In the Matter of

CADY, ROBERTS & CO.

File No. 8-3925. Promulgated November 8, 1961

(Securities Exchange Act of 1934—Sections 15(b), 15A and 19(a)(3))

BROKER-DEALER PROCEEDINGS

Grounds for Suspension from National Securities Exchange

Use of Inside Information Regarding Reduction of Dividend

Where partner of registered broker-dealer firm is informed by associate in firm, who is also a director of issuer of a security listed on national securities exchange, of dividend reduction applicable to such security, and such partner knowing that such information has not yet been released to the public, executes orders for discretionary accounts on the exchange for the sale of shares of such security without waiting for the public announcement of or disclosing the dividend action, *held*, willful violation of anti-fraud provisions of securities acts by broker-dealer firm and partner and under all the circumstances it is in the public interest to suspend partner from exchange.

Appearances:

Philip A. Loomis, Jr., Ralph S. Saul, William D. Moran, Frank J. Evangelist, Jr. and Stanley H. Ragle, for the Division of Trading and Exchanges of the Commission.

Joseph G. Connolly, Ralph H. Demmler, Delmar W. Holloman, Alan Rosenblat, Kenneth M. Greenfield and *Kaye, Scholer, Fierman, Hays & Handler*, for Cady, Roberts & Co.

Joseph Lotterman and *Ralph R. Weiser*, of Lotterman & Weiser, for Robert M. Gintel.

FINDINGS AND OPINION OF THE COMMISSION

By Cary, Chairman:

This is a case of first impression and one of signal importance in our administration of the Federal securities acts. It involves a selling broker who executes a solicited order and sells for discretionary accounts (including that of his wife) upon an exchange. The crucial question is what are the duties of such a broker after receiving nonpublic information as to a company's dividend action from a director who is employed by the same brokerage firm.

These proceedings were instituted to determine whether Cady, Roberts & Co. ("registrant") [1] and Robert M. Gintel ("Gintel"), the selling broker and a partner of the registrant, willfully violated the "anti-fraud" provisions of Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), Rule 10b–5 issued under that Act, and Section 17(a) of the Securities Act of 1933 ("Securities Act") and, if so, whether any disciplinary action is necessary or appropriate in the public interest.[2] The respondents have submitted an offer of settlement which essentially provides that the facts stipulated by respondents shall constitute the record in these proceedings for the purposes of determining the occurrence of a willful violation of the designated anti-fraud provisions and the entering of an appropriate order, on the condition that no sanction may be entered in excess of a suspension of Gintel for 20 days from the New York Stock Exchange.[3]

The facts are as follows:

Early in November 1959, Roy T. Hurley, then President and Chairman of the Board of Curtiss-Wright Corporation, invited 2,000 representatives of the press, the military and the financial and business communities to a public unveiling on November 23, of a new type of internal combustion engine being developed by the company. On November 24, 1959, press announcements concerning the new engine appeared in certain newspapers. On that day Curtiss-Wright stock was one of the most active issues on the New York Stock Exchange, closing at 35¼, up 3¼ on a volume of 88,700 shares. From November 6, through November 23, Gintel had purchased approximately 11,000 shares of Curtiss-Wright stock for about 30 discretionary accounts of customers of registrant. With the rise in the price on November 24, he began selling Curtiss-Wright shares for these accounts and sold on that day a total of 2,200 shares on the Exchange.

The activity in Curtiss-Wright stock on the Exchange continued the next morning, November 25, and the price rose to 40¾, a new high for the year. Gintel continued sales for the discretionary accounts and, between the opening of the market and about 11:00 a.m., he sold 4,300 shares.

[1] Registrant has been registered with us as a broker-dealer pursuant to Section 15(b) of the Securities Exchange Act of 1934 ("Exchange Act"), since March 1955, having registered as successor to a firm organized in January 1953. Registrant is also a member of the National Association of Securities Dealers, Inc. ("NASD"), a national securities association registered pursuant to Section 15A of the Exchange Act, and registrant and its partners are members, within the meaning of Section 3(a)(3) of the Exchange Act, of the New York and American Stock Exchanges.

[2] See Sections 15(b), 15A(*l*)(2), and 19(a)(3) of the Exchange Act.

[3] The offer of settlement, submitted pursuant to Section 5(b) of the Administrative Procedure Act and Rule 8 of our Rules of Practice, further provides that respondents also waive a hearing and a recommended decision by a hearing examiner and agree to participation by our Division of Trading and Exchanges in the preparation of our findings and opinion.

On the morning of November 25, the Curtiss-Wright directors, including J. Cheever Cowdin ("Cowdin"), then a registered representative of registrant,[4] met to consider, among other things, the declaration of a quarterly dividend. The company had paid a dividend, although not earned, of $.625 per share for each of the first three quarters of 1959. The Curtiss-Wright board, over the objections of Hurley, who favored declaration of a dividend at the same rate as in the prior quarters, approved a dividend for the fourth quarter at the reduced rate of $.375 per share. At approximately 11:00 a.m., the board authorized transmission of information of this action by telegram to the New York Stock Exchange. The Secretary of Curtiss-Wright immediately left the meeting room to arrange for this communication. There was a short delay in the transmission of the telegram because of a typing problem and the telegram, although transmitted to Western Union at 11:12 a.m., was not delivered to the Exchange until 12:29 p.m. It had been customary for the company also to advise the Dow Jones News Ticker Service of any dividend action. However, apparently through some mistake or inadvertence, the Wall Street Journal was not given the news until approximately 11:45 a.m. and the announcement did not appear on the Dow Jones ticker tape until 11:48 a.m.

Sometime after the dividend decision, there was a recess of the Curtiss-Wright directors' meeting, during which Cowdin telephoned registrant's office and left a message for Gintel that the dividend had been cut. Upon receiving this information, Gintel entered two sell orders for execution on the Exchange, one to sell 2,000 shares of Curtiss-Wright stock for 10 accounts, and the other to sell short 5,000 shares for 11 accounts.[5] Four hundred of the 5,000 shares were sold for three of Cowdin's customers. According to Cowdin, pursuant to directions from his clients, he had given instructions to Gintel to take profits on these 400 shares if the stock took a "run-up." These orders were executed at 11:15 and 11:18 a.m. at 40¼ and 40⅜, respectively.[6]

When the dividend announcement appeared on the Dow Jones tape at 11:48 a.m., the Exchange was compelled to suspend trading in Cur-

[4] Mr. Cowdin, who died in September 1960, was a registered representative of the registrant from July 1956 until March 1960, and was also a member of the board of directors of Curtiss-Wright, having first been elected in 1929.

[5] Included in the 5,000 share sell order was an order to sell 1,000 shares placed by a third party which Gintel joined with his order for the latter's convenience.

[6] Subsequently, but prior to 11:48 a.m., Gintel sold 2,000 shares of Curtiss-Wright stock for a mutual fund which had a large position in this stock. A securities analyst for the investment manager of this fund who came into Gintel's office that morning about 11 o'clock testified that he had been concerned about the possible Curtiss-Wright dividend action and, on behalf of the fund, had delivered to Curtiss-Wright a letter urging that the dividend not be reduced. Both Gintel and the analyst stated that Gintel did not furnish any information regarding the dividend action. The analyst, by telephone from registrant's office, did advise the investment manager of the fund to sell Curtiss-Wright stock. The fund placed orders for and sold about 11,300 shares, including the 2,000 sold through Gintel, who had previously not handled any transactions for the fund.

tiss-Wright because of the large number of sell orders. Trading in Curtiss-Wright stock was resumed at 1:59 p.m. at 36½ ranged during the balance of the day between 34⅛ and 37, and closed at 34⅞.

VIOLATION OF ANTI-FRAUD PROVISIONS

So many times that citation is unnecessary, we have indicated that the purchase and sale of securities is a field in special need of regulation for the protection of investors. To this end one of the major purposes of the securities acts is the prevention of fraud, manipulation or deception in connection with securities transactions. Consistent with this objective, Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Rule 10b–5, issued under that Section,[7] are broad remedial provisions aimed at reaching misleading or deceptive activities, whether or not they are precisely and technically sufficient to sustain a common law action for fraud and deceit.[8] Indeed, despite the decline in importance of a "Federal rule" in the light of *Erie R. Co.* v. *Tompkins*,[9] the securities acts may be said to have generated a wholly new and far-reaching body of Federal corporation law.[10]

Section 17(a) and Rule 10b–5, in almost identical terms, make illegal the use of the mails or of the facilities of interstate commerce, including the facility of any national exchange, by any person who directly or indirectly engages in any of the following prohibited kinds of conduct in connection with the sale of any security:

(1) Employment of any device, scheme or artifice to defraud.

(2) The obtaining of money or property by means of, or the making of, any untrue statement of a material fact or the omission to state a material fact necessary in order to make statements made, in the light of the circumstances under which they were made, not misleading.

[7] Section 10(b) makes it unlawful for any person to use, in connection with the purchase or sale of a security, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for protection of investors. By virtue of this grant of authority, the Commission promulgated Rule 10b–5, Securities Exchange Act Release No. 3230, May 21, 1942.

[8] *Hooper* v. *Mountain States Securities Corporation*, 282 F. 2d 195, 201 (C.A. 5, 1960); *Ellis* v. *Carter*, 291 F. 2d 270 (C.A. 9, 1961); see also *Charles Hughes & Co., Inc.* v. *S.E.C.*, 139 F. 2d 434, 437 (C.A. 2, 1943), *cert. denied*, 321 U.S. 786 (1944); *Norris & Hirshberg, Inc.* v. *S.E.C.*, 177 F. 2d 228, 233 (C.A.D.C., 1949).

[9] 304 U.S. 64 (1938).

[10] As was stated in *McClure* v. *Borne Chemical Co., Inc.*, 292 F. 2d 824, 834 (C.A. 3, 1961);

"In the present case we are construing two Sections [10, 29] of the Securities Exchange Act of 1934. That Act deals with the protection of investors, primarily stockholders. It creates many managerial duties and liabilities unknown to the common law. It expresses Federal interest in management-stockholder relationships which heretofore had been almost exclusively the concern of the states. Section 10(b) imposes broad fiduciary duties on management vis-a-vis the corporation and its individual stockholders. As implemented by Rule 10b–5 and Section 29(b), Section 10(b) provides stockholders with a potent weapon for enforcement of many fiduciary duties. It can be said fairly that the Exchange Act, of which Sections 10(b) and 29(b) are parts, constitutes far reaching Federal substantive corporation law."

(3) Engaging in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.[11]

These anti-fraud provisions are not intended as a specification of particular acts or practices which constitute fraud, but rather are designed to encompass the infinite variety of devices by which undue advantage may be taken of investors and others.[12]

Section 17 and Rule 10b–5 apply to securities transactions by "any person." Misrepresentations will lie within their ambit, no matter who the speaker may be. An affirmative duty to disclose material information has been traditionally imposed on corporate "insiders," particularly officers, directors, or controlling stockholders. We, and the courts have consistently held that insiders must disclose material facts which are known to them by virtue of their position but which are not known to persons with whom they deal and which, if known, would affect their investment judgment. Failure to make disclosure in these circumstances constitutes a violation of the anti-fraud provisions.[13] If, on the other hand, disclosure prior to effecting a purchase or sale would be improper or unrealistic under the circumstances, we believe the alternative is to forego the transaction.

The ingredients are here and we accordingly find that Gintel willfully violated Sections 17(a) and 10(b) and Rule 10b–5. We also find a similar violation by the registrant, since the actions of Gintel, a member of registrant, in the course of his employment are to be regarded as actions of registrant itself.[14] It was obvious that a reduction in the quarterly dividend by the Board of Directors was a material fact which could be expected to have an adverse impact on the market price of the company's stock. The rapidity with which Gintel

[11] The language of Rule 10b–5 is broader in several respects than that of Section 17(a) of the Securities Act. Thus, while Section 17(a) prohibits fraudulent or deceptive practices "in the offer or sale" of any security, Rule 10b–5 prohibits such activities "in connection with the purchase or sale" of any security. Section 17(a) makes it unlawful "to obtain money or property by means of" false or misleading statements, while Rule 10b–5 provides, that it is unlawful "to make any such statements." Rule 10b–5 specifically refers to the use "of any facility of any national securities exchange," language not contained in Section 17(a). A national securities exchange, however, is one of the facilities of interstate commerce. *Professional Investors, Inc.*, 37 S.E.C. 173, 175–6 (1956); *Consolidated Development Corporation*, 40 S.E.C. 294 (1960); Exchange Act, Section 2.

[12] It might be said of fraud that age cannot wither, nor custom stale its infinite variety.

[13] *Speed* v. *Transamerica Corp.*, 99 F. 808, 828–829 (D. Del. 1951); *Kardon* v. *National Gypsum Co.*, 73 F. Supp. 798, 800 (E.D. Penna. 1947); *Ward LaFrance Truck Corp.*, 13 S.E.C. 373, 380, 381 (1943).

Although the "majority" state rule apparently does not impose an affirmative duty of disclosure on insiders when dealing in securities, an increasing number of jurisdictions do impose this responsibility either on the theory that an insider is generally a fiduciary with respect to securities transactions or "special facts" may make him one. See, e.g., *Strong* v. *Repide*, 213 U.S. 419, 29 S. Ct. 521 (1909); *Hobart* v. *Hobart Estate Co.*, 26 Cal. 2d 412, 159 P. 2d 958 (1945); *Hotchkiss* v. *Fischer*, 136 Kans. 530, 16 P. 2d 531 (1932).

[14] *H. F. Schroeder & Co.*, 27 S.E.C. 833, 837 (1948); Cf. *Reynolds & Co.*, 39 S.E.C. 902 (1960).

acted upon receipt of the information confirms his own recognition of that conclusion.

We have already noted that the anti-fraud provisions are phrased in terms of "any person" and that a special obligation has been traditionally required of corporate insiders, e.g., officers, directors and controlling stockholders. These three groups, however, do not exhaust the classes of persons upon whom there is such an obligation. Analytically, the obligation rests on two principal elements; first, the existence of a relationship giving access, directly or indirectly, to information intended to be available only for a corporate purpose and not for the personal benefit of anyone,[15] and second, the inherent unfairness involved where a party takes advantage of such information knowing it is unavailable to those with whom he is dealing. In considering these elements under the broad language of the anti-fraud provisions we are not to be circumscribed by fine distinctions and rigid classifications.[16] Thus our task here is to identify those persons who are in a special relationship with a company and privy to its internal affairs, and thereby suffer correlative duties in trading in its securities. Intimacy demands restraint lest the uninformed be exploited.

The facts here impose on Gintel the responsibilities of those commonly referred to as "insiders." He received the information prior to its public release from a director of Curtiss-Wright, Cowdin, who was associated with the registrant. Cowdin's relationship to the company clearly prohibited him from selling the securities affected by the information without disclosure. By logical sequence, it should prohibit Gintel, a partner of registrant.[17] This prohibition extends not only over his own account, but to selling for discretionary accounts and soliciting and executing other orders. In somewhat analogous circumstances, we have charged a broker-dealer who effects securities transactions for an insider and who knows that the insider possesses non-public material information with the affirmative duty to make appropriate disclosures or dissociate himself from the transaction.[18]

[15] A significant purpose of the Exchange Act was to eliminate the idea that the use of inside information for personal advantage was a normal emolument of corporate office. See Sections 2 and 16 of the Act; H. R. Rep. No. 1383, 73rd Cong., 2d Sess. 13 (1934); S. Rep. No. 792, 73rd Cong., 2d Sess. 9 (1934); S.E.C., *Tenth Annual Report* 50 (1944).

[16] See Comment, *The Prospects for Rule X–10 B–5; An Emerging Remedy for Defrauded Investors*, 59 Yale L. J. 1120, 1144–56 (1950): Cf. *Brophy* v. *Cities Service Co.*, 31 Del. Ch. 241, 70 A. 2d 5 (1949); see also *Charles Hughes & Co., Inc.*, v. *S.E.C.* 139 F. 2d 434 (C.A. 2, 1943), *cert. den.*, 321 U.S. 786 (1944); *Hughes* v. *S.E.C.*, 174 F. 2d 969, 975 (C.A.D.C. 1949); *Norris J. Hirshberg, Inc.* v. *S.E.C.*, 177 F. 2d 228, 233 (C.A.D.C. 1949).

[17] See 3 Loss, *Securities Regulation*, 1450–1 (2d ed., 1961). Cf. Restatement, *Restitution*, Section 201(2) (1937). Although Cowdin may have had reason to believe that news of the dividend action had already been made public when he called registrant's office, there is no question that Gintel knew when he received the message that the information was not yet public and was received from a director.

[18] *Hughes & Treat*, 22 S.E.C. 623, 626 (1946); *Fry* v. *Schumaker*, 83 F. Supp. 476, 478 (E.D. Pa. 1947). Cf. *William I. Hay*, 19 S.E.C. 397, 406–09 (1945); *R. D. Bayly & Co.*, 19 S.E.C. 773, 784 (1945); *Alexander Smith*, 22 S.E.C. 13, 18 (1946).

The three main subdivisions of Section 17 and Rule 10b–5 have been considered to be mutually supporting rather than mutually exclusive. Thus, a breach of duty of disclosure may be viewed as a device or scheme, an implied misrepresentation, and an act or practice, violative of all three subdivisions.[19] Respondents argue that only clause (3) may be applicable here. We hold that, in these circumstances, Gintel's conduct at least violated clause (3) as a practice which operated as a fraud or deceit upon the purchasers. Therefore, we need not decide the scope of clauses (1) and (2).[20]

We cannot accept respondents' contention that an insider's responsibility is limited to existing stockholders and that he has no special duties when sales of securities are made to non-stockholders.[21] This approach is too narrow. It ignores the plight of the buying public—wholly unprotected from the misuse of special information.

Neither the statutes nor Rule 10b–5 establish artificial walls of responsibility. Section 17 of the Securities Act, explicitly states that it shall be unlawful for any person in the offer or sale of securities to do certain prescribed acts. Although the primary function of Rule 10b–5 was to extend a remedy to a defrauded seller, the courts and this Commission have held that it is also applicable to a defrauded buyer.[22] There is no valid reason why persons who *purchase* stock from an officer, director or other person having the responsibilities of an "insider" should not have the same protection afforded by disclosure of special information as persons who *sell* stock to them. Whatever distinctions may have existed at common law based on the view that an officer or director may stand in a fiduciary relationship to existing stockholders from whom he purchases but not to members of the pub-

[19] *Speed V. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951).

[20] The respondents rely on *Joseph* v. *Farnsworth Radio and Television Corp.*, 99 F. Supp. 701 (S.D.N.Y., 1951), *aff'd* 198 F. 2d 883 (C.A. 2, 1952), and particularly the language in that opinion to the effect that "silence cannot be deemed to be the employment of 'any device, scheme or artifice' contemplated by the interdiction of Rule X-10(b)(5)(a) of the Commission," 99 F. Supp. 701, 706. However, this statement relates only to the first subdivision of Rule 10b–5, the scope of which we are not deciding here. Cf. *Charles Hughes & Co., Inc.* v. *S.E.C.*, 139 F. 2d 434, 436–37 (C.A. 2, 1943), *cert. denied*, 321 U.S. 786 (1944). Moreover, in its discussion of clause (3), upon which we base our finding, the court in the *Farnsworth* case apparently assumed that silence could be viewed as an "act, practice or course of business" which operated as a fraud or deceit, but denied relief on the grounds of a lack of privity between plaintiffs and defendants. See page 914 *infra*.

[21] It should be noted that the record contains no evidence to indicate the correctness of the assumption, upon which respondents' contention is apparently based, that none of the persons who purchased the Curtiss-Wright shares sold by Gintel during the interval in question were already stockholders of that company.

[22] See *Ellis* v. *Carter*, 291 F. 2d 270 (C.A. 9, 1961); *Matheson* v. *Armbrust*, 284 F. 2d 670 (C.A. 9, 1960), *cert. denied*, 365 U.S. 870 (1961); *Fischman* v. *Raytheon*, 188 F. 2d 783 (C.A. 2, 1951). See Securities Exchange Act Release No. 3634. We note that, in 16 F.R. 7928, August 11, 1951, the Commission struck the words "by a purchaser" from the title of Rule 10b–5 (then X10B–5) so as to read "Employment of manipulative and deceptive devices."

lic to whom he sells, it is clearly not appropriate to introduce these into the broader anti-fraud concepts embodied in the securities acts.[23]

Respondents further assert that they made no express representations and did not in any way manipulate the market, and urge that in a transaction on an exchange there is no further duty such as may be required in a "face-to-face" transaction.[24] We reject this suggestion. It would be anomalous indeed if the protection afforded by the anti-fraud provisions were withdrawn from transactions effected on exchanges, primary markets for securities transactions. If purchasers on an exchange had available material information known by a selling insider, we may assume that their investment judgment would be affected and their decision whether to buy might accordingly be modified. Consequently, any sales by the insider must await disclosure of the information.[25]

Cases cited by respondents in which relief was denied to purchasers or sellers of securities in exchange transactions are distinguishable.[26] The action here was instituted by the Commission, not by individuals. The cited cases concern private suits brought against insiders for violation of the anti-fraud rules. They suggest that the plaintiffs may not recover because there was lacking a "semblance of privity" since it was not shown that the buyers or sellers bought from or sold to the insiders.[27] These cases have no relevance here as they concern the

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[23] As Judge Learned Hand has stated in the context of Section 16(b) of the Exchange Act:

> "For many years a grave omission in our corporation law had been its indifference to dealings of directors or other corporate officers in the shares of their companies. When they bought shares they came literally within the conventional prohibitions of the law of trusts; yet the decisions were strangely slack in so deciding. When they sold shares, it could indeed be argued that they were not dealing with a beneficiary, but with one whom his purchase made a beneficiary. That should not, however, have obscured the fact that the director or officer assumed a fiduciary relation to the buyer by the very sale; for it would be a sorry distinction to allow him to use the advantage of his position to induce the buyer into the position of a beneficiary although he was forbidden to do so once the buyer had become one."

Gratz v. *Claughton*, 187 F. 2d 46, 49 (C.A. 2, 1951), *cert. denied*, 341 U.S. 920 (1951).

[24] It is interesting to note that earlier attacks on the applicability of Rule 10b–5 rested on the contention that it applied only to exchange transactions or other transactions on an organized security market. The courts have rejected these attempts to narrow the broad applicability of the rule. *Matheson* v. *Armbrust*, 284 F. 2d 670 (C.A. 9, 1960), *cert. denied*, 365 U.S. 870 (1961); *Fratt* v. *Robinson*, 203 F. 2d 627 (C.A. 9, 1953).

[25] The Exchange Act was enacted to remedy abuses in the exchange markets, including specifically improper transactions by officers, directors, and principal stockholders. See Senate Report No. 792, 73rd Cong., 2d Sess.; H.R. Report No. 1383, 73rd Cong., 2d Sess. Cf. *Wilko* v. *Swan*, 127 F. Supp. 55 (S.D.N.Y. 1955) (recovery from broker in exchange transactions under Section 12(2) of the Securities Act). See Ballantine, *Corporations* 216 (1946 Rev. Ed.). But compare *Goodwin* v. *Agassiz*, 283 Mass. 358, 186 N.E. 659 (1931).

[26] See *Joseph* v. *Farnsworth Radio and Television Corp.*, 99 F. Supp. 701 (S.D.N.Y. 1951), *aff'd*, 198 F. 2d 883 (C.A. 2, 1952); *Donovan* v. *Taylor*, 136 F. Supp. 552 (N.D. Cal. 1955).

[27] See also *Holmberg.* v. *Williamson*, 135 F. Supp. 493 (S.D.N.Y., 1955); *Buchholtz* v. *Renard*, 188 F. Supp. 888 (S.D.N.Y. 1960). Cf. *Birnbaum* v. *Newport Steel Corp.*, 193 F. 2d 461 (C.A. 2, 1952), *cert. denied*, 343 U.S. 956 (1953) (10b–5 only applies to purchasers and sellers). *Contra: Trans Continental Life Insurance Co.* v. *Bankers and Bond Co.*, 187 F. Supp. 14, 24 (W.D. Ky. 1960) (no "privity" requirement).

remedy of the buyer or seller *vis-a-vis* the insider. The absence of a remedy by the private litigant because of lack of privity does not absolve an insider from responsibility for fraudulent conduct.

Respondents argue that any requirement that a broker-dealer in exchange transactions make disclosure of "adverse factors disclosed by his analysis" would create uncertainty and confusion as to the duties of those who are constantly acquiring and analyzing information about companies in which they or their clients are interested. Furthermore, it is claimed, substantial practical difficulties would be presented as to the manner of making disclosures.

There should be no quandary on the facts here presented. While there may be a question as to the materiality and significance of some corporate facts and as to the necessity of their disclosure under particular circumstances, that is not this case.[28] Corporate dividend action of the kind involved here is clearly recognizable as having a direct effect on the market value of securities and the judgment of investors. Moreover, knowledge of this action was not arrived at as a result of perceptive analysis of generally known facts, but was obtained from a director (and associate) during the time when respondents should have known that the board of directors of the issuer was taking steps to make the information publicly available but before it was actually announced.

Furthermore, the New York Stock Exchange has recognized that prompt disclosure of important corporate developments, including specifically dividend action, is essential for the benefit of stockholders and the investing public and has established explicit requirements and recommended procedures for the immediate public release of dividend information by issuers whose securities are listed on the Exchange.[29] The practical problems envisaged by respondents in effecting appropriate disclosures in connection with transactions on the Exchange are easily avoided where, as here, all the registered broker-dealer need do is to keep out of the market until the established procedures for public release of the information are carried out instead of hastening to execute transactions in advance of, and in frustration of, the objectives of the release.

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[28] For one court's view of what material facts require disclosure, see *James Blackstone Memorial Library Association* v. *Gulf, Mobile & Ohio RR Co.*, 264 F. 2d 445, 450–51 (C.A. 7, 1959), *cert. denied* 361 U.S. 815. For citations of "special facts" cases, see Lattin, *Corporations*, 264–66 (1959).

[29] Article III(4), Form of Listing Agreement, New York Stock Exchange Manual, Page A–28; also pages A–37—A–42. As respondents point out, the primary responsibility for the prompt public release of dividend news is on the issuer. However, this does not relieve respondents of their responsibilities to uninformed public investors when they receive such news from an associate who is a director of the company, in advance of its public release. The existence of the exchange requirement, of which respondents must be presumed to have knowledge, represents an awareness of the potentialities for abuse by persons having access to inside information as to dividend action and other activities of material significance to investors.

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Finally, we do not accept respondents' contention that Gintel was merely carrying out a program of liquidating the holdings in his discretionary accounts—determined and embarked upon prior to his receipt of the dividend information. In this connection, it is further alleged that he had a fiduciary duty to these accounts to continue the sales, which overrode any obligations to unsolicited purchasers on the Exchange.

The record does not support the contention that Gintel's sales were merely a continuance of his prior schedule of liquidation. Upon receipt of the news of the dividend reduction, which Gintel knew was not public, he hastened to sell before the expected public announcement all of the Curtiss-Wright shares remaining in his discretionary accounts, contrary to his previous moderate rate of sales. In so doing, he also made short sales of securities which he then allocated to his wife's account and to the account of a customer whom he had never seen and with whom he had had no prior dealings.[30] Moreover, while Gintel undoubtedly occupied a fiduciary relationship to his customers, this relationship could not justify any actions by him contrary to law.[31] Even if we assume the existence of conflicting fiduciary obligations, there can be no doubt which is primary here. On these facts, clients may not expect of a broker the benefits of his inside information at the expense of the public generally. The case of *Van Alstyne, Noel & Co.*,[32] cited by respondents, not only fails to support their position but on the contrary itself suggests that a confidential relationship with one person cannot be relied upon as overriding a duty not to defraud another. In that case, we held that a broker-dealer's sales of a company's securities to customers through misleading statements and without revealing material facts violated anti-fraud provisions, notwithstanding the broker-dealer's assertion that the information concealed from investors had been obtained in confidence from the company and so could not be revealed.[33]

[30] Gintel explains his short sales as follows: He was uncertain as to the exact number of Curtiss-Wright shares remaining in his discretionary accounts at that point and, in his haste to enter the orders, did not take the time to make an exact count. Since he thus ran the risk of over-selling, he marked the order as a short sale, contemplating that if necessary any excess would be carried in his wife's account. He could make short sales for his discretionary accounts only "against the box." When it developed that he had overestimated the number of unsold shares in the discretionary accounts, he allocated 950 shares as a short sale in his wife's account and 500 shares as a short sale for a new customer. The new customer was suggested to Gintel by the securities analyst of the investment fund who was in Gintel's office at the time (See n. 6, p. ——, *supra*). Gintel called the customer and secured permission to allocate the 500 shares sold short to his account.

[31] "But to say that a man is a fiduciary only begging analysis; it gives direction to further inquiry, to whom is he a fiduciary? What obligation does he owe as a fiduciary?" *S.E.C.* v. *Chenery Corporation*, 318 U.S. 80, 85–86 (1943). In the circumstances, Gintel's relationship to his customers was such that he would have a duty not to take a position adverse to them, not to take secret profits at their expense, not to misrepresent facts to them, and in general to place their interests ahead of his own.

[32] 33 S.E.C. 311 (1952).

THE PUBLIC INTEREST

All the surrounding circumstances and the state of mind of the participants may be taken into consideration in determining what sanctions should appropriately be imposed here.

It is clear that Gintel's conduct was willful in that he knew what he was doing.[34] However, there is no evidence of a preconceived plan whereby Cowdin was to "leak" advance information of the dividend reduction so that Gintel could use it to advantage before the public announcement; on the contrary, the evidence points to the conclusion that Cowdin probably assumed, without thinking about it, that the dividend action was already a matter of public information and further that he called registrant's office to find out the effect of the dividend news upon the market. The record, moreover, indicates that Gintel's conduct was a spontaneous reaction to the dividend news, that he intended primarily to benefit existing clients of Cady, Roberts & Co. and that he acted on the spur of the moment and so quickly as to preclude the possibility of review by registrant or of his own more deliberate consideration of his responsibilities under the securities acts.

Gintel has been fined $3,000 by the New York Stock Exchange in connection with the instant transactions. The publication of this opinion, moreover, will in itself serve as a further sanction upon Gintel and registrant and will also induce a more careful observance of the requirements of the anti-fraud provisions in the area in question. Furthermore, registrant had no opportunity to prevent Gintel's spontaneous transactions and no contention has been made that its procedures for handling accounts did not meet proper standards. Under all the circumstances we conclude that the public interest and the protection of investors will be adequately and appropriately served if Gintel is suspended from the New York Stock Exchange for

[33] *Id.* at 320–1.

[34] *Hughes* v. *S.E.C.*, 174 F. 2d 969, 977 (C.A.D.C. 1949); *Shuck* v. *S.E.C.* 264 F. 2d 358 (C.A.D.C. 1958); *Thompson Ross Securities Co.*, 6 S.E.C. 1111, 1122 (1940).

Gintel has stressed that he did not communicate with or advise any of his other accounts to trade in Curtiss-Wright stock or make any trades for himself (other than the excess short position taken in his wife's account) upon receiving the dividend information, thus in effect indicating that he recognized the impropriety of using what he knew was inside information not publicly known.

When asked why he had not disclosed the fact that the dividend had been cut, Gintel answered: "Well, the only answer I can think of to give is that I didn't want to tell him or anybody that what I had accidentally learned from a director of the company . . . I had obtained the information from a director of the company in this manner."

20 days [35] and if no sanction is imposed against the registrant. Accordingly, we accept respondents' offer of settlement.

An appropriate order will issue.

Commissioners Woodside and Cohen join in the above opinion. Commissioner Frear dissents in part (see below).

Commissioner Frear, Dissenting in part:

I agree that the facts disclosed by the record submitted in connection with the offer of settlement show willful violations of the anti-fraud provisions of the Securities Acts, and I concur in the views enunciated in the part of the Commission's Findings and Opinion dealing with such violations. However, in my opinion those facts and violations require the imposition of a greater sanction than the 20-day suspension of Gintel from membership on the New York Stock Exchange, which is the maximum permitted under the offer of settlement, and I would accordingly reject the offer.

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[35] See Section 19(a)(3) of the Exchange Act.