

UNITED STATES OF AMERICA
before the
SECURITIES AND EXCHANGE COMMISSION
May 6, 1971

In the Matter of	:
	:
IVY FUND, INC.	:
155 Berkeley Street	:
Boston, Massachusetts	:
	:
and	:
	:
STUDLEY, SHUPERT AND CO., INC. OF BOSTON	:
155 Berkeley Street	:
Boston, Massachusetts	:
	:
(812-2469)	:
	:
Investment Company Act of 1940 -	:
Section 17	:
	:
	:

FINDINGS,
OPINION
AND ORDER
DENYING
APPLICATION
FOR EXEMPTION

TRANSACTION BETWEEN AFFILIATED PERSONS

Grant of License by Investment Company to
Adviser With Respect to Use of Name

Where investment company and its adviser applied, pursuant to Section 17(b) of Investment Company Act of 1940, for exemption from Section 17(a) of Act with respect to proposed grant to adviser, for specified cash consideration, of license to use investment company's name in adviser's name and to confer similar name on other investment companies for which adviser presently or in future acted as adviser, held, applicants failed to meet burden of proving reasonableness and fairness of consideration to be paid for license, and application denied.

APPEARANCES:

Robert M. Gargill, of Choate, Hall & Stewart, for applicants.

Stanley B. Judd, for the Division of Corporate Regulation of the Commission.

Ivy Fund, Inc. ("Fund"), a registered open-end investment company, and Studley, Shupert and Co., Inc. of Boston ("Adviser"), Fund's investment adviser and business manager, filed a joint application pursuant to Section 17(b) of the Investment Company Act of 1940 ("Act") for an order exempting from the provisions of Section 17(a) of the Act the proposed grant by Fund to Adviser of a license, more fully described below, to use the word "Ivy" in a proposed new name for Adviser and the names of other investment companies advised by it, in

consideration of a payment of \$2,000 by Adviser to Fund. After appropriate notice, 1/ hearings were held and the hearing examiner submitted an initial decision in which he concluded that the application should be granted. Our Division of Corporate Regulation filed a petition for review, which we granted, with respect to the examiner's finding that the proposed consideration was reasonable and fair, and briefs were filed by the Division and applicants. 2/ Our findings are based upon an independent review of the record.

Under the terms of the proposed transaction, which was approved by Fund's board of directors and shareholders, subject to our grant of an exemption Fund would grant to Adviser (1) a license to use the word "Ivy" in a new name for Adviser and in the name of any wholly or majority owned subsidiary of Adviser, and (2) the right to confer, by sub-license or otherwise, the privilege of using a name similar to the name of Fund on any other investment company for which Adviser now or hereafter acts as investment adviser. The agreement further provides that such license and right would be terminable at the option of Fund in the event that Adviser ceases to be an investment adviser of Fund, and that the privilege of any other investment company to use a name similar to Fund's name would be terminable at the option of Fund in the event that Adviser ceases to be an investment adviser of Fund or of such other investment company.

As pertinent here, Section 17(a) of the Act prohibits an affiliated person of a registered investment company from purchasing any property from such company. An investment adviser of an investment company is an "affiliated person" of such company under Section 2(a)(3) of the Act and Fund's name constitute "property". 3/ Section 17(b) of the Act provides, in relevant part, for the granting of an exemption from such prohibition if evidence establishes that the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned. 4/ The burden of proving the availability of an exemption is upon the applicants. 5/ In our opinion, applicants here have failed to meet that burden.

Fund was organized in 1960 under a different name and its shares were initially sold with a sales load. In 1966, it became a "no-load" fund and in March 1967, at the suggestion of Adviser, it adopted its

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- 1/ Ivy Fund, Inc., Investment Company Act Release No. 5971 (February 6, 1970).
 - 2/ Three shareholders of Fund submitted letters objecting to the proposed transaction.
 - 3/ See Taussig v. Wellington Fund, Inc., 313 F.2d 472 (C.A. 3, 1963).
 - 4/ No issue has been raised on review, and we find no basis for any adverse findings, respecting compliance of the proposed transaction with the other standards of Section 17(b), requiring consistency of such transaction with the policy of the investment company concerned and the general purposes of the Act.
 - 5/ See, e.g., Fifth Avenue Coach Lines, Inc., Investment Company Act Release No. 5214, p. 3 (December 27, 1967).

present name. No advertising or salesmen are used in connection with the sale of Fund's shares. Nevertheless, Fund experienced a very large growth in the period following 1966. The number of shareholders increased from 295 as of the end of that year to 17,145 by the end of 1968 and increased further to 28,190 by the end of 1969; total shares outstanding increased from 131,390 to 5.1 million between the end of 1966 and the end of 1968 and reached 7.9 million by the end of the following year; and total net assets rose from about \$678,000 to \$63.5 million by the end of 1968 and were \$65.5 million as of December 31, 1969. Shares sold during this period rose from about 127,000 in 1967 to 5.1 million each in 1968 and 1969, while shares redeemed totalled about 15,000, 290,000 and 2.3 million, respectively. Net asset value per share increased from \$5.16 at December 31, 1966 to \$12.36 by the end of 1968, before decreasing to \$8.27 by the end of 1969. 6/

Adviser states that it desires the proposed license for a number of reasons. It seeks to adopt a new name including the word "Ivy" so as to identify itself with Fund and its investment performance and to differentiate itself from Studley, Shupert and Co., Inc. of Philadelphia, a previously related company which is also in the investment management business, as well as from the ownership and management of Adviser prior to 1966. In addition, at the time in early 1969 when the licensing agreement was reached, Adviser wanted to secure the "Ivy" name for two new investment companies then being established and for which Adviser was to be investment adviser. One of these was to be a closed-end investment company named "Ivy Capital Corp." which at that time had already filed registration statements with us under that name. However, that company subsequently changed its name to "Inventure Capital Corp." and made a public offering and continued operations under such name. A change back to its original name is not now contemplated, although it would be within the terms of the proposed license. The second company, which was to be called "Ivy Convertible Securities Fund", was envisaged as an open-end no-load fund investing primarily in convertible securities. It was anticipated at the time that Fund's net assets would soon reach approximately \$100 million, at which point it would discontinue the offering of its shares to other than its existing shareholders, and that the new fund would take Fund's place as a vehicle for public offering. Subsequent developments, however, defeated the expectation regarding the growth of Fund's assets, 7/ and the other company, while in existence as a corporation, is still inactive. 8/

6/ The figures for shares outstanding, sold and redeemed and net asset value per share have been adjusted to reflect a 5 for 2 stock split effected in 1969.

7/ Net assets had increased from \$2.3 million at December 31, 1967 to \$63.5 million at December 31, 1968, but, as previously noted, only increased to \$65.5 million over the next year.

8/ Aside from the question whether other parties in interest would agree to name changes, Adviser committed itself not to confer a name similar to Fund's on Commonwealth Fund Indenture of Trust Plans and Competitive Capital Fund for which it also serves as investment adviser and one of several advisers, respectively.

The Division contends that applicants have failed to prove that \$2,000 is fair and reasonable consideration for the license and that in fact such figure was selected on an arbitrary basis. It urges that the license can be valued only by estimating the worth both of its benefits to Adviser and of the detriments to Fund; that any estimate of the former element must include an estimate of the value of the right to confer the "Ivy" name on other funds; and that there is no evidence that Fund's board of directors attempted to make such estimate. It contends that such an estimate would have required an attempt to estimate sales of shares of funds which Adviser was then in the process of creating and the proportion of such sales, and derivative revenues to Adviser, attributable to the use of the "Ivy" name by such funds.

Applicants, on the other hand, urge that the record supports the examiner's findings that Fund's board of directors, a majority of whom were independent of Adviser, made a value judgment in good faith based on the pertinent and relevant information, including its judgment as to the value of the license to Adviser. They also contend that the method of valuation suggested by the Division is not realistic and provides no reliable help in the valuation process.

The record shows that at the board meeting at which the grant of a license was first considered, Adviser suggested a payment of \$500, but action was deferred. The minutes of that meeting indicate that consideration was given to the facts that Fund had spent no money on advertising or promoting its name, that the name had originated with Adviser, that it was anticipated that sales of Fund shares would soon be discontinued, that it would be "difficult to prove any damages" to Fund's shareholders as a result of the license, and that it was planned to use the "Ivy" name in connection with the two investment companies being established by Adviser. The consideration was resumed at the next meeting, in the course of which one of the independent directors suggested the \$2,000 figure. The minutes of that meeting recite that there was a discussion of "all of the various factors," and the testimony of the two witnesses who appeared on behalf of applicants, one of whom is the secretary of Fund and the other a director of Fund who is also executive vice-president of Adviser, indicates that there were extended discussions at the two meetings encompassing such matters as the past sales and investment performance of Fund, the fact that the license would be revocable, and possible advantages which might inure to Adviser and to Fund by virtue of the licensing agreement.

We must agree with the Division's position that as far as the record shows the \$2,000 figure was selected essentially on an arbitrary basis. While it appears that Fund's board of directors discussed various factors relevant to the amount which would represent fair consideration for the license, the record does not show that the board, which acted without the benefit of independent expert assistance, made any effort to place dollar values on any of such factors. We note in this connection the testimony of the director that the originally suggested price of \$500 represented "an attempt not to just name a nominal \$1 or ... a silly amount," but a figure which the shareholders and this Commission would recognize as meaningful, that one of the directors not affiliated with Adviser felt \$500 would look too low to the shareholders and that the figure of \$2,000 would have "some substance in it," since "thousands looked bigger than hundreds," and that such figure represented a compromise.

If we are to be able to make the necessary statutory findings, a method of valuation must be selected which removes the determination from the area of guess-work. The fact that Fund's directors did not have available any specific precedent which could serve as a basis for comparison in the circumstances did not relieve them of the burden to develop a valuation basis for the proposed sale of Fund's asset. It seems likely that guidance could have been obtained from a consideration of analogous situations such as, for example, the sale or licensing of trade names. Moreover, without such guidance the various uncertainties as to the use which Adviser would make of the license, particularly the extent to which it could make use of the "Ivy" name in connection with other investment companies, precluded a reasonable determination by the board of directors of an appropriate consideration for all such uses. Such uncertainties could have been narrowed by appropriate limitations in the licensing agreement or a formula provision for additional payments.

In light of our conclusion that applicants have not sustained the burden of proving the reasonableness and fairness of the consideration to be paid for the license, we must deny the application.

Accordingly, IT IS ORDERED that the application for exemption under Section 17(b) of the Investment Company Act of 1940 filed by Ivy Fund, Inc. and Studley, Shupert & Co., Inc. of Boston be, and it hereby is, denied.

By the Commission (Commissioners OWENS, SMITH, NEEDHAM and HERLONG). Commissioner NEEDHAM filed a separate concurrence. Chairman CASEY did not participate.

Theodore L. Humes
Associate Secretary

Commissioner NEEDHAM, concurring:

I completely concur in the decision of my colleagues. However, without reflecting on the conduct of the parties now before us, I also deem it appropriate to indicate my concern with what in my view is a largely unnecessary recourse in many instances to lengthy formal procedures. In my view, such recourse serves to divert the Commission's attention and resources from more important responsibilities.

The Commission was created for the purpose of providing maximum protection for investors and thereby foster confidence in the securities markets which will promote growth of American business and trade. It was envisaged that the Commission, as the agency charged with the administration of the securities acts, would be able to bring expertise and flexibility to bear on the problems of an extremely complex and constantly changing area and to obviate the need for frequent Congressional action or resort to the judicial branch of the government. Clarification of the scope and intent of the necessarily broad provisions of the various statutory provisions with whose administration it is charged, including the provisions of the Investment Company Act, has to a considerable extent been accomplished, in large part through the rule-making process and through the issuance of statements of policy and interpretations, as well as by the adjudicatory process. In areas

where the Commission's policy or position has thus been established, it has provided for simplified procedures and delegations of authority to its staff to facilitate the resolution and disposition of particular matters presented for action. Such steps have directly benefitted the business community by permitting more expeditious effectuation of those business decisions which are consistent with applicable standards. At the same time, the Commission has been enabled to devote more attention to major matters of policy and planning as well as to resolve issues which come to it de novo or involve questions of first impression.

What concerns me is what I see as a general trend toward an increasing incidence of undesirable controversy and away from the reasonable accommodation between business activity and the public interest which Congress contemplated. Reversal of this trend will require an increased sense of responsibility on the part of the business sector, combined, as to matters within our responsibilities, with a greater readiness by this Commission and its staff to facilitate and expedite the implementation of reasonable business decisions. In a context such as that before us, management must take all reasonable steps to reach decisions which take into account relevant public interest considerations. At the same time, our staff must be ready, to the extent that its heavy responsibilities permit, to provide assistance to those seeking it in good faith and to facilitate resolution of issues in a way comporting with the Congressional objectives.