authorizing Boruski's wife under her maiden name to vote the stock at the 1963 stockholders' meeting. Registrant's initial officers and directors, 2/ who occupied those positions at Boruski's request, performed no functions except those of a ministerial nature requested by Boruski, and no stockholders' or directors' meetings were held. Indeed, Furman was recruited for the office of registrant's president by a letter prepared by Boruski stating that the president's sole duties would be to sign agreements with mutual funds and engage in correspondence with regulatory authorities. 3/ Boruski admitted that he prepared various documents relating to the formation of registrant and for registering it with us, the National Association of Securities Dealers, Inc., and state regulatory authorities.

Under Rule 17 CFR 240.12b-2 promulgated under the Act, the test of control is the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a company. We agree with the hearing examiner that the record on the suspension issue indicates that Boruski had such power and accordingly controlled registrant within the meaning of that Rule, and that registrant's application for registration and amendments thereto were false and misleading in failing to list Boruski as a controlling person. 4/

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- 1/ The letter also stated that registrant arranged to purchase all of Boruski's Keystone accounts. Boruski admitted that the statement was not true but asserted that "any efforts to circumvent the seizure of ... funds" by Keystone was "proper."
- 2/ An amendment to registrant's application for broker-dealer registration filed in September 1963 listed new officers and directors.
- 3/ An amendment to the registration application filed in April 1963 stated in effect that registrant's president was the only officer active in its securities business.
- 4/ An amendment filed in February 1964 stated that Boruski was secretary and director but inactive in the securities business of registrant.

The application for registration is a basic and vital part in our administration of the provisions of the Act respecting brokers and dealers. It is particularly essential to the efficacy of the regulatory scheme under the Act that a broker-dealer's application disclose controlling persons; concealment of the real principals defeats the purpose of the registration provisions. 5/ The record evidences a deliberate attempt by registrant and Boruski to circumvent and thwart the regulatory scheme. 6/ Registrant was organized by Boruski specially to enable him to engage in the securities business as an undisclosed principal and receive concessions on mutual fund share sales, particularly in the event of the revocation or withdrawal of his own broker-dealer registration. 7/

In determining whether the conduct involved here warrants suspension, we have taken into consideration the fact that on a prior occasion, in sustaining the disciplinary action taken by the NASD suspending Boruski from NASD membership for 60 days for, among other things, using misleading sales literature in the sale of mutual fund shares, we found that he demonstrated a "lack of sympathy for and even hostility toward the objectives and regulations of the NASD indicating a general unwillingness to comply with such regulations." 8/ Boruski has thus manifested a consistent lack of appreciation for and refusal to comply with, if not actual contempt for, the objectives and regulations underlying the regulation of brokers and dealers for the protection of public investors.

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5/ L. H. Feigin, 40 S.E.C. 594, 597 (1961); Jefferson Associates, Inc., 39 S.E.C. 271, 273 (1959).

6/ While Furman was being recruited for the office of president, he received a proposed organization chart of registrant prepared by Boruski, and thereafter received a document entitled "Explanation of Organizational Chart" which stated, among other things, "because registration papers would immediately disclose any party that the SEC or NASD had previously gotten, it is necessary to use corporate set ups without 'patsy' party's name appearing as a stockholder, director, officer, or associated party. Altho somewhat difficult to do, FCI (registrant) has been successfully set up to be in the clear in this respect. If anything should happen to FCI, a new corporation can be set up to take its place. Some key personnel may have to be dropped on paper, but the overall set up can be retained and no personnel will lose ... fees just because their name may have to be dropped." Boruski refused to testify whether he had prepared the "Explanation of Organizational Chart," invoking the privilege against self-incrimination.

7/ Boruski asserted that registrant was dormant and had no securities business or income of its own but acted merely as a "clearing broker," and as a conduit for the receipt and transmission of checks to other broker-dealers. He stated that the Keystone accounts in his name transferred to registrant belonged to another dealer at the time of the transfer and that the commissions transmitted by Keystone to registrant were forwarded to the "proper" dealer and that "donations" were obtained from other broker-dealers for the payment of bank charges in registrant's bank account. However, he refused, on grounds of privilege against self-incrimination, to identify the dealers who assertedly owned the accounts and furnished the "donations."

8/ Ernest F. Boruski, Jr., 40 S.E.C. 258, 264 (1960) aff'd 289 F. 2d 738 (C.A. 2, 1961).

Under all the circumstances we adopt the hearing examiner's conclusion that a sufficient showing has been made to make it necessary and appropriate in the public interest and for the protection of investors to suspend registrant's broker-dealer registration pending final determination of the issue of revocation of such registration. 9/

Accordingly, IT IS ORDERED that the registration as a broker and dealer of Financial Counsellors, Inc. be, and it hereby is, suspended pending final determination whether such registration shall be revoked.

By the Commission (Chairman CARY, and Commissioners WOODSIDE, COHEN, WHITNEY and OWENS).

Orval L. DuBois  
Secretary

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9/ To whatever extent the exceptions to the recommended decision of the hearing examiner involve issues which are relevant and material to the decision, we have by our findings and opinion ruled upon them. We sustain such exceptions to the extent that they are in accord with the views herein, and we overrule them to the extent that they are inconsistent with such views.