

(Securities Act Release No. 5269)

ADMINISTRATIVE PROCEEDING FILE NO. 3-3281

UNITED STATES OF AMERICA before the SECURITIES AND EXCHANGE
COMMISSION July 7, 1972

In the Matter of

BRIAN-LLOYD CO., INC. 220 Fifth Avenue New York, New York

(2—34902)

Securities Act of 1933 Section 8(d)

FINDINGS, OPINION, AND STOP ORDER

STOP ORDER PROCEEDINGS

Misstatements and Omissions

Where registration statement filed under Securities Act of 1933 substantially overstated issuer's sales, net income, earnings per share, accounts receivable, and retained earnings as result of improper inclusion in sales of so-called "guaranteed sales," under terms of which buyer had right to return all unsold merchandise at future date without being obligated to pay for it, and where description of issuer's marketing and sales activities failed to disclose terms and amount of such "sales" and that substantial amount of merchandise returned or to be returned had been sold on such basis, held, stop order will issue suspending effectiveness of registration statement.

APPEARANCES

Richard H. Rowe, Robert M. Steinbach, and Theodore A. Doremus, for the Division of Corporation Finance of the Commission.

Arnold Mandell, president of Brian-Lloyd Co., Inc., for registrant.

These are proceedings under Section 8(d) of the Securities Act of 1933 to determine whether a stop order should issue suspending the effectiveness of a registration statement on Form S-1 filed by Brian-Lloyd Co., Inc. ("registrant"), a New York corporation whose primary business in 1969 and 1970 was the distribution of electric hairsetters. The registration statement, which as amended became effective on February 20, 1970, covered a public offering of 100,000 shares of registrant's 1¢ par value common stock at \$6 per share.

Registrant submitted an offer of settlement in which, solely for the purpose of these proceedings, it admitted certain facts, consented to findings consistent with the allegations contained in the Statement of Matters filed by our Division of Corporation Finance ('Division'), and consented to the issuance of a stop order. Registrant further agreed to mail a copy of our decision, within 30 days after its issuance, to each subscriber to its offering, which had been completed, and to all shareholders of record as of December 31, 1971.

After due consideration of the offer of settlement and upon the recommendation of the Division, we determined to accept such offer. On the basis of the Statement of Matters and the offer of settlement, as well as investigative materials obtained by our staff in its private investigation which registrant has consented may be considered, we find that the registration statement as amended contained materially untrue and misleading statements and omitted to state material facts required to be stated therein, in the respects set forth below.

The unaudited Statement of Income for the six-month period ended November 30, 1969, substantially overstated registrant's sales, which were reported in the amount of \$578,078, as a result of the improper inclusion of so-called "guaranteed sales," which constituted at least 12% of the reported sales. Based upon all the factors surrounding the "guaranteed sales" transactions, income could not properly be accrued on the merchandise at the time it was shipped. The hairsetter was a new product, and the customer, under the terms of the "guaranteed sale," had the absolute right to return all unsold hairsetters at some future date without being obligated to pay for them. Registrant's indication that the customer assumed the risk of damage or loss while he had control of the merchandise did not alter the essentially incomplete nature of the transaction. Under the circumstances, whether or not title passed, these so-called sales should have been treated no differently from consignments whose inclusion in revenues would clearly have been improper. 1/

The inclusion of "guaranteed sales" in the Statement of Income for the six-month period also resulted in the material overstatement of net income and earnings per share in that Statement and of accounts receivable and retained earnings in registrant's Statements of Financial Condition and Retained Earnings as of November 30, 1969.

Between December 1, 1969 and February 20, 1970, the effective date of the registration statement, merchandise returns exceeded \$100,000, and a substantial portion of those returns was of merchandise sold on a "guaranteed sale" basis. 2/ Also, as of February 20, registrant's management knew or had reason to know that substantial additional returns of merchandise would be forthcoming. In fact, substantial returns were made after that date, and a material amount of these returns resulted from prior "guaranteed sales" transactions. The description of registrant's marketing and sales activities was also deficient in failing to disclose the terms and material amount of "guaranteed sales," and that a substantial amount of the merchandise returned or to be returned had been sold on a "guaranteed sale" basis.

Moreover, the sales figure of \$578,078, and the resulting overstated six-month net income of \$45,446 and earnings per share of 28¢, when compared with the certified figures in the Statement of Income for the full fiscal year ended May 31, 1969, which showed sales of \$775,186, 3/ net income of \$60,548, and earnings of 37¢ per share, conveyed the materially misleading impression that increased profits could be expected for the fiscal year ending May 31, 1970, and that registrant's business was therefore on the upswing. 4/

In view of the foregoing, a stop order should issue suspending the effectiveness of the registration statement.

Accordingly, IT IS ORDERED that the effectiveness of the registration statement filed by Brian-Lloyd Co., Inc. be, and it hereby is, suspended.

By the Commission (Chairman CASEY and Commissioners OWENS, NEEDHAM, HERLONG and LOOMIS).

Ronald F. Hunt
Secretary

1/ See Major Realty Corporation, Securities Exchange Act Release No. 9137 (April 8, 1971), in which we concluded that a real estate transaction had been improperly reported as a sale. Although title to the property had passed, we determined that, in view among other things of the insignificant down-payment and the seller's retention of the right, under certain conditions, to rescind the sale, the transaction "must be accounted for in a manner which follows its substance rather than its legal form."

2/ Most of the "guaranteed sale" merchandise was shipped in October and November, 1969, and unsold merchandise had to be returned anytime after Christmas 1969 through February 1970, depending upon the individual agreement.

3/ We found no evidence that those states included any guaranteed sales' transactions.

4/ Registrant has reported to the Commission that on October 7, 1971, it filed a petition for an arrangement with creditors pursuant to Chapter XI of the Bankruptcy Act in the United States District Court for the Southern District of New York.