

# sec news digest

Issue 95-149

August 3, 1995

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## RULES AND RELATED MATTERS

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### EXEMPTIONS FROM RULES 10b-6 AND 10b-13 FOR NEW YORK STOCK EXCHANGE SPECIALISTS

Pursuant to delegated authority, on July 31 the Division of Market Regulation issued a letter granting exemptions from Rules 10b-6 and 10b-13 under the Securities Exchange Act of 1934 to allow New York Stock Exchange specialists to continue to act in their specialist capacity during a distribution of or a tender offer for specialty securities when they otherwise would be subject to those rules because of their affiliates' participation in such distribution or tender offer. (Rel. 33-7202; 34-36044; International Series Rel. 833)

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## ENFORCEMENT PROCEEDINGS

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### COMMISSION SUSTAINS NASD DISCIPLINARY ACTION AGAINST RICHARD LANIGAN

The Commission has sustained the disciplinary action taken by the NASD against Richard J. Lanigan, a registered representative of a member firm. The NASD had censured Lanigan, fined him \$2,500 and suspended him from association with any member for five business days.

The Commission found that Lanigan failed to honor an arbitration award in a timely manner. Lanigan did not make a good faith effort to pay the award promptly, and only commenced settlement efforts when faced with disciplinary action by the NASD. The Commission also found that Lanigan failed to update his Form U-4 to disclose the arbitration award against him. (Rel. 34-36028)

## HARVEY SORLING INDICTED ON SECURITIES FRAUD AND SALES OF UNREGISTERED SECURITIES

The United States Attorney for the Eastern District of California and the Commission announced that on July 14 the Grand Jury indicted Harvey Dale Sorling on five counts of Securities Fraud (15 U.S.C. Section 77q(a), 78j and 78 ff and 17 C.F.R. Section 240.10b-5); five counts of Sales of Unregistered Securities (15 U.S.C. Section 77e(c)); and one count of Conspiracy to sell shares of unregistered securities and securities fraud (18 U.S.C. Section 371).

The Indictment alleges that from May 21, 1992 through April 30, 1994, Harvey Dale Sorling and others sold stock or limited partnership interests in companies he knew were not registered with the Commission and that these companies were required to file a registration statement with the Commission. In addition, in connection with the purchase or sale of these shares or interests, Sorling's false statements to the investors included: the investors' monies would be used to obtain a fortune estimated to be in excess of one trillion dollars; this fortune was created through "Bank Roll Programs and The Swaps Market"; the investors would receive a return on their investment of \$1,000 to \$2,000 for every dollar invested; none of the investors' monies would be used for payment to Sorling. As a result of Sorling's misrepresentations, he obtained over \$1,000,000 from investors in the United States and Canada. [U.S. v. Harvey Dale Sorling, Criminal Action No. CR-S-95-339, WBS, E.D. Cal.] (LR-14584)

## DAVID DENNIS VAN PELT PLEADS GUILTY TO SECURITIES FRAUD

The United States Attorney for the Eastern District of California and the Commission today announced that on July 31 David Dennis Van Pelt pled guilty to one count of securities fraud and one count of tax fraud. Sentencing is scheduled for October 10, 1995.

The Indictment alleged that from November, 1990 through June, 1992 David Dennis Van Pelt, in connection with the purchase or sale of stock in DBS Network, Inc., a company purported to be a viable, commercial developer of direct broadcast satellite technology in the United States, made false representations to investors. The scheme consisted of making false representations concerning the status of FCC licenses; contracts and negotiations between DBS Network, Inc. and builders and launchers of commercial satellites; financing commitments that DBS Network, Inc. had purportedly obtained; and the value of the stock in DBS Network, Inc. [U.S. v. David Dennis Van Pelt, Criminal Action No. CR-S-95-47, ELG, E.D. Cal.] (LR-14585)

## CIVIL ACTION AGAINST STIFEL, NICOLAUS AND COMPANY, INC.

The Commission today filed a complaint in the U.S. District Court for the Western District of Oklahoma against Stifel, Nicolaus and Company, Inc., (Stifel) a broker-dealer. The Commission alleged that in accepting undisclosed payments from third parties that sold investments to municipal bond issuers, Stifel violated Section 17(a) of the Securities Act, Sections 10(b), 17(a)(1) and 15B(c)(1) of the Securities Exchange Act and Rules 10b-5, 17a-3 and 17a-4 thereunder. Stifel also violated Rules G-8, G-9 and G-17 of the Municipal Securities Rulemaking Board (MSRB).

The complaint alleges that from 1989 through 1993, Stifel received millions of dollars in undisclosed payments from third parties that sold or brokered investments to municipal issuers and undermined the integrity of the bidding process set up for the purchase of certain of those investments. The complaint further alleges that Stifel defrauded investors by failing to disclose the payments, thereby depriving investors of information material to an assessment of the tax exempt status of the bonds.

Without admitting or denying the allegations contained in the complaint, Stifel consented to the entry of a Final Judgment of Permanent Injunction against violations of the provisions of the federal securities laws cited above. In addition, Stifel also has agreed to pay \$1,436,378 representing disgorgement of undisclosed payments, prejudgment interest and civil money penalties. [SEC v. Stifel, Nicolaus and Company, Inc., United States District Court for the Western District of Oklahoma, Civil Action No. 95-1190] (LR-14587)

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## INVESTMENT COMPANY ACT RELEASES

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### AMERICAN SKANDIA TRUST, ET AL.

An order has been issued pursuant to Section 6(c) of the Investment Company Act exempting American Skandia Trust (Trust) and American Skandia Investment Services, Incorporated (ASISI) from Sections 9(a), 13(a), 15(a) and 15(b) of the Act and Rules 6e-2(b)(15) and 6e-3(T)(b)(15) thereunder. The order provides exemptions to the extent necessary to permit shares of any current or future series of the Trust and shares of any other investment company that is designed to fund insurance products and for which ASISI, or any of its affiliates may in the future serve as investment adviser, administrator, manager, principal underwriter or sponsor to be sold to and held by (i) variable annuity and variable life insurance company separate accounts of both affiliated and unaffiliated life insurance companies and (ii) qualified pension and retirement plans outside the separate account context. (Rel. IC-21263 - August 1)

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## HOLDING COMPANY ACT RELEASES

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### NORAM ENERGY CORP.

An order has been issued to NorAm Energy Corporation for an order of exemption in connection with its contemplated acquisition of an interest in Gas Natural, S.A., a gas public utility, shares of which will be sold by the Colombian government pursuant to a privatization plan. (Rel. 35-26345)

### THE SOUTHERN COMPANY

An order has been issued authorizing The Southern Company (Southern) to issue and sell up to \$1 billion of short-term and term loan notes to lenders and/or commercial paper to dealers from time to time prior to April 1, 2000. The proceeds will be used to make direct or indirect investments in Southern subsidiaries, including exempt wholesale generators and foreign utility companies. (Rel. 35-26346)

### THE SOUTHERN COMPANY, ET AL.

A supplemental order has been issued authorizing The Southern Company (Southern), a registered holding company, and its subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company, Southern Company Services, Inc., Southern Electric International, Inc., Southern Nuclear Operating Company, Inc., and Southern Electric Generating Company, a subsidiary of Alabama Power Company and Georgia Power Company, to issue and sell and use the proceeds from sale of up to \$37 million of common stock to various Southern employee benefit plans for investments in exempt wholesale generators and foreign utility companies to the extent provided for in rules 53 and 54. (Rel. 35-26347)

### THE SOUTHERN COMPANY, ET AL.

A supplemental order has been issued authorizing a proposal by The Southern Company (Southern), Atlanta, Georgia, a registered holding company, and its electric public utility subsidiaries, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Savannah Electric and Power Company and Southern Electric Generating Company, a subsidiary of Alabama Power Company and Georgia Power Company, to have the Commission release jurisdiction over Georgia Power Company's issuance and sale of up to \$300 million of short-term notes and commercial paper from time-to-time, through March 31, 1996. (Rel. 35-26348)

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## SELF-REGULATORY ORGANIZATIONS

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### WITHDRAWALS SOUGHT

A notice has been issued giving interested persons until August 22 to comment on the application of MedicalControl, Inc. to withdraw its Common stock, \$.01 Par Value, and its Warrants expiring May 13, 1996, from listing and registration on the Pacific Stock Exchange. (Rel. 34-36045)

A notice has been issued giving interested persons until August 22 to comment on the application of NuMed Home Health Care, Inc. to withdraw its Common Stock, \$.001 Par Value, and its Redeemable Common Stock Purchase Warrants, expiring February 7, 2000, from listing and registration on the Boston Stock Exchange. (Rel. 34-36046)

### WITHDRAWAL GRANTED

An order has been issued granting the application of Paxcon Communications Corporation to withdraw from listing and registration its Class A Common Stock, \$.01 Par Value on the Boston Stock Exchange. (Rel. 34-36047)

### ACCELERATED APPROVAL OF PROPOSED RULE CHANGES

The Commission granted accelerated approval to a proposed rule change submitted by the New York Stock Exchange (SR-NYSE-95-15) to permit the use of automated telephone voting systems by member organizations or their proxy agent. (Rel. 34-36040)

The Commission granted accelerated approval to a proposed rule change and granted accelerated approval to Amendment No. 1 of the proposed rule change relating to amendments to Rule 460.20 submitted by the New York Stock Exchange (SR-NYSE-95-21). (Rel. 34-36043)

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## SECURITIES ACT REGISTRATIONS

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The following registration statements have been filed with the SEC under the Securities Act of 1933. The reported information appears as follows: Form, Name, Address and Phone Number (if available) of the issuer of the security; Title and the number and/or face amount of the securities being offered; Name of the managing underwriter or depositor (if applicable); File number and date filed; Assigned Branch; and a designation if the statement is a New Issue.

S-8 20TH CENTURY INDUSTRIES, 6301 OWENSMOUTH AVE STE 700, WOODLAND HILLS, CA  
91367 (818) 704-3700 - 1,000,000 (\$12,000,000) COMMON STOCK. (FILE  
33-61355 - JUL. 28) (BR. 10)

REGISTRATIONS CONT.

- S-8 AMERICAN BUSINESS PRODUCTS INC, 2100 RIVEREDGE PKWY STE 1200,  
PO BOX 105684, ATLANTA, GA 30328 (404) 953-8300 - 500,000 (\$9,406,250)  
COMMON STOCK. (FILE 33-61359 - JUL. 28) (BR. 12)
- S-3 DUKE REALTY INVESTMENTS INC, 8888 KEYSTONE CROSSING STE 1200,  
INDIANAPOLIS, IN 46240 (317) 574-3531 - 360,000,000 (\$360,000,000)  
STRAIGHT BONDS. (FILE 33-61361 - JUL. 28) (BR. 5)
- S-3 MENS WEARHOUSE INC, 5803 GLENMONT DR, HOUSTON, TX 77081 (713) 664-3692  
- 2,300,000 (\$72,737,500) COMMON STOCK. (FILE 33-94358 - JUL. 27) (BR. 2)
- SB-2 EUPHONIX INC (CA), 220 PORTAGE AVE, PALO ALTO, CA 94306 (415) 855-0400  
- \$19,406,250 COMMON STOCK. (FILE 33-94898-LA - JUL. 21) (BR. 3  
- NEW ISSUE)
- S-8 U S PAWN INC, 7215 LOWELL BLVD, WESTMINSTER, CO 80030 (303) 657-3550 -  
150,000 (\$300,000) COMMON STOCK. (FILE 33-95012 - JUL. 26) (BR. 1)
- S-8 RAMSAY MANAGED CARE INC, ONE POYDRAS PLAZA STE 1725, 639 LOYOLA AVE,  
NEW ORLEANS, LA 70113 (504) 585-0515 - 1,152,000 (\$4,032,000) COMMON STOCK.  
(FILE 33-95018 - JUL. 26) (BR. 6)
- S-8 LITTLEFUSE INC, 800 EAST NORTHWEST HIGHWAY, DES PLAINES, IL 60016  
(708) 824-1188 - 30,000 (\$1,031,400) COMMON STOCK. (FILE 33-95020 -  
JUL. 26) (BR. 3)
- S-1 RESURGENCE PROPERTIES INC, 411 WEST PUTNAM AVENUE, GREENWICH, CT 06830  
(214) 879-5800 - 4,110,000 (\$32,880,000) COMMON STOCK. (FILE 33-95024 -  
JUL. 26) (BR. 5)
- S-1 SYNAGRO TECHNOLOGIES INC, 20515 SH249, STE 380, HOUSTON, TX 77070  
(713) 370-6700 - 2,400,000 (\$19,930,000) COMMON STOCK. (FILE 33-95028 -  
JUL. 27) (BR. 8)
- S-8 EVEREST MEDICAL CORPORATION, 13755 1ST AVE N STE 500, MINNEAPOLIS, MN  
55441 (612) 473-6262 - 100,000 (\$234,000) COMMON STOCK. (FILE 33-95030 -  
JUL. 26) (BR. 8)
- S-1 CEL SCI CORP, 66 CANAL CENTER PLZ STE 510, ALEXANDRIA, VA 22314  
(703) 549-5293 - 2,415,000 (\$7,943,625) COMMON STOCK. UNDERWRITER:  
NEIDIGER TUCKER BRUNER INC. (FILE 33-95032 - JUL. 26) (BR. 4)
- S-8 MEDQUEST INC - 210,000 (\$1,338,750) COMMON STOCK. (FILE 33-95034 -  
JUL. 27) (NEW ISSUE)
- S-1 STORMEDIA INC, 390 REED ST, SANTA CLARA, CA 95050 (408) 988-1409 -  
460,000 (\$20,125,000) COMMON STOCK. (FILE 33-95036 - JUL. 27) (BR. 9)
- S-3 MINNESOTA EDUCATIONAL COMPUTING CORP, 6160 SUMMIT DR NORTH, MINNEAPOLIS,  
MN 55430 (612) 569-1500 - 3,841,000 (\$111,869,125) COMMON STOCK. (FILE  
33-95038 - JUL. 27) (BR. 9)
- S-3 SIERRA PACIFIC RESOURCES, 6100 NEIL RD, P O BOX 30150, RENO, NV 89520  
(702) 689-3600 - 500,000 (\$10,625,000) COMMON STOCK. (FILE 33-95044 -  
JUL. 27) (BR. 8)
- S-3 AES CORPORATION, 1001 N 19TH ST, ARLINGTON, VA 22209 (703) 522-1315 -  
600,000 (\$18,300,000) COMMON STOCK. (FILE 33-95046 - JUL. 27) (BR. 8)
- S-8 PETSMART INC, 10000 N 31ST AVE, STE C-100, PHOENIX, AZ 85051  
(602) 944-7070 - 4,500,000 (\$124,201,291.12) COMMON STOCK. (FILE 33-95050  
- JUL. 27) (BR. 1)
- S-8 ELECTROGLAS INC, 2901 CORONADO DRIVE, SANTA CLARA, CA 95054  
(408) 727-6500 - 750,000 (\$42,750,000) COMMON STOCK. (FILE 33-95052 -  
JUL. 27) (BR. 10)

SECURITIES AND EXCHANGE COMMISSION

Release Nos. 33-7202; 34-36044; International Series Release  
No. 833

August 1, 1995

**EXEMPTIONS FROM RULES 10b-6 AND 10b-13 FOR NEW YORK STOCK  
EXCHANGE SPECIALISTS**

Pursuant to delegated authority, on July 31, 1995, the Division of Market Regulation issued a letter ("NYSE Specialist Letter") granting exemptions from Rules 10b-6 and 10b-13 under the Securities Exchange Act of 1934 to allow New York Stock Exchange specialists to continue to act in their specialist capacity during a distribution of or a tender offer for specialty securities when they otherwise would be subject to those rules because of their affiliates' participation in such a distribution or tender offer. The NYSE Specialist Letter has been issued in the context of a continuing review of Rule 10b-6, and is published to provide notice of the availability of these exemptions.

Jonathan G. Katz  
Secretary

11 Wall Street  
New York, NY 10005  
212 656 2060

James E. Buck  
Senior Vice President  
and Secretary

April 28, 1995

Mr. Jonathan G. Katz  
Secretary  
Securities and Exchange Commission  
450 Fifth Street, N.W.  
Washington, D.C. 20549

  
New York  
Stock Exchange, Inc.

Dear Mr. Katz:

The New York Stock Exchange, Inc. (the "Exchange" or "NYSE") is writing to request relief from the restrictions of Rule 10b-6 for certain specialist organizations that are affiliated with an organization engaged in a fixed price, firm commitment underwriting (hereafter referred to as a "distribution") of a security in which the specialist organization makes a market (a "specialty stock") where the two organizations are conducting their respective operations pursuant to NYSE Rule 98.

The Exchange is also requesting relief from the restrictions of Rule 10b-6 and Rule 10b-13 for such specialist organizations that are affiliated with the dealer-manager of an exchange or tender offer of a specialty stock, to the extent the specialist organization is bidding for or purchasing the security in the course of market making activities and not for the purpose of participating in the exchange or tender offer.

The Exchange believes that exemptive relief is appropriate in that (i) NYSE specialist organizations are subject to strict affirmative and negative obligations that restrict the specialist's ability to influence the price of, or condition the market for, a specialty stock; (ii) the Exchange's Rule 98 procedures mandate information barriers that preclude the flow of material non-public market information between a specialist organization and its affiliates; and (iii) the Exchange has appropriate surveillance capability and will conduct detailed surveillances and reviews of trading in conjunction with activities subject to Rule 10b-6 and Rule 10b-13. The Exchange proposes that the exemptive relief sought herein be subject to the conditions specified below. The Exchange undertakes to submit such monitoring reports as the Commission deems appropriate.



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Mr. Jonathan G. Katz

Under separate cover, the Exchange is submitting, pursuant to the Commission's Rule 19b-4, a filing to amend NYSE Rule 460.20 to delete references to "giving up the book" by an Exchange specialist associated with a broker dealer that has obtained exemptive relief from specified NYSE rules pursuant to NYSE Rule 98.

### **Current Application of Rule 10b-6 to NYSE Specialists Affiliated with a Participant in a Distribution**

NYSE Rule 460.10 prohibits Exchange specialist organizations and their affiliates from engaging in any "business transaction" with any company in whose stock the specialist organization is registered. The term "business transaction" is interpreted to include, among other matters, participating in a distribution of a security issued by such company.

Exchange Rule 98 provides an exemption from Rule 460.10 for affiliates of a specialist organization that conduct their operations pursuant to the Rule's requirements. The Rule 98 exemption is available only to the affiliate; under no circumstances may the specialist organization itself participate in any distribution of a security issued by a company in whose stock the specialist organization is registered.

Today, when an affiliated entity is participating in a distribution of a security stock, the specialist organization is required to withdraw from the market commencing with the applicable Rule 10b-6 "cooling off" period until the affiliate has completed its participation in the distribution. NYSE Rule 460.20 provides that the specialist organization must "give up the book" (i.e., cease to function as market maker) to an unaffiliated specialist organization, which then assumes all market making responsibilities under NYSE rules, until the approved person (affiliate) has completed its participation in the distribution, at which time the regular specialist organization regains the "book" and resumes its market making activities.

### **Current Application of Rule 10b-13 to NYSE Specialists Affiliated with a Dealer-Manager of an Exchange or Tender Offer**

Rule 10b-13 generally prohibits any person making a tender offer from purchasing or making arrangements to purchase the security that is the subject of a tender offer from the time of the public announcement of the tender offer until its expiration. The Exchange understands that the Commission staff appears to have taken the interpretive position the Rule 10b-13 applies generally to the dealer-manager in connection with a

tender offer. Thus, under Rule 10b-13, absent exemptive relief, a specialist organization affiliated with such dealer-manager would be prohibited from purchasing any such security that was a specialty stock during an exchange or tender offer.

In September 1992, the Division of Market Regulation granted the Exchange's request that a specialist organization be exempt from Rules 10b-6 and 10b-13, under specified conditions, where an affiliate that had obtained an exemption pursuant to Rule 98 was participating in a distribution or acting as dealer-manager of a tender or exchange offer.<sup>1</sup> The exemption permits the specialist organization to continue to function in its market capacity up until the period commencing five business days before the scheduled termination of the subject offer. The Exchange is seeking herein to broaden the exemption to permit the specialist organization to continue to function in its market making capacity during the entire offer period.

#### Disparities in Regulation

The Exchange wishes to note that currently there is a disparity between regulatory treatment of over-the-counter market makers and Exchange specialists. Market makers for over-the-counter issuers need not withdraw from the market if they are participating in a distribution of an issuer's securities, as they can continue to make markets subject to the passive market making tests. An NYSE specialist affiliated with a participant in a distribution of a specialty security must, however, withdraw from the market, with the market making function then being assumed by a relief specialist. An over-the-counter issuer may view this disparate treatment of market makers as a possible reason to remain listed in the over-the-counter market, as it may perceive less potential disruption of the market making function in the over-the-counter market. Thus, the current regulatory scheme may have a negative impact on the Exchange's ability to attract new listings.

The current disparity in regulation may also operate as a disincentive for large, diversified NYSE member firms to enter, and commit capital to, the specialist business. Such firms may have to weight investment banking opportunities against the potential negative impact, both in terms of issuer relations and operational efficiencies, that may

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<sup>1</sup> See letter from William Heyman, Director, Division of Market Regulation, Securities and Exchange Commission to Robert McSweeney, Senior Vice President, Market Surveillance Division, New York Stock Exchange, dated September 15, 1992.

result when an Affiliated Specialist is required to cease all market making activity in a specialty security subject to a distribution. Such a potential negative impact may make specializing on the NYSE appear to be less attractive as a business proposition.

### Affirmative and Negative Obligations of Specialists Under Exchange Rules

Exchange specialists are subject to affirmative and negative obligations with respect to their responsibilities to maintain fair and orderly markets. The negative obligation is codified in Exchange Rule 104, which provides that a specialist shall not effect a proprietary transaction in a specialty stock "unless such dealings are reasonably necessary to permit such specialist to maintain a fair and orderly market, or to act as an odd-lot dealer in such security." The affirmative obligation is codified in Rule 104.10(2), which provides that, "In connection with the maintenance of a fair and orderly market, it is commonly desirable that a member acting as specialist engage to a reasonable degree under existing circumstances in dealings for his own account when lack of price continuity, lack of depth, or disparity between supply and demand exists or is reasonably to be anticipated."

The affirmative and negative obligations constitute the foundation of the NYSE's regulation of specialists. They preclude a specialist from trading when there is sufficient buying and selling interest to maintain a fair and orderly market, and require the specialist to trade to minimize short-term disparities in supply and demand. In the context of trading by a specialist while an affiliate is engaged in a distribution of a specialty stock, the negative obligation would bar trading by a specialist to influence the price of the stock when the market is otherwise fair and orderly; the affirmative obligation similarly restricts the ability of a specialist to influence a stock's price by requiring the specialist to react to short-term imbalances in supply and demand, and trade on whichever side of the market will be contra to the overall market trend. Thus, the affirmative and negative obligations significantly inhibit the specialist's ability to effect transactions for market conditioning purposes, which is the type of transaction Rule 10b-6 is intended to prohibit.

We are enclosing as an attachment several pages from the Exchange's Floor Official Manual which discuss the affirmative and negative obligations in detail, and which cross-reference these obligations to specific restrictions on specialist's trading as codified in various provisions of Rule 104.

### Rule 98 Information Barriers

As noted above, this request for exemptive relief requires the specialist and affiliated organization to have Exchange approval under NYSE Rule 98 and its Guidelines. NYSE Rule 98 affords exemptive relief for entities in a control relationship with a specialist organization from restrictions in NYSE Rule 104, 104.13, 105, 113.20 and 460.10 that would otherwise be applicable to such entities' transactions in securities in which the specialist organization is registered, or to business transaction with the issuers of such securities. Pursuant to Rule 98 and the implementing guidelines promulgated thereunder, the specialist organization and the affiliated entity must be operated as separate and distinct organizations, and information barriers must be established that place substantial limits on access to, and communication of, trading information, including positions and strategies, between the two organizations. Rule 98 exemptive relief is conditioned on the organizations' receiving prior written approval from the Exchange. The functional separation procedures that must be implemented pursuant to Rule 98 preclude the transfer of market-sensitive information between a specialist organization and an affiliate, and minimize potential conflicts of interest whereby one entity might otherwise be inclined to take market action for the purpose of benefiting the other entity.

The Exchange notes that the procedures specified in Rule 98 are consistent with procedures pertaining to the establishment of information barriers, monitoring of such barriers, and notice (in the case of Rule 98, to the Exchange) as described in the Commission's recent exemptive letter to CS Holding (TP File NO. 94-267).

Through Exchange Rule 342 (Supervision), each member organization afforded exemptive relief under Rule 98 is required to monitor the procedures adopted to comply with the Guidelines. The Exchange inspects its member organizations afforded such relief on an annual basis for adherence to these supervisory requirements.

### Exchange Surveillance

Since the adoption of Rule 10b-6 in 1955, the Exchange has made substantial investments in sophisticated surveillance procedures, including comprehensive audit trail submissions by member firms, and extensive use of software analytics designed to assist in reviewing this and other data available for such surveillance. For example, the Market Analysis and Reconstruction System (MARS) enables Exchange analysts to retrieve and review trading information dynamically and, utilizing information in the

Exchange's existing data base, enables these analysts to review trading for anomalies using many combinations of analytical criteria.

The Exchange will conduct surveillance and reviews of specialist trading activity when an affiliated organization is involved in trading activities in a specialty stock subject to Rule 10b-6 or Rule 10b-13 that are specifically designed to highlight such trading for any possible manipulative intent.

### Conditions for Exemptive Relief from Rule 10b-6 and Rule 10b-13

The Exchange believes that exemptive relief for a specialist organization affiliated with a participant in a distribution that has obtained exemptive relief pursuant to Rule 98 (an "Affiliated Specialist" and an "Affiliated Broker-Dealer") would be appropriate under the following conditions:

1. Issuer Qualification Standards. The security being distributed, or any security of the same class or series as those securities, or any right to purchase such security, or any security that is the subject of a transaction to which Rule 10b-13 is applicable ("Subject Security") must qualify for the two business day cooling-off period specified in paragraphs (a)(4)(v), (xi) and (xii)(A) of Rule 10b-6.
2. Establishment of Information Barriers. The Affiliated Specialist and the Affiliated Broker-Dealer must have, and implement effectively, written policies and procedures designed to segregate the flow of confidential market-sensitive information, including distribution information, between the Affiliated Specialist and the Affiliated Broker-Dealer. The policies and procedures must have been approved by the NYSE as conforming to the requirements of NYSE Rule 98.
3. Monitoring of Information Barriers. During the timeframe commencing with the two business day cooling-off period until the distribution participant has completed its participation in the distribution ("Rule 10b-6 Covered Period"), the Affiliated Specialist and its Affiliated Broker-Dealer must conduct a daily review of transactions in the Subject Securities effected by the Affiliated Specialist and the Affiliated Broker-Dealer, respectively, and by Affiliated Purchasers, as that term is defined in Rule 10b-6(c)(i). Any irregular trades by the Affiliated Specialist, the Affiliated Broker-Dealer, and any Affiliated Purchaser, or suspected breaches of the Information Barriers, must be reported immediately to the NYSE.

4. Notice of Breach. Should any Affiliated Specialist or Affiliated Broker-Dealer discover that there was a breach of the Information Barriers during the Rule 10b-6 Covered Period, it must provide immediate notice to the NYSE of such occurrence. Upon request of the SEC Division of Market Regulation (the "Division"), the Affiliated Specialist and/or Affiliated Broker-Dealer shall provide the Division with a written analysis of the circumstances surrounding that breach.
  
5. Annual Compliance Review.
  - a. As part of the annual review specified in Exchange Rule 342.30, each Affiliated Specialist and each Affiliated Broker-Dealer must include a review, conducted by a person independent of the business line being reviewed, of its compliance during the calendar year with the terms of this exemption, including its operation and any breaches of information barriers, and report on such review to its management; or (ii) prepare a statement ("Statement") that it did not participate in any distributions of a Subject Security during the calendar year if such is the case. Upon a request from the Division, such reviews, management reports, and statements must be supplied to the Division within 15 days of the request.
  
  - b. Prior to relying on this exemption, each Affiliated Broker-Dealer and Affiliated Specialist must submit to the Division a written explanation of how it will comply with the review noted in paragraph (a) above. The explanation of the review must describe, among other things, the review plan, the scope of the review, how the review will be conducted, and the title of the person or group who will conduct the review.
  
6. NYSE Surveillance. The NYSE shall establish and implement special surveillance procedures to review all trading by the Affiliated Specialist and Affiliated Broker-Dealers in Subject Securities during the Rule 10b-6 Covered Period, including on-line surveillance of trading by the Affiliated Specialist and off-line surveillance of trading by Affiliated Broker-Dealers. The NYSE also will review trading in Subject Securities by the Affiliated Specialist and Affiliated Broker-Dealers for a ten business day period prior to the commencement of the Rule 10b-6 Covered Period and for two business days thereafter. With respect to transactions subject to Rule 10b-13 (the "Subject Offer"), the NYSE will review all trading by the Affiliated Specialist for the period commencing with public announcement of the Subject Offer, and reconstruct all Affiliated Specialist trading on a daily basis from the period two business days prior to the commencement of the Subject Offer until the conclusion of the Subject Offer, to detect possible market manipulation

and to monitor compliance by the Affiliated Specialist with its obligations under NYSE rules.

7. Notice of Participation. Affiliated Broker-Dealers must notify the NYSE of their participation in any distribution during which the Affiliated Specialist will continue its specialist activities in Subject Securities pursuant to the exemption granted herein. At a minimum, the Affiliated Broker-Dealer must provide the NYSE advance notice, on the business days prior to commencement of the Rule 10b-6 cooling-off period, of the dates of the Rule 10b-6 Covered Period and notice of the completion of the distribution.
8. Recordkeeping. a. All documents required under this Exemption shall be kept for a period of not less than two years. Reports of annual compliance reviews must be retained for a period of three years.  
  
b. None of the requirements of these exemptions shall have any effect upon the obligations of any Affiliated Specialist or Affiliated Broker-Dealer to make, preserve, or produce records pursuant to any other provision of the federal securities laws, or the rules of the Exchange.
9. Disclosure. The Affiliated Broker-Dealer shall include in the "Plan of Distribution" section of the prospectus, pursuant to Rule 408 under the Securities Act of 1933, a brief description of the activities of the Affiliated Specialist and the exemption granted herein. When an Affiliated Broker-Dealer is participating in a distribution as a managing or co-managing underwriter, the inside front cover page of the prospectus shall display prominently a statement to the effect that the Affiliated Specialist will act in its specialist capacity in the Subject Security pursuant to the exemption granted herein.
10. Analysis. The NYSE will provide the Division with a written analysis of the operation of the exemption granted herein for the 18-month period commencing from the date exemptive relief is granted.

In all other respects, the Affiliated Specialist and its Affiliated Broker-Dealer must comply with the provisions of Rules 10b-6 and 10b-13. No bids or purchases of Subject Securities by the Affiliated Specialist or Affiliated Broker-Dealers may be effected for the purpose of creating actual, or apparent, active trading in a Subject Security or raising the price of a Subject Security. In addition, Affiliated Specialists

Page 9

Mr. Jonathan G. Katz

and Affiliated Broker-Dealers availing themselves of the exemption herein must comply with the anti-fraud and anti-manipulation provisions of the Securities Exchange Act of 1934, particularly Section 9(a), Section 10(b), and Rule 10b-5 thereunder.

We have enclosed a description of surveillance of specialist trading activity when an affiliate is engaged in a distribution of a specialty security. Confidential treatment is requested pursuant to the Freedom to Information Act and the applicable SEC rules thereunder. Such treatment is requested on the grounds, among others, that the information submitted may contain confidential financial data of private parties as well as sensitive surveillance data, disclosure of which may significantly impair the effectiveness of the Exchange's self-regulatory mechanism. Accordingly, should any request be made for disclosure of these materials, or their contents, we ask that you notify us of this fact immediately, giving us an opportunity to interpose our objections.

Sincerely,

A handwritten signature in black ink, appearing to read "J.G. Katz", with a large, sweeping flourish at the end.

brian\letter\katz





UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

DIVISION OF  
MARKET REGULATION

July 31, 1995

Mr. James E. Buck  
Senior Vice President and Secretary  
New York Stock Exchange, Inc.  
11 Wall Street  
New York, N.Y. 10005

Re: Application of Rules 10b-6 and 10b-13 to New York Stock Exchange Specialists  
File No. TP 94-293

Dear Mr. Buck:

In regard to your letter dated April 28, 1995, as supplemented by conversations with the staff, this response thereto is attached to the enclosed photocopy of your correspondence. By doing this, we avoid having to recite or summarize the facts set forth in your letter. Each defined term in this letter has the same meaning as defined in your letter unless otherwise noted herein. 1/

Response:

Subject to certain exceptions, Rule 10b-6 under the Securities Exchange Act of 1934 ("Exchange Act") prohibits persons participating in a distribution of securities and their "affiliated purchasers," as defined in paragraph (c)(6)(i) of Rule 10b-6 ("Affiliated Purchaser"), from bidding for or purchasing, or inducing others to bid for or purchase, such securities, or any security of the same class and series as those securities, or any right to purchase any such security ("Subject Securities"), until they have completed their participation in the distribution. Paragraph (a)(4)(xi) ("exception xi") of Rule 10b-6 excepts from this prohibition bids for or purchases of the Subject Securities effected by an underwriter, prospective underwriter, or dealer, and their affiliated purchasers, prior to two or nine business days before the commencement of offers or sales of the security to be distributed ("cooling-off period"). Once the cooling-off period commences, Rule 10b-6 requires the distribution participant and its

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1/ This letter supersedes our letter dated September 15, 1992, which granted exemptions from Rules 10b-6 and 10b-13 under the Securities Exchange Act of 1934 ("Exchange Act") to permit specialists affiliated with member broker-dealer organizations to continue to function as specialists in their respective specialty securities in connection with certain mergers and tender or exchange offers in which the affiliated broker-dealer participates in a distribution or acts as dealer-manager of a tender or exchange offer.

Mr. James E. Buck  
Senior Vice President and Secretary  
New York Stock Exchange, Inc.  
Page 2

affiliated purchasers to cease bidding for or purchasing the Subject Securities until the distribution participant has completed its participation in the distribution ("Rule 10b-6 Covered Period"), as set forth in paragraph (c)(3) of Rule 10b-6.

Because a New York Stock Exchange, Inc. ("NYSE") specialist organization ("Affiliated Specialist") affiliated with a distribution participant would be an Affiliated Purchaser, such Affiliated Specialist would be required to suspend its specialist activities in a Subject Security during the applicable cooling-off period until any affiliated broker-dealer ("Affiliated Broker-Dealer") has completed its participation in the distribution.

Rule 10b-13, among other things, prohibits a person making a cash tender offer or exchange offer for an equity security from, directly or indirectly, purchasing or making any arrangement to purchase such security or any security which is immediately convertible into or exchangeable for such security, otherwise than pursuant to the offer, from the time the offer is publicly announced until its expiration ("Rule 10b-13 Covered Period"). Rule 10b-13 applies to the dealer-manager of the offer (and affiliates of the dealer-manager, including an Affiliated Specialist) because the dealer-manager acts as the agent of the bidder to facilitate the bidder's objectives.

Currently, to ensure compliance with Rule 10b-6(a)(4)(xi), the NYSE requires the Affiliated Specialist to suspend its specialist activities in a Subject Security during the applicable cooling-off period specified in Rule 10b-6, until the Affiliated Broker-Dealer has completed its participation in the distribution. Specifically, NYSE Rule 460.20 provides that the Affiliated Specialist must "give up the book" (i.e., suspend its specialist activities) to a specialist organization unaffiliated with any distribution participant, which then assumes all specialist responsibilities under NYSE rules. When the Affiliated Broker-Dealer has completed its participation in the distribution, the Affiliated Specialist may regain the "book" and resume its specialist activities in the Subject Security.

On the basis of your representations and the facts presented, particularly the affirmative and negative obligations that govern specialist trading under NYSE Rule 104; the provisions of NYSE Rule 98 that require information barrier policies and procedures that segment information between the Affiliated Specialist and its Affiliated Broker-Dealer; and NYSE surveillance procedures designed to detect specialist activity that may condition the market for a Subject Security during a distribution, and without necessarily concurring in the analysis in your letters, the Commission hereby grants exemptions from Rules 10b-6 and 10b-13 to Affiliated Specialists and their Affiliated Broker-Dealers to permit the Affiliated Specialists to continue to bid for and purchase Subject Securities as a specialist during the Rule 10b-6 Covered Period and the Rule 10b-13 Covered Period, as applicable, subject to the following conditions:

1. Scope of the Exemptions. These exemptions apply to mergers, exchange offers, and firm commitment, fixed price offerings that are distributions for purposes of Rule 10b-6, and tender and exchange offers subject to Rule 10b-13. The Subject Securities must have a minimum price of five dollars per share and a minimum public float of 400,000 shares, as computed in accordance with Rule 10b-6(c)(7).

2. Establishment of Information Barriers. The Affiliated Specialist and the Affiliated Broker-Dealer must have, and implement effectively, written policies and procedures designed to segregate the flow of confidential market-sensitive information, including distribution information, between the Affiliated Specialist and the Affiliated Broker-Dealer ("Information Barriers"). The policies and procedures must have been approved by the NYSE as conforming to the requirements of NYSE Rule 98.
3. Monitoring of Information Barriers. During the Rule 10b-6 Covered Period or Rule 10b-13 Covered Period, as applicable, the Affiliated Specialist and Affiliated Broker-Dealer reasonably must monitor for compliance with, and must inquire into possible breaches of, Information Barriers. Any inquiries must be documented, and the underlying records, including any analyses, inter-office memoranda, and employee statements, must be made available promptly to the Division of Market Regulation ("Division") upon request.
4. Notice of Breach. Should any Affiliated Specialist or Affiliated Broker-Dealer discover that there was a breach of the Information Barriers during the Rule 10b-6 Covered Period and Rule 10b-13 Covered Period, as applicable, it must provide immediate notice to the NYSE of such occurrence. Upon request of the Division, the Affiliated Specialist or Affiliated Broker-Dealer shall provide the Division with a written analysis of the circumstances surrounding that breach.
5. Annual Compliance Review. a. Each Affiliated Specialist and each Affiliated Broker-Dealer must annually: (i) conduct an independent review ("Annual Compliance Review") of its compliance during the calendar year with the terms of these exemptions, including their operation and any breaches of information barriers, and report on such review to its management; or (ii) prepare a statement ("Statement") that it did not participate in any distribution or tender offer involving a Subject Security during the calendar year if such is the case. The Annual Compliance Review must be conducted by an independent person acceptable to the Division, and may be conducted in conjunction with the annual review specified in NYSE Rule 342.30. Upon a request from the Division, such reviews, management reports, and statements shall be supplied to the Division within 15 days of the request.  
  
b. Prior to relying on these exemptions, each Affiliated Broker-Dealer and Affiliated Specialist must submit to the Division a written explanation of how it will comply with the Annual Compliance Review. The explanation of the Annual Compliance Review must describe, among other things, the review plan, the scope of the review, how the review will be conducted, and the independent person, who will conduct the review.
6. NYSE Surveillance. The NYSE shall establish and implement special surveillance procedures to review all trading by the Affiliated Specialist and Affiliated Broker-Dealers in Subject Securities during the Rule 10b-6 Covered Period, including on-line surveillance of trading by the Affiliated Specialist and off-line surveillance of trading by Affiliated Broker-Dealers. The NYSE also will

review trading in Subject Securities by the Affiliated Specialist and Affiliated Broker-Dealers for a ten business day period prior to the commencement of the Rule 10b-6 covered Period and for two business days thereafter. With respect to tender offers subject to Rule 10b-13, the NYSE will review all trading by the Affiliated Specialist for the period commencing with a public announcement of the tender offer, and reconstruct all Affiliated Specialist trading on a daily basis from the period as of two business days prior to the commencement of the tender offer until the offer's expiration.

7. Notice of Participation. Affiliated Broker-Dealers shall give timely notice to the NYSE of their participation in any distribution or tender offer during which the Affiliated Specialist will continue its specialist activities in Subject Securities pursuant to the exemptions granted herein. The Affiliated Broker-Dealer must provide the NYSE advance notice prior to the commencement of the Rule 10b-6 Covered Period and Rule 10b-13 Covered Period, as applicable, and notice of the completion of the distribution and tender offer, as applicable.
8. Recordkeeping. a. All documents required under these exemptions shall be kept for a period of not less than two years. Reports of Annual Compliance Reviews must be retained for a period of three years.  
  
b. None of the requirements of these exemptions shall have any effect upon the obligations of any Affiliated Specialist or Affiliated Broker-Dealer to make, preserve, or produce records pursuant to any other provision of the federal securities laws or other regulatory requirements.
9. Disclosure. a. The Affiliated Broker-Dealer shall include in the "Plan of Distribution" section of the prospectus, pursuant to Rule 408 under the Securities Act of 1933, a brief description of the activities of the Affiliated Specialist and the exemptions granted herein, as applicable. When an Affiliated Broker-Dealer is participating in a distribution as a managing or co-managing underwriter, the inside front cover page of the prospectus shall display prominently a statement to the effect that the Affiliated Specialist will act in its specialist capacity in the Subject Security pursuant to the exemptions granted herein.  
  
b. At the commencement of the distribution or tender offer, the Affiliated Broker-Dealer shall disclose to the market the fact of the distribution or tender offer and of the Affiliated Specialist's continuation as a specialist in the Subject Security, pursuant to the exemptions granted herein.
10. Rule 10b-13 Condition. The Affiliated Specialist may tender only those Subject Securities into an exchange offer that it has acquired in a manner consistent with its specialist obligations under NYSE Rule 104.
11. Analysis. The NYSE will provide the Division with a written analysis of the operation of the exemptions granted herein for the 18 month period beginning on the date of this letter. On or before April 30, 1997, the Division will notify the

Mr. James E. Buck  
Senior Vice President and Secretary  
New York Stock Exchange, Inc.  
Page 5

NYSE whether the exemptions should be extended, modified or terminated. Unless otherwise extended, these exemptions will expire on July 31, 1997.

The foregoing exemptions from Rules 10b-6 and 10b-13 are strictly limited to the application of those rules to activities by Affiliated Specialists, acting in their specialist capacity, as described above, and are subject to compliance with the conditions set forth above. These exemptions are subject to modification or revocation if at any time the Commission or Division determines that such action is necessary or appropriate in furtherance of the purposes of the Exchange Act. 2/

No bids or purchases of Subject Securities by the Affiliated Specialist or Affiliated Broker-Dealers shall be made for the purpose of creating actual, or apparent, active trading in a Subject Security or raising the price of a Subject Security. In addition, Affiliated Specialists and Affiliated Broker-Dealers availing themselves of this exemption are directed to the anti-fraud and anti-manipulation provisions of the Exchange Act, particularly Section 9(a), 10(b), 14(e) and Rules 10b-5 and 14e-3 thereunder. Responsibility for compliance with these and any other applicable provisions of the federal securities laws must rest with the Affiliated Specialist, the Affiliated Broker-Dealer, and their Affiliated Purchasers. The Commission expresses no view with respect to any other questions that the proposed transactions may raise, including, but not limited to, the applicability of any other federal or state laws.

For the Commission, by the Division of  
Market Regulation, pursuant to delegated authority,



Brandon Becker  
Director

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2/ In 1994, the Commission published a concept release regarding the anti-manipulation regulation of securities distributions, which sought comment on, among other things, the application of Rule 10b-6 to affiliated purchasers. See Securities Exchange Act Release No. 33924 (April 19, 1994), 59 FR 21681. In light of the comments received in response to that release, the Commission may determine to undertake rulemaking or other action that may supersede these exemptions.

SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 36028 / July 27, 1995

Admin. Proc. File No. 3-8578

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In the Matter of the Application of

RICHARD J. LANIGAN  
1601 Mission Valley Blvd.  
Laurel, Florida 34272

For Review of Disciplinary Action Taken by the  
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

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OPINION OF THE COMMISSION

REGISTERED SECURITIES ASSOCIATION -- REVIEW OF DISCIPLINARY  
PROCEEDINGS

Violations of Rules of Fair Practice

Failure to Pay Arbitration Award Promptly

Failure to Amend Form U-4

Where registered representative of a member firm failed to honor promptly an arbitration award made against him, and did not amend his Form U-4 to disclose the arbitration award, held, association's finding of violation and sanctions it imposed sustained.

APPEARANCES:

Richard J. Lanigan, pro se.

T. Grant Callery and Norman Sue, Jr., for the National Association of Securities Dealers, Inc.

Appeal filed: December 21, 1994  
Briefing completed: February 21, 1995

I.

Richard J. Lanigan, a registered representative of a member firm of the National Association of Securities Dealers, Inc. ("NASD"), appeals from NASD disciplinary action. The NASD found that Lanigan violated Article III, Section 1 of the NASD's Rules of Fair Practice ("NASD Rules") by failing to honor in a timely

manner an arbitration award made against him and by failing to amend his Form U-4 to disclose the arbitration award. 1/ The NASD censured Lanigan, fined him \$2,500, and suspended him for five business days. Our findings are based on an independent review of the record.

## II.

On July 7, 1992, an NASD arbitration panel rendered an award of \$4,500 against Lanigan in favor of a deceased customer's estate. 2/ Lanigan's counsel then filed a motion to vacate the arbitration award, and the claimant filed a motion to confirm the award. The court denied Lanigan's motion, granted the claimant's motion, and awarded certain attorneys' fees to the claimant, on January 21, 1993. 3/ On August 24, 1993, the claimant's attorney notified the NASD that Lanigan had failed to satisfy the award. About a month later, the NASD attempted, unsuccessfully, to contact Lanigan by letter about his failure to pay the award. 4/ On September 27, 1993, the court amended the final judgment to modify the amount of attorneys' fees assessed. The court sent a copy of the amended final judgment to Lanigan.

Lanigan took no action with respect to the award until December 31, 1993, when he responded to a second letter from the NASD regarding his nonpayment. 5/ Settlement efforts between Lanigan and the claimant's attorney commenced in January 1994 but

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- 1/ Article III, Section 1 requires that members "observe high standards of commercial honor and just and equitable principles of trade." Art. III, Sec. 1, Rules of Fair Practice, NASD Manual (CCH) ¶2151, p. 2014.
  - 2/ In the Matter of the Arbitration between Cushman and Shearson, James, and Lanigan, 32-136-0045-91-ID.
  - 3/ Cushman v. Shearson, James, and Lanigan, 91-1640-CA-01 (Jan. 21, 1993, Fla. Cir. Ct.).
  - 4/ NASD staff sent a letter, dated September 16, 1993, to Lanigan at his home address via certified mail, return receipt requested, soliciting an explanation for Lanigan's failure to pay the award. The letter also addressed Lanigan's failure to amend his Form U-4 to reflect the award. The NASD letter was returned by the post office marked "Unclaimed." Lanigan states that he did not claim the NASD's first letter because of a grueling work schedule that required him to leave his home before the post office opened and return after it closed.
  - 5/ The NASD sent this second letter, dated December 20, 1993, to Lanigan's business address.

ultimately were unsuccessful. Finally, on April 6, 1994, Lanigan satisfied the award in full.

### III.

The NASD's Code of Arbitration is designed to provide a mechanism for the speedy resolution of disputes "arising out of or in connection with the business of any member." 6/ Lanigan, as an associated person of an NASD member, was obligated to pay the arbitration award promptly. 7/ Here, the arbitration panel rendered its decision on July 7, 1992, and on January 21, 1993, a court denied Lanigan's motion to vacate the award and confirmed the award. Although Lanigan was obligated to satisfy the award, he made no attempt to contact the complainant for this purpose until January 1994, after the NASD had sent him a second letter requesting an explanation for his failure to pay the award.

The NASD has advised in a Board of Governors Resolution that arbitration awards shall be paid "upon receipt," in full, and in cash, thus underscoring its view of the importance of prompt payment of arbitration awards. 8/ Lanigan's apparent disregard

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6/ Code of Arbitration Procedure, NASD Manual (CCH) ¶3701, Section 1, p. 3711. See also Stix & Co., Inc., 46 S.E.C. 578, 579 (1976).

7/ See Eric M. Diehm, Sec. Exch. Act Rel. No. 33478 (Jan. 14, 1994), 55 SEC Docket 2830, 2832; Peter K. Lloyd, Sec. Exch. Act Rel. No. 31625 (Dec. 21, 1992), 53 SEC Docket 273, 276.

8/ The Board of Governors interpretation states:

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Article III, Section 1 of the Rules of Fair Practice for a member or a person associated with a member to fail to . . . honor an award of arbitrators properly rendered pursuant to the Uniform Code of Arbitration under the auspices of the National Association of Securities Dealers, Inc., . . . where a timely motion has not been made to vacate or modify such award pursuant to applicable law.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. . . . Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

(continued...)



of his obligation until the NASD for the second time sought an explanation of his nonpayment leads us to conclude that Lanigan did not act in good faith to pay the award promptly. 9/ We further conclude that Lanigan's failure to pay timely the arbitration award was conduct inconsistent with just and

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8/(...continued)

Code of Arbitration Procedure, Resolution of the Board of Governors, NASD Manual (CCH) ¶3745, p. 3731. See Peter Thompson Higgins, Sec. Exch. Act Rel. No. 33325 (Dec. 10, 1993), 55 SEC Docket 2082.

9/ Lanigan's failure to enter into settlement negotiations until confronted by the NASD further indicates his lack of good faith. See, e.g., Diehm, 55 SEC Docket at 2832-33.

We reject Lanigan's attempted reliance on an advice-of-counsel defense. Lanigan asserts that in July 1992 he attempted to contact the attorney who had represented him at the arbitration hearing, learned that she was on maternity leave, and was advised (by someone Lanigan failed to identify) that he should not pay the arbitration award. Lanigan further claims that in late 1993, responding to the NASD's demand to pay the award, he again contacted the attorney, whom Lanigan asserts told him that she would try to settle the matter.

In order to establish reasonable reliance on the advice of counsel, a respondent must show that he made complete disclosure to counsel, sought advice as to the legality of his conduct, received advice that his conduct was legal, and relied on that advice in good faith. Markowski v. S.E.C., 34 F.3d 99, 105 (2d Cir. 1994). Even where these prerequisites are satisfied, such reliance is not a complete defense, but only one factor for consideration. Id. See also Higgins, 55 SEC Docket at 2085. Lanigan's haphazard and incomplete communications with his attorney fall far short of what is required.

Lanigan also challenges the merits of the arbitration decision. An applicant, however, may not collaterally attack an arbitration award in a disciplinary proceeding for failing to pay the award:

To permit a party dissatisfied with an arbitral award to attack it collaterally for legal flaws in a subsequent disciplinary proceeding would subvert the salutary objective that the NASD's [arbitration] resolution seeks to promote.

Stix & Co., Inc., 46 S.E.C. at 580.

equitable principles of trade, and we accordingly find that Lanigan violated Article III, Section 1 of the NASD Rules. 10/

IV.

Registered representatives are required to sign and file with the NASD a Form U-4, which is to be "kept current at all times." 11/ Thus, Lanigan had a duty to update his Form U-4 to reflect the arbitration award assessed against him and reveal his failure to pay the award. 12/ He failed to do so. The failure to furnish specific line-item information undermines the NASD's ability to carry out its self-regulatory functions, and amounts to a violation of Article III, Section 1. 13/

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10/ See Bruce M. Zipper, Sec. Exch. Act Rel. No. 33376 (Dec. 23, 1993), 55 SEC 2327. Like the respondent in Zipper, Lanigan attempted to meet his obligation only when pressed by the NASD.

11/ Art. IV, Sec. 2(a) and (c), By-Laws, NASD Manual (CCH), ¶1152, p. 1201.

12/ Item H under Question 22A on Form U-4 requires disclosure of an "investment-related, consumer-initiated complaint or proceeding," Item I inquires whether the applicant is "now the subject of any complaint, investigation, or proceeding," and Item K requires disclosure of any "unsatisfied judgments or liens against [the applicant]."

13/ Jay Frederick Keeton, Sec. Exch. Act Rel. No. 31082 (Aug. 24, 1992), 52 SEC Docket 1322; Wedbush Securities, Inc., 48 S.E.C. 963, 973 (1988).

Lanigan asserts that he was unaware of his duty to update the form. Ignorance of the NASD's rules is no excuse for their violation. David A. Gingras, Sec. Exch. Act Rel. No. 31206 (Sept. 21, 1992), 52 SEC Docket 2188, 2195 n.12 (D.C. Cir. 1992) (citing John R. LaSalla, Sec. Exch. Act Rel. No. 26352 (Dec. 13, 1988), 42 SEC Docket 693, 695).

Participants in the securities industry must take responsibility for compliance and cannot be excused for lack of knowledge, understanding or appreciation of these requirements. Kirk A. Knapp, Sec. Exch. Act Rel. No. 31556 (Dec. 3, 1992), 52 SEC Docket 4397, 4423.

Lanigan further claims that he filed several Forms U-4; he has not produced copies of the documents, however, and the CRD does not show that these forms were received. In any event, Lanigan does not specify that his "filings" reflected

(continued...)

V.

Lanigan claims that the NASD's decision is harsh and will deprive him of his livelihood. We, however, are unable to conclude that the NASD's sanctions, including the modest \$2,500 fine, are excessive or oppressive. 14/ Arbitration is intended to minimize the delay and costs of disputes. By failing to pay his arbitration award, Lanigan has delayed both the resolution of the dispute underlying the award and the payment of a duly-rendered award. 15/ Further, by failing to amend his form U-4, Lanigan impeded the NASD's discovery of his compliance failure. 16/ His actions added unnecessarily to the cost of both the claimant and the NASD in resolving this dispute. 17/

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13/ (...continued)

entry of the arbitration award. Indeed, this assertion contradicts Lanigan's claim that he was unaware of his obligation to amend his Form U-4 to reflect the arbitration award against him.

14/ The NASD Sanction Guidelines suggest a five-business-day suspension and a fine between \$2,500 and \$10,000 for a failure to honor in a timely manner an arbitration award. NASD Sanction Guidelines, NASD 1993, p. 7. The NASD in its Sanction Guidelines has recognized the need to tailor to the relevant circumstances sanctions for failure to pay an arbitration award. Specifically, the Guidelines note that a bona fide inability to pay a judgment must be considered in determining the sanction. Despite Lanigan's suggestions, made at various points in this proceeding, that he was without funds to pay the award, Lanigan concedes that he has not demonstrated that he could not have paid the award earlier than he in fact paid it. In addition, the Guidelines suggest a fine between \$2,500 and \$20,000 for failure to keep accurate reports on file with the NASD. NASD Sanction Guidelines at p. 21.

15/ See James M. Bowen, Sec. Exch. Act Rel. No. 34195 (Jun. 10, 1994), 56 SEC Docket 2810, 2814.

16/ Art. IV, Sec. 2(a) and (c), By-Laws, NASD Manual (CCH), ¶1152, p. 1201.

17/ See Peter Thompson Higgins, Sec. Exch. Act Rel. No. 33325 (Dec. 10, 1993), 55 SEC Docket 2082, 2086.

An appropriate order will issue. 18/

By the Commission (Chairman LEVITT and Commissioner WALLMAN).

Jonathan G. Katz  
Secretary

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18/ All of the contentions advanced by the parties have been considered. They are rejected or sustained to the extent that they are inconsistent or in accord with the views expressed herein.

UNITED STATES OF AMERICA  
before the  
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934  
Rel. No. 36028 / July 27, 1995

Admin. Proc. File No. 3-8578

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In the Matter of the Application of :

RICHARD J. LANIGAN :  
1601 Mission Valley Blvd. :  
Laurel, Florida 34272 :

For Review of Disciplinary Action Taken by the :  
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. :

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ORDER SUSTAINING DISCIPLINARY ACTION TAKEN BY REGISTERED ,  
SECURITIES ASSOCIATION

On the basis of the Commission's opinion issued this day, it  
is

ORDERED that the disciplinary action taken by the National  
Association of Securities Dealers, Inc. against Richard J.  
Lanigan, be, and it hereby is, sustained.

By the Commission.

Jonathan G. Katz  
Secretary

**SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C.**

**Litigation Release No. 14587 / (August 3, 1995)**

**SECURITIES AND EXCHANGE COMMISSION v. STIFEL, NICOLAUS AND COMPANY,  
INC., United States District Court for the Western District of  
Oklahoma, Civil Action No. 95-11907 (August 3, 1995)**

The Securities and Exchange Commission ("Commission") announced today that it filed a Complaint ("Complaint") against Stifel, Nicolaus and Company, Incorporated, ("Stifel") a broker-dealer headquartered in St. Louis. The Commission alleges that in accepting undisclosed payments from third parties that sold investments to municipal bond issuers, Stifel violated Section 17(a) of the Securities Act of 1933, Sections 10(b), 17(a)(1) and 15B(c)(1) of the Securities Exchange Act of 1934 and Rules 10b-5, 17a-3 and 17a-4 thereunder. Stifel also violated Rules G-8, G-9 and G-17 of the Municipal Securities Rulemaking Board (MSRB). Simultaneously with the filing of the Complaint, without admitting or denying the allegations contained in the Complaint, Stifel consented to the entry of a Final Judgment enjoining it from future violations of the provisions of the federal securities laws cited above. In addition, Stifel also has agreed to disgorge \$922,741, pay prejudgment interest on that amount of \$263,637 and pay a civil money penalty pursuant to Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act of \$250,000.

The Complaint alleges that from 1989 through 1993, Stifel received millions of dollars in undisclosed payments from third parties that sold or brokered investments to municipal issuers, and that Stifel undermined the integrity of the bidding process set up for the purchase of certain of those investments. According to the Complaint, in advising the issuers about the purchase of the investments, Stifel had a duty to disclose conflicts of interest. Stifel breached its duty and defrauded the issuers in accepting undisclosed payments from the investment providers or investment brokers. The Complaint further alleges Stifel defrauded investors by failing to disclose the payments to participants in the bond issues, including the issuer, bond counsel and/or special tax counsel, thereby depriving investors of information material to an assessment of the tax exempt status of the bonds.

The Complaint also alleges that from at least 1990-93, in connection with the issue of Certificates of Participation ("COPs") for the benefit of Oklahoma school districts and Counties, Stifel prepared or assisted others in preparing, materially overstated projected cumulative cash flow deficits resulting in inflated participation amounts by the school districts and Counties. Stifel's actions created a risk that the bonds issued would be deemed arbitrage bonds by the Internal Revenue Service.

The Commission's investigation continues as to the conduct of other entities and individuals involved in this matter.

Securities and Exchange Commission  
Washington, D.C.

LITIGATION RELEASE NO. 14588 / August 3, 1995  
Accounting and Auditing Enforcement Release No. 694

Securities and Exchange Commission v. Malcolm Cheek and Robert W. Zak, Jr., United States District Court for the District of Columbia  
Civil Action No. 95-CV-1451 (NHJ)

The Securities and Exchange Commission today announced the filing of a complaint in the U.S. District Court for the District of Columbia against Malcolm Cheek, the former president and chief executive officer of the now-defunct Y&A Group, Inc., and Robert W. Zak, Jr., its former chief financial officer.

Cheek has consented, without admitting or denying the Commission's allegations, to the entry of a final judgment prohibiting him from serving as an officer or director of any SEC reporting company and enjoining him from violating Section 17(a) of the Securities Act of 1933, Sections 10(b) and 13(b)(5) of the Securities Exchange Act of 1934, and Rules 10b-5, 13b2-1, and 13b2-2 thereunder. Zak has consented, without admitting or denying the Commission's allegations, to the entry of a final judgment ordering him to disgorge \$175,000 and enjoining him from violating Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder. Moreover, Zak has offered to consent to an order in a separate administrative proceeding which will prohibit him from practicing before the SEC as an accountant for five years.

The Commission's complaint alleges that from 1989 to 1991, Malcolm Cheek intentionally overstated the financial results that Y&A reported to the public, falsified Y&A's books and records, and lied to Y&A's independent auditors to cover up his fraud. Y&A's strong reported earnings were due, in large part, to fraudulently recognized revenues from Y&A Concepts, Inc., a Y&A subsidiary for which Cheek supposedly performed financial consulting services. In fact, according to the complaint, Cheek's financial consulting services were fictitious. The complaint alleges that Cheek actually performed no services for his supposed customers, that he created phony invoices to support the recognition of false income, and that Y&A received no payment from the billings. The complaint further states that Cheek made other material misstatements and engaged in improper accounting practices to create the illusion that Y&A was earning profits when it was actually sustaining losses. According to the complaint, Y&A's 1989 Form 10-K, February 1990 registration statement, and Forms 10-Q for June 1989, September 1989, March 1990, June 1990, and September 1990 were materially false and misleading.

The complaint states that Cheek disappeared in March 1991, as Y&A's financial pressures mounted. According to the complaint, the FBI located and arrested Cheek in April 1994, after a three-year search. In March 1995, a federal district court sentenced Cheek to

nine years in prison for committing bank fraud, filing a false Form 10-K with the Commission, embezzling Y&A pension funds, and conspiring to commit bankruptcy fraud.

The Commission further alleges that Robert W. Zak, Jr. served as Y&A's executive vice president and chief financial officer. The complaint alleges that Zak failed to follow Generally Accepted Accounting Principles and, as a result, false and misleading statements were included in Y&A's Form 10-K for 1989 and Form 10-Q for the third quarter 1990. In addition, the complaint alleges that Zak engaged in insider trading by selling Y&A securities while in possession of nonpublic information concerning Y&A's true financial condition. The complaint alleges that Zak sold 40,000 shares of Y&A stock in February 1991 when he was in possession of the nonpublic information that Y&A had encountered severe cash flow problems, that it would report a large fourth quarter loss, and that it would sustain a loss for the year. Just three weeks after Zak sold his stock, Y&A announced that Malcolm Cheek had disappeared and that the company had incurred huge losses. The news caused Y&A's stock price to drop. By selling Y&A stock in advance of the bad news, according to the complaint, Zak avoided losses of more than \$400,000.