

Re: Release Nos. IC-8394 (6/21/74) In Re Carl L. Shipley
 34-10871 (6/21/74) In Re Middendorf, Colgate & Co.;
Austen B. Colgate

The Securities and Exchange Commission today decided that former Section 36 and present Section 36(a) of the Investment Company Act cannot serve as the sole basis for administrative proceedings for alleged violations of the Act. It therefore dismissed proceedings against Carl L. Shipley and vacated prior orders and dismissed proceedings against Middendorf, Colgate & Co. and Austen B. Colgate. See Middendorf, Colgate & Co., Release No. 34-10016 (2/26/73) and Austen B. Colgate, Release No. 34-10157 (5/18/73).

The original proceedings were the first administrative proceedings initiated solely for violations of Section 36 and Section 36(a). Mr. Shipley and the Investment Company Institute, the mutual fund industry trade association, contended that those sections authorized the Commission to bring only civil injunctive actions in the courts. The Commission's Division of Enforcement disagreed.

The Commission concluded that Section 36 "cannot serve as sole basis for administrative sanctions." It therefore dismissed the proceeding against Mr. Shipley and vacated prior orders and dismissed proceedings against Mr. Colgate and Middendorf, Colgate & Co.

The Commission observed, however, that it could consider breaches of trust involving personal misconduct within the meaning of Section 36 in weighing the sanction to be imposed in proceedings "otherwise appropriately before it," that is, where there were found to be willful violations of other provisions of the Act.

The Commission's prior order imposing sanctions against Colgate and Middendorf, Colgate was based solely upon its findings that Colgate, aided and abetted by Middendorf, Colgate willfully engaged in acts and practices constituting gross misconduct or gross abuse of trust, or breach of fiduciary duty involving personal misconduct within the meaning of former Section 36 and present Section 36(a) of the Investment Company Act.

(Relevant provision of law attached)

Sec. 36 (a) The Commission is authorized to bring an action in the proper district court of the United States, or in the United States court of any territory or other place subject to the jurisdiction of the United States, alleging that a person serving or acting in one or more of the following capacities has engaged within five years of the commencement of the action or is about to engage in any act or practice constituting a breach of fiduciary duty involving personal misconduct in respect of any registered investment company for which such person so serves or acts -

(1) as officer, director, member of any advisory board, investment adviser, or depositor; or

(2) as principal underwriter, if such registered company is an open-end company, unit investment trust, or face-amount certificate company.

If such allegations are established, the court may enjoin such persons from acting in any or all such capacities either permanently or temporarily and award such injunctive or other relief against such person as may be reasonable and appropriate in the circumstances, having due regard to the protection of investors and to the effectuation of the policies declared in section 1(b) of this title.