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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON

SECURITIES EXCHANGE ACT OF 1934
Release No. 3056

The Securities and Exchange Commission today made public an opinion of its General Counsel, Chester T. Lane, discussing the circumstances under which a broker who has raised the market price of a security in the course of accumulating a long position in that security may be held to have violated the anti-manipulation provisions of the Securities Exchange Act of 1934.

Mr. Lane's opinion deals with the case of a broker who accumulates a block of securities for purposes of later resale. In such a situation, Mr. Lane points out, the broker's purchases may frequently raise the market price of the security. If the broker begins to sell the security at a time when the market still reflects the effects of his activity, the natural inference would be that he had raised the market price for puroses of manipulation. However, where the broker refrains from selling for a sufficient length of time after his purchases so that the market price of the security no longer represents a price for which he is responsible, his failure to take advantage of the market price resulting from his buying would tend to show that he had not caused the rise in market prices for a manipulative purpose. The opinion applies both to exchange securities and to over-the-counter securities.

The text of the opinion follows:

"You have asked me for my opinion as to the legality of certain transactions which you propose to effect in stock of the X Corporation, a security listed on a national securities exchange and registered under the Securities Exchange Act of 1934. As I understand the situation from your letter, you have made a study of the condition of the X Corporation, and have satisfied yourself that, at the current market quotation, the stock is underpriced. You have recently acquired a substantial block of the stock in a privately negotiated transaction, and contemplate making a public distribution of the block so acquired. In order to increase the size of the proposed redistribution you wish to purchase additional shares in the open market. Your letter indicates that you expect that your purchases of additional shares will have the effect of raising the market price of the stock to a figure somewhat closer to what you consider to be its true value. Your proposed redistribution would be at that increased figure.

"In entering upon any such program, it is essential to keep in mind the provisions of Section 9 (a) (2) of the Securities Exchange Act, which makes it unlawful, directly or indirectly, 'to effect . . . a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or *raising* or depressing *the price* of such security, *for the purpose of inducing the purchase* or sale *of such security by others.*' (The italics are mine.)

"Your letter shows that a vital part of your program will be the expected rise in price which will enable you to make the profit without which you would naturally be unwilling to go into the operation. As you point out, any substantial buying on your part would naturally advance the price. Bringing about a price rise by extensive purchases is not unlawful in itself; this was recognized by the Senate Committee on Banking and Currency, which, in its report on the Act prior to its passage, said:

> 'To manipulate the price of a security by any series of transactions with the specific intent of raising or depressing the price, is prohibited by paragraph (3) [the present paragraph (2)]. Any extensive purchases or sales are bound to cause changes in the market price of the security, but mere knowledge on the part of the purchaser or seller that his transactions will have this effect is not sufficient to bring him within the scope of this provision. Thus, if a person is merely trying to acquire a large block of stock for investment, or desires to dispose of a big holding, his knowledge that in doing so he will affect the market price does not suffice to make his actions unlawful.' - Sen. Rep. No. 792, p. 17, 73d Congress, 2d Session.

"The purpose of Section 9 (a) (2) is thus not to prohibit purchasing which may advance the market, or selling which may depress it. However, when purchasing is done under such circumstances that it must be expected to, and does, raise the price, and where the purpose of such purchasing is to induce others to purchase--presumably at the higher levels thus created--the statutory elements are present, and a violation of the Act is involved. The Act makes unlawful any series of purchases made for such a purpose, whether or not the purpose is achieved, i.e., whether or not any other persons do in fact purchase at the higher levels. And furthermore, it is immaterial that the program is undertaken in a *bona fide* belief that the security *ought* for some reason to be selling at the higher level.

"As the existence of a violation of Section 9 (a) (2) is dependent upon the precise acts engaged in during the course of an operation and the purpose with which they are entered into, I am naturally reluctant to attempt any expression of opinion in advance as to whether any proposed operation will be in violation of the law. Only an analysis of the precise activities conducted can justify an opinion on such a question. And, of course, questions of *purpose* and *motive* can ordinarily be best determined by the observer on the basis of the evidentiary weight to which concrete facts and actions are reasonably entitled. It is in this sense that the timing of any selling in which you may engage becomes important. Let me illustrate this by two hypothetical cases:

"On the one hand, let us suppose that a broker, believing a stock to be underpriced, enters into a buying program which, in view of the condition of the market, he knows will have the result of raising the price. From time to time he disposes of part of his purchases, either over the exchange or over-the-counter, to customers attracted either by the rising price or the increased activity, at the levels which his buying has thus created. Or, to vary the case, he makes no sales until his purchases have carried the price to what he considers proper levels, and then disposes of the stock at those levels, either over-the-counter to his customers, or, if he believes the market by reason of the increased activity he has generated will take the selling without breaking, by means of sales over the exchange.

"In either case, the broker will have effected a series of purchases creating active trading and raising the price of the security, and it will be difficult to avoid the inference that his transactions were effected for the illegal purpose of inducing others to buy. The fact that the broker may have believed *bona fide* that the stock at higher levels would still be a good buy for his customers is immaterial; tampering with a market, manipulating it, cannot be excused even by an honest belief that it would be of benefit to others to have it tampered with. And in the picture I have drawn, the relevance of the sales is not that they are an indispensable element of the offense, but that they are of great *evidentiary weight* in determining the *purpose* with which the buying was undertaken. Consequently, under the circumstances stated, I should be of the opinion that the broker in question was guilty not only of violating Section 9 (a) (2) of the Securities Exchange Act, but also of violating the general fraud provisions of the Securities Act and the Securities Exchange Act. In this connection I direct your attention to the Commission's opinion *In the Matter of Barrett & Co.*, Securities Exchange Act Release No. 2901.

"On the other hand, let us suppose the case of a broker who enters into a similar buying program with the same faith in the value of a stock, and the same belief that at higher levels it will still be a good buy for his customers. This broker likewise knows that his buying will affect the price of the stock, either through increased activity or rising prices. He does not buy, however, for the purpose of inducing others to purchase, but rather for the purpose of acquiring a supply which he can dispose of at a profit if an expected increase in market price does materialize from other causes than his buying activity. Consequently, this broker, before making any sales, whether on the exchange or over-the-counter, takes care to permit a sufficient period of time to elapse from time of his last purchase to make sure that the effect of his purchases on the market will have been dissipated, and the market will have found a level (whether above, below, or at, his last purchase price) which is its own independent level, created by outside factors of supply and demand and unaffected by his own activities. The length of time he waits will be dependent upon the character of the market, and the length of time which the market takes to lose the effect of his buying.

"Of course, other factors discernible in connection with the operation might be of evidentiary value in establishing the existence of a manipulative purpose even though resales were not undertaken in proximity to the purchasing. Such factors might include the pattern of the broker's purchasing--that is, whether his purchases were made in a manner particularly calculated to raise market prices, whether he accompanied his buying by efforts to induce others to buy in the market at the same time, whether he was being pressed to repay or reduce bank loans for which securities of the same issues were held as collateral. The presence of these or other similar factors might well lead, as a matter of evidence, to the conclusion that the broker was motivated by a manipulative purpose.

"However, in the absence of such other complicating factors, it would seem that in the case I have last described any inference of illegality which might have arisen merely from the fact that the broker's buying had raised the market price would be rebutted by the fact that he had avoided resales until the effect of his buying on the market had been dissipated and the markt price had become a price uninfluenced by his buying program.

"I appreciate that in the two cases I have described the brokers may claim to have been motivated by equally genuine desires to assist their customers into good and fairly priced investments. But the facts of the second case, as I have stated them, do not seem to me to raise any inference of manipulation, whereas I believe that from the facts of the first case a manipulation may fairly be inferred. And the program presented by your letter seems to me to fall within the first rather than the second of my two hypothetical cases. The Act is designed to prevent manipulative activities, and does not excuse them merely because they may be in part benevolently inspired."

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