

NEW YORK STOCK EXCHANGE

Memorandum

December 10, 1968

On July 29, 1968, the Securities and Exchange Commission issued Release No. 8363. This notice states that it is a violation of the anti-fraud provisions of the federal securities laws for a dealer to sell stock from his own account to, or a broker to buy a security as agent for, a customer if the dealer-broker has reason to believe the security cannot be delivered to the customer promptly.

On August 30, 1968 Carlisle & Jacquelin solicited the President for the Exchange's support in a request to the SEC for a clarification of the Release and an exemption from the Release for registered odd-lot dealers.

James E. Buck of the Department of Civic & Governmental Affairs approached the SEC informally on the basis that the Release was not applicable to the specialists and odd-lot dealers registered with the Exchange because of the nature of their respective functions and responsibilities to the market and the public investor. The SEC Staff disagreed, and felt it was applicable to all brokers and dealers.

On October 4, 1968, Donald L. Calvin and I spoke on the telephone with Irving Pollack, Director of the Division of Trading and Markets. At the conclusion of our conversation, Mr. Pollack agreed that the specialists were exempt from the provisions of this directive because they had a duty to maintain price continuity with reasonable depth in the stocks in which they were registered. Furthermore, breach of such duty could subject the specialist to disciplinary action by the Exchange or the Commission. However, he agreed with his Staff in that the odd-lot dealers should not be exempt from the Release.

On November 26, 1968, Mr. Buck and I met with various members of the SEC Staff to discuss a variety of subjects. I again requested an exemption for odd-lot dealers from the provisions of Release No. 8363. At the time when this subject was discussed, Irving Pollack, Donald O'Connor, Fred Siesel and Michael Mitchell of the SEC Staff were present.

Mr. Pollack reiterated what he had said on the telephone. Particularly, he indicated that the normal activities of the odd-lot dealers would fall without the scope of the Release provided

that the odd-lot dealers would let their customer firms know what securities they might not be able to deliver; and that the respective firms then could apprise their customers of the fact that there might be a delayed delivery.

I mentioned that Mr. Pollack was dealing with a legal concept of fraud, and there certainly was no intent on the part of the odd-lot dealer to defraud customers when he merely fulfilled his ordinary business functions for which he was registered with the Exchange. I also brought to his attention that if a member firm was charged with the responsibility of informing customers of delayed deliveries with regard to securities in restricted supply, it would have to require its registered representatives to apprise such customers of this fact before accepting their buy orders in such securities; that in view of the many duties already imposed upon the registered representatives, it cannot be expected that they would remember to inform or could inform the customers in every case; that all public customers who place buy or sell odd-lot orders expect that their orders will be executed; that the odd-lot dealers are interested in servicing firms customers' orders, and expend every effort to supply stock, even when there are difficulties; that if delivery was untimely, the customer firm had the right to cause a buy-in order to be entered against the odd-lot dealer; that a good number of the delivery problem stocks were preferred issues, a number of which traded in 10-share units; that it should be widely known that there is difficulty in making delivery in such issues because Exchange Rules acknowledge such difficulty by providing for delivery in fourteen days rather than the regular five day delivery period set forth in other Rules. Furthermore, I said that the brokers servicing orders are accustomed to filling them based upon the round-lot sale in accordance with Rule 124; that these brokers are associated with the odd-lot firms and not partners of such firms; that they personally have no knowledge of whether the dealers can deliver stock because that is strictly a back office problem; and that the customers of the odd-lot dealers are the commission firms and not the customers who entered the orders. In view of these facts and the service performed to the market and public investor by the odd-lot dealers, I said we felt very strongly that the odd-lot dealer should be granted an exemption, and that a lot of additional paper work (with no effective means of surveillance) should not be imposed on the industry.

In response, Mr. Pollack said that he couldn't give us a specific exemption, but that the odd-lot dealers would have no problem under the Release with the SEC if they continue as they have been doing; but that this would not prevent a member firm from making a claim against the odd-lot firm for delayed delivery, or preclude such firm's customer from making a claim against either the member firm or the odd-lot firm.

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