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COMMENT/Summary and Successive Suspension of Trading under the Exchange Act of 1934: The Constitution, the Congress and the SEC*

Introduction

If in its opinion the public interest and the protection of investors so require, the [Securities and Exchange] Commission is authorized summarily to suspend trading, otherwise than on a national securities exchange, in any security . . . for a period not exceeding ten days . . . .

And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days . . . .

Section 19(a) (4) of the Securities Exchange Act of 1934 embodies the Securities and Exchange Commission's power to summarily suspend trading in securities. The power at first was limited to securities listed on stock exchanges. Thirty years later, however, over-the-counter issues were brought within the aegis of statutory summary suspension power, though the new authority was embodied in Section 15 of the Act.

Experiencing little controversy in its enactment, Section 19(a) (4) initially laid dormant for ten years, waiting for criteria to be developed which would define “emergency,” the type of situation deemed a pre-requisite for exercising the power. It was not until November 29, 1944, that the Commission issued its first summary suspension order. For the next twenty years the newly found power was used sparingly; in only twenty-eight subsequent cases did the Commission find an “emergency.” Since 1964, however, there has been a rapid proliferation in the SEC’s issuance of suspensions. During this four year period, the number of suspensions has nearly quadrupled the

* Based on a study made by Robert J. Gillispie, Editor-in-Chief, Vol. XVII, and Charles M. Tobin, Comment Editor, Volume XVII.
3. Elastic Stop Nut Corp. of America, Sec. Ex. Act Rel. Nos. 3626, 3629, 3632, 3635 (1944) (1 month). The SEC learned that the president of Elastic Stop Nut had committed suicide. Additionally and more importantly, grave questions were raised as to the accuracy and adequacy of the financial statements in the company's recent filings.
number issued in the preceding thirty years. Since the beginning of this year alone, there have been twenty-seven such orders.

Despite this sudden increase in suspensions, little has been written and nothing litigated on Section 19(a)(4) and its over-the-counterpart, Section 15(c)(5). The purpose of this Comment is to analyze this power and its use by the Commission, focusing particularly on several significant questions: What are the criteria for the power's application? What are its limitations, especially in the area of successive application? What remedies, if any, are available in the event of its abuse? What part, if any, did the 1964 amendment play in the increased utilization of Section 19(a)(4), and further, what part should it play?

The discussion of these issues will first examine the intent of the enacting Congress, then view the SEC's interpretation of the statute as seen through its exercise of the power, and finally survey the area of possible remedies for abuse.

**Legislative History and Successive Suspension**

No instance of serious legal objection to the Commission's summary powers is found in the legislative history of Section 19(a)(4). A possible explanation is that Congress carefully limited this power "to a period not exceeding ten days," and then only when the "public interest so requires." This limitation was said to comply with "[t]he requirement expressed in the cases [where delegation of congressional commerce powers has been challenged] . . . that there must be standards prescribed by Congress for the guidance of the administrative agency." 4

On the other hand, there has been serious objection to the interpretation given this power by the Securities and Exchange Commission—an interpretation perhaps supported by later congressional committee reports. The case analysis will demonstrate that the SEC has considered itself authorized to renew any suspension every ten days, and, if it views the public interest as still requiring, to renew it for unlimited successive periods—reaching in one case two and one-half5 and in another five years.6 The process by which this is accomplished is, of course, entirely non-adversary, for as the name suggests, it is a summary proceeding.

The Commission's successive exercise of the power must be considered in the context of limitations the enacting Congress intended to placed upon it.

Furthermore, the legislative history of Section 15(c)(5) must be examined. Consideration of this 1964 amendment is important not only because it is a potentially persuasive source of support for the Commission's successive application of Section 19(a)(4), but also because it may well be the cause behind the Commission's stepped-up exercise of summary suspension power.

In 1933, Secretary of Commerce Daniel Roper, at President Roosevelt's direction, established a committee\(^7\) to study the problems which federal regulation of stock exchanges might present. The committee deemed it imperative that a "Government agency operating in this field . . . be in the highest degree effective, non-political [and] able to act rapidly . . . ."\(^8\) But the committee also recommended that an "[a]ppropriate procedure for appealing to the courts from the orders of the Stock Exchange Authority must, of course, be devised."\(^9\) As a result of the committee's report, investigations were initiated by the Senate in the Seventy-second Congress; in the Seventy-third Congress the Senate investigations were resumed, while the House of Representatives commenced its own inquiry. In both Houses of Congress, a series of bills were introduced which evolved into the Fletcher-Rayburn Act, or as it is officially and commonly known, the Securities Exchange Act of 1934.\(^10\)

Although changes were made in other sections of the Act during the course of this evolution, the provision authorizing the ten-day suspension power was untouched from the first time it appeared in the House committee print on April 3, 1934. This was followed by inclusion in the Senate print on April 4. Curiously, there was no reference to summary suspensions in the public hearings preceding this inclusion. The specific source and inducement, therefore, are unknown, and nothing conclusive on the question of intent can be drawn from the legislative records of the enactment period.

Section 19(a)(2) of the Exchange Act authorizes the Commission to suspend the registration of a security "[a]fter appropriate notice and opportunity for hearing . . . if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder."\(^11\) Both the House\(^12\) and Senate\(^13\) committee reports distinguish the Section 19(a)(2) adversary suspension authority from the Section 19(a)(4) summary suspension power on the basis of an "emergency." While "emer-

7. The committee was composed of Chairman John Dickinson, A. A. Berle, Arthur H. Dean, J. M. Landis and Henry J. Richardson.
8. COMM. ON STOCK EXCHANGE REGULATION, 73d Cong., 2d Sess., REPORT TO THE SECRETARY OF COMMERCE 7 (1934).
9. Id. at 12.
gency” was undefined, it has been the SEC's position, as will be seen from a study of the cases, that an emergency exists when a prospective investor does not have adequate or reliable information to make a fair judgment of a particular security. This characterization, however, appears subject to at least one infirmity; that is, the very purpose of the Exchange Act was to insure adequate information for investors. Conceivably, following the SEC's reasoning, any deviation from the Act's express provisions could be deemed an emergency. But alternative means of meeting certain departures from the Act are found in other sections, and the committee reports' characterization of only summary suspension as an emergency power is persuasive authority that not every deviation is to be construed as an emergency.

In that connection, it is noteworthy that Mr. Thomas Corcoran, testifying before the Senate committee on its original version of Section 19(a)(2), stated: “Of course, this is the extreme remedy if everything else fails.” Senator Gore responded: “Yes; capital punishment is the extreme limit; that is true.” This exchange took place only three days before the summary power of Section 19(a)(4) first appeared in the House bill, while Mr. Corcoran was serving as an advisor to the House committee. Yet the “capital punishment” referred to is limited to a twelve month suspension, after an adversary proceeding before the Commission, the results of which, in some aspects, are appealable to the courts under Section 25 of the Act. In contrast lies the boundless— theoretically and effectually—limits of the Commission's interpretation of Section 19(a)(4) as a nonadversary, renewable, and arguably nonappealable suspension.

The Senate committee report, however, does not indicate that the majority of the members regarded anything in Section 19 as such an extreme measure. The report states:

Disciplinary action short of criminal or civil penalties is provided for in Section 19. The Commission is authorized in case of certain violations and after adequate hearing, to suspend or withdraw the registration of an exchange or of a security. . . . In an emergency the Commission may suspend trading in a security for 10 days, or,

16. Id. at 6574.
17. 48 Stat. 901 (1934), 15 U.S.C. §78y (1964): “Any person aggrieved by an order issued by the Commission in a proceeding under this title to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States. . . .” (Emphasis added.)
with the consent of the President of the United States, close an exchange for 90 days.\textsuperscript{18} (Emphasis added.)

The House report treated the scope and constitutionality of H.R. 9323, the bill eventually enacted as the Exchange Act, as follows:

[T]he wide delegation of powers to the . . . Commission . . . has been considered with particular care—and the delegation made only with the indication of such maximum standards for discretion as . . . the technical character of the problems to be dealt with would permit. The bill legislates specifically just as far as the Committee feels it can.\textsuperscript{19} (Emphasis added.)

With specific reference to Section 19, the House report noted that although orders issued under Section 19(a) (1), (2), and (3) must be preceded by notice and an opportunity for hearing, "action [taken] under (4) is of an emergency nature and therefore limited in time."\textsuperscript{20} To permit a more thorough evaluation, the minority report\textsuperscript{21} accompanying this bill urged a postponement of floor action until the next Congress convened; one area evoking serious concern was the variety and importance of suspension powers.\textsuperscript{22}

Commissioner Landis of the SEC testified on both H.R. 7852 and H.R. 8720, predecessors of the bill ultimately enacted. With respect to the former, which contained no summary suspension provision, he observed:

Some weeks ago, Secretary Roper gave to the President . . . a report of a departmental committee, of which I happened to be a member, which said that the objective of stock exchange regulation should be a minimum of specific statutory requirements and a maxi-

\textsuperscript{18} S. \textsc{Rep.} No. 792, 73d \textsc{Cong.}, 2d \textsc{Sess.} 13 (1934).
\textsuperscript{19} H.R. \textsc{Rep.} No. 1383, 73d \textsc{Cong.}, 2d \textsc{Sess.} 6 (1934). A number of witnesses objected to this kind of broad sweep with regard to suspension power at hearings conducted on H.R. 7852, a forerunner of H.R. 9323. Mr. Eugene E. Thompson, president of the Associated Stock Exchanges, stated:

The language of this section would seem to have no precedent in the annals of Congress. It provides, among other things, that whenever the commission shall be of the opinion that any person "is about to violate any provision of the act" and when any person is "about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this act, or of any rule or regulation prescribed under authority thereof", the commission may proceed against such person . . . for having an intention which may be nothing more than suspicion or an inference. We see no reason for the delegation of such powers, and we strongly protest such language as is contained in this section.

\textit{Hearings on H. R. 7852 Before the House Comm. on Interstate and Foreign Commerce}, 73d \textsc{Cong.}, 2d \textsc{Sess.}, at 263 (1934).
\textsuperscript{20} H.R. \textsc{Rep.} No. 1383, 73d \textsc{Cong.}, 2d \textsc{Sess.} 25 (1934).
\textsuperscript{21} H.R. \textsc{Rep.} No. 1383, Part 2 (Minority Report to Accompany H.R. 9323), 73d \textsc{Cong.}, 2d \textsc{Sess.} 3 (1934).
\textsuperscript{22} Id. at 2.
mum of administrative discretion. I think that criterion is a proper one.

The bill, in my judgment, largely follows that requirement.\textsuperscript{23}

Slightly more than one month later, Congressman Wolverton asked Commissioner Landis if there were any provisions in H.R. 8720 which would allow removal of stocks from the exchanges when manipulative practices were taking place. The Commissioner replied:

As I remember it, this section that has been called to my attention limits the right to taking off, to delisting the securities, to cases where the issuer of those securities has failed to comply with any provisions of this act or rules or regulations thereunder.

Now there you should have to relate the manipulative practices to the issuers in order to authorize delisting on that ground.

On the other hand, in subsection 4 there is a right of suspension when the public interest so requires, to suspend trading in any registered security for a period of not exceeding 10 days in order to act quickly under those circumstances.\textsuperscript{24} (Emphasis added.)

Although the SEC presently interprets Section 19(a) (4) as a delegation of authority to issue successive ten-day suspensions, it has not always taken such a strong position. In 1955, the Commission, in a letter to Senator William Fulbright, suggested an amendment specifically authorizing suspensions for more than a single ten-day period. The Commission noted that an emergency may last more than ten days, and “[i]t might be helpful if the Commission's power to review the ten-day suspension from time to time were clarified.”\textsuperscript{25}

Accordingly, S. 3915 and H.R. 11129 were introduced in 1956, allowing suspensions “for one or more periods no one of which shall exceed ten days...”\textsuperscript{26}

The request was renewed in 1958, and bills S. 1179\textsuperscript{27} and H.R. 2480\textsuperscript{28} were introduced, repeating the language of the 1956 bills. In a conference between the SEC and industry representatives concerning these legislative proposals, Mr. Mooney of the American Stock Exchange and Mr. Rosenberry of the New York Stock Exchange voiced objection to “the possible unlimited sequence of 10-day suspensions, and suggested that a ‘cap’ be put upon the

\textsuperscript{23} Hearings on H.R. 7852, supra note 19, at 22.
\textsuperscript{24} Hearings on H.R. 8720, supra note 4, at 900. When asked if he thought the bill was constitutional, Commissioner Landis replied affirmatively. Id. at 901.
\textsuperscript{26} S. 3915, 84th Cong., 2d Sess. (1956); H.R. 11129, 84th Cong., 2d Sess. (1956).
\textsuperscript{27} 86th Cong., 1st Sess. (1959).
\textsuperscript{28} 86th Cong., 1st Sess. (1959).
total length of time during which the Commission could suspend trading.\textsuperscript{29} The Senate finally passed S. 3770\textsuperscript{30} in 1960, which was a more extensive version of S. 1179. It increased the suspension period to twenty days and placed a nine month limitation on the successive suspension of listed securities. A provision expanding the Commission's authority to the over-the-counter market was added. This contained a twenty day suspension period with a twelve month limit. The House, however, failed to pass these provisions, and Section 19(a)(4) remained as it had been enacted.

Although the Commission has issued successive 19(a)(4) orders during the pendency of 19(a)(2) proceedings, it does not view 19(a)(4) and successive orders issued pursuant to that section as requiring initiation of 19(a)(2) proceedings. Testifying in 1959, SEC Chairman Gadsby told a congressional committee:

The duration of the suspension must depend upon the duration of the emergency; a matter not subject to our control . . . . The suggestion that the Commission should, after a certain period of time, commence a proceeding under section 19(a)(2) of the statute, ignores the fact that the emergency which requires suspension under section 19(a)(4) . . . very often . . . furnishes no basis for a section 19(a)(2) proceeding. The latter proceeding can only be undertaken where the issuer has failed to comply with the statute or rules thereunder.\textsuperscript{31}

\textsuperscript{29} Memorandum from Thomas G. Meeker, General Counsel of the SEC to the Commission, concerning the Legislative Program, April 16, 1959, on file in the SEC Library.

\textsuperscript{30} A similar argument concerning limitation of suspension powers was put forth in the same year by Edward Gray, Executive Vice-President of the New York Stock Exchange:

In the proposed amendment of section 19(a)(4) [to specifically provide for multiple suspensions], the Commission now asks for legislative authority to do what it has been doing for 15 years. . . . We believe, however, that Congress may want to take the opportunity to impose an overall time limit within which the Commission must proceed to a hearing as provided in section 19(a)(2).


\textsuperscript{31} Mr. Gadsby did, however, admit:

Lately, this grant of power [19(a)(4)] has been used to keep in effect a suspension of trading pending final disposition of delisting proceedings under Section 19(a)(2) of the Act. It has been useful where it has appeared that the current information available to the public concerning a security is misleading or is inadequate to permit investors to make informed judgments with respect to its purchase or sale, and it appears that the additional necessary information cannot be obtained and made available to investors until all the facts are elicited through the 19(a)(2) proceedings. These proceedings, because of their complexity, often cannot be completed within a single 10-day period, and it has been found necessary to renew the suspension for successive
Mr. Gadsby's statement notwithstanding, the subsequent analysis of suspension cases clearly shows that statutory violations are frequently present, but Section 19(a)(2) proceedings have only infrequently been commenced by the SEC.

In 1963 the Commission's interpretation received support from the Senate Committee on Banking and Currency. In a report accompanying a bill amending the 1934 Act, it stated:

The Commission has consistently construed Section 19(a)(4) as permitting it to issue more than one suspension if, upon reexamination at the end of the 10-day period, it determines that another suspension is necessary. *The committee accepts this interpretation*. At the same time the committee recognizes that suspension of trading in a security is a *drastic step* and that prolonged suspension of trading may impose considerable hardship on stockholders. The committee therefore expects that the Commission will exercise this power with restraint and will proceed with all diligence to develop the necessary facts in order that any suspension can be terminated as soon as possible.32 (Emphasis added.)
Thus, what could not be done by direct legislation, was accomplished indirectly. Such committee approval is one possible source of support for the SEC's current interpretation.

Still another available source of justification for such an interpretation of Section 19(a)(4) is the 1964 amendment which added Section 15(c)(5). The Senate Committee on Banking and Currency report accompanying the amending bill stated:

The bill . . . would provide the Commission with authority summarily to suspend over-the-counter trading in any security . . . for \textit{periods of 10 days} . . . This provision would be a counterpart to section 19(a)(4) . . . As under section 19(a)(4), the Commission could invoke this suspension power in those cases in which fraudulent or manipulative practices of the issuer or other persons have deprived the security of a fair and orderly market, or where some corporate event makes informed trading impossible and provides opportunities for the deception of investors. Trading would be resumed as soon as adequate disclosure and dissemination of the facts material to informed investment decision were achieved.\textsuperscript{33} (Emphasis added.)

Section 15(c)(5) is relied upon in two respects to bolster this broad interpretation of Section 19(a)(4). First, the Senate\textsuperscript{34} and House\textsuperscript{35} reports on Section 15(c)(5) specifically refer to "periods" of suspension. Second, there is no equivalent in Section 15 to Section 19(a)(2). It is thus argued that 19(a)(4) cannot consistently be viewed as a mere prelude to proceedings pursuant to 19(a)(2). Of course, both of these arguments ignore the fact that the two sections were enacted by different Congresses. Further, the mere absence of a counterpart provision in Section 15 cannot singularly emasculate Section 19(a)(2) and any relationship that subsection 4 is asserted to have with it. Nor does the adoption of 15(c)(5) alter the fact that the House of Representatives has not responded to repeated requests to grant express statutory authority for successive suspensions under 19(a)(4).

In returning to the basis for this analysis, and evaluating objections to the Commission's interpretation, legislative history says much for the view that the enacting Congress in 1934 never conceived of successive suspensions. On the other hand, the intent of at least the reporting committees at the time of the adoption of Section 15(c)(5) was to allow successive suspensions. Consistently, those committees sanctioned, for whatever value, the same interpretation of Section 19(a)(4). No definitive resolution of the issue is readily

\textsuperscript{33} \textit{Id.} at 66.
\textsuperscript{34} \textit{Id.} at 26.
reached. As a practical matter, the result would be perplexing indeed were courts to adopt contrary interpretations for two sections with exactly the same wording.

Case Analysis

The staff of the SEC carefully monitors exchange and over-the-counter trading. If an irregularity appears, or even an unexplained or unusual incident, the staff will investigate. Often, however, not enough information can be gathered to disseminate, or even if it can be, dissemination cannot be made rapidly enough to influence investor action. At this point suspension is frequently commenced by either or both the Division of Trading and Markets and the Division of Corporate Finance, particularly the latter in cases of failure to file required reports. Even if the SEC is not in a position at that time to prove a case of illegality or irregularity, it may nevertheless take the case to the Commission with a request for suspension. Upon a finding that an "emergency" exists, a suspension will issue. The entire process—from information of irregularity to issuance of a suspension order—may take as little as one hour, but in most cases the process is more extended.

Because of the myriad factors which influence the issuance of a suspension order, and because of the significant increase in suspension orders after the 1964 amendment, it is convenient and helpful to divide a case analysis into two periods, with 1964 as the demarcation line. As previously mentioned, this date is important for several reasons. First, the SEC interpreted the Eighty-sixth Congress' amendment as an acknowledgment of its power to issue a series of orders in the event an "emergency" continues for more than ten days. Secondly, although the Commission had direct power to suspend exchange trading prior to 1964, it had no equivalent authority over unlisted securities traded over-the-counter, and only indirect authorization to suspend listed securities traded in this manner through Rule 15c2-2.36 In 1964 the Com-

36. Section 15(c)(2) of the Securities Exchange Act of 1934 prohibits the use of the mails or interstate commerce in fraudulent, deceptive or manipulative practices or fictitious quotations in respect to securities traded over-the-counter. The section continues:

The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.


Pursuant to this section, Rule 15c2-2 was promulgated, enabling the Commission to suspend over-the-counter trading when necessary to prevent such practices. 17 C.F.R. § 240.15c2-2 (1949). Rule 15c2-2 was repealed September 1, 1964, Sec. Ex. Act Rel. No. 34-7408, shortly after Section 15(c)(5) was enacted. 29 Fed. Reg. 12627 (1964).

One of the intricate problems presented to the broker-dealer as a result of the increased number of suspensions relates to the post-suspension consummation of securities transac-
mission was given express statutory power to summarily suspend trading on
the over-the-counter market.

In the following analysis, the bases upon which the Commission orders a
suspension will be developed. These criteria, however, have been gleaned
from the SEC’s news releases, issued in conjunction with a suspension. That
factors other than those released by the SEC enter into the Commission’s
decision warrant acknowledgment; in fact, most of the releases are of a
boilerplate nature and provide only a sketchy background. Since the analysis
is dependent entirely upon what the SEC releases, no suspension can be
singled out as ill-timed or unjustly issued, and this study cannot be conclu-
sive as to fairness of application.

Pre-Amendment Years

During the pre-amendment period, the Commission suspended trading on
twenty-nine occasions. In eleven instances\(^37\) the exchanges themselves sus-
pended trading prior to the Commission’s order, and in nine of these cases
they continued the suspension after it was terminated by the Commission.\(^38\)

The effect of the Commission’s action in these instances was to make the
suspension applicable to over-the-counter trading of listed securities. There-
fore, when the Commission lifted its suspension only over-the-counter trading
was permitted. In all cases during this period, with the exception of Trans
Continental Industries, Incorporated\(^39\) the suspension affected both over-the-
counter and exchange trading of listed securities, and in no case did the
Commission suspend a security exclusively traded on the over-the-counter


38. The only two cases in which the exchange lifted their bans simultaneously with
the SEC were: Adolf Gobel, Inc., supra note 37; United Indus. Corp., supra note 37.

market. Presumably, since Rule 15c2-2 was a derivative power, the Commission felt it had no authority to suspend such a security.

Looking to the cases themselves, the Commission in three instances\textsuperscript{40} suspended trading because the price of the stock had markedly increased to a point far above its actual value. In these cases the exchanges had suspended trading prior to the Commission's order, a suspension which remained in effect after the Commission's order was terminated.

Failure to file reports with the SEC was the criterion for suspension of two other companies' securities. In one,\textsuperscript{41} a proxy statement soliciting shareholder approval of a contemplated merger was not filed. Moreover, the statement omitted certain information required by the proxy rules. In the other case,\textsuperscript{42} the Commission suspended trading because the company failed to file its 10-K annual report. The San Francisco Mining Exchange ultimately delisted the security for this reason.

Action was commenced in eight cases\textsuperscript{43} because serious questions were raised as to the accuracy and/or adequacy of financial and other information previously filed with the SEC. A typical example is \textit{United Industrial Corporation}.\textsuperscript{44} The initial suspension was precipitated by the company's announcement of changes in its management and of writedowns and adjustments aggregating some $7 million in its inventories, accounts receivable, and other assets. In addition to raising questions as to the accuracy of its financial statements, the Commission also felt there was inadequate information for public investors to rely upon in evaluating the company's securities. The New York Stock Exchange and the Pacific Coast Stock Exchange had previously suspended trading, and their suspensions entered into the Commission's determination. The Commission ultimately terminated its order, after

\textsuperscript{40} In both Interstate Home Equip. Co., \textit{supra} note 37, and Kresge Dept. Stores, Inc., \textit{supra} note 37, the companies were in the process of liquidation and the value of their securities in liquidation was substantially less than the trading prices. In Seaboard Commercial Corp., \textit{supra} note 37, the president of Seaboard sent letters both to the Exchange and the Commission stating that there was a question whether the stock was worth anything.

\textsuperscript{41} Apex Minerals Corp., Sec. Ex. Act Rel. Nos. 6556, 6894 (1961) (16 months). After statements had been filed with the SEC and mailed to all shareholders of the company, the suspension was lifted.


\textsuperscript{44} \textit{Supra} note 37.
successively issuing 25 ten-day suspensions, when adequate dissemination of clarifying information was made.

In another instance, the reason for suspension was that several broker-dealers were engaged in an unregistered distribution of securities in violation of Sections 5 and 17 of the Securities Act. Concurrently, there had been substantial purchases of the company's securities by a foreign source at rising prices on the American Stock Exchange. The suspension was not continued beyond a second ten-day period, since the Commission in the meantime had filed an injunction against the broker-dealers, and the issuer and other controlling persons had agreed not to sell any shares until the Commission's investigation was completed.

In Continental Vending Machine Corporation, the failure to file a 10-K report and lack of knowledge concerning the collectibility of certain loans or advances to an affiliate were the criteria which prompted a suspension order. Here, the Commission had gone through the ritual of ten-day suspensions for more than five years, and is presently still suspending trading. In R. C. Williams & Company, the Commission issued a suspension for seven days to allow adequate dissemination of information released by the company.

In eleven cases the suspension of trading was concurrent with the institution of proceedings under Section 19(a)(2), and in the remaining two cases, concurrent with stop-order proceedings under the 1933 Act. Although the Commission has demonstrated, even from its first suspension order, that it could issue more than a single suspension so long as it made a redetermination every ten days, a serious statutory problem arises by the Commis-
sion's use of Section 19(a) (4) as a pendente lite suspension power in a Section 19(a) (2) proceeding. Under 19(a) (2) the issuer has an absolute right to appropriate notice and an opportunity for a hearing prior to any suspension; in no event can a suspension exceed twelve months. In marked contrast, Section 19(a) (4) allows the Commission to summarily suspend any security if an emergency is present. The issuer is not entitled to an adversary proceeding, and the Commission, by tacking one suspension onto another, is able to continue a suspension indefinitely. In some cases the Commission summarily suspended securities for more than a year before any adjudication was made in the 19(a) (2) proceeding—a proceeding which limits suspensions issued under it to twelve months. Since 1962, the Commission has avoided this quagmire by not exercising the summary suspension power in conjunction with a 19(a) (2) proceeding.

Post-Amendment Years

After 1964, the Commission used Section 19(a) (4) more frequently, and the total number of trading suspensions soared to 108. Securities traded exclusively on the over-the-counter market were regulated by Section 15(c) (5)—the counterpart to Section 19(a) (4)—and these comprised 52 of the suspensions issued during this period. The companies themselves, for diverse reasons, requested the Commission on occasion to suspend trading in their own securities. The touchstones used during this period resembled those in the pre-1964 era. Additional "emergencies" were added and others expanded.

In twelve cases, the Commission initially ordered the suspension of trading in the security due to an absence of current information available to the public concerning the companies' financial condition. This resulted from their failure to file certain reports with the SEC. The missing reports ranged from the 10-K annual report and the 9-K semi-annual report to the 8-K and an-

54. Black Bear Indus., Inc., supra note 50 (20 months); Bon Ami Co., supra note 5 (28 months); Bellanca Corp., supra note 50 (13½ months).
annual report to shareholders. Even though this primary factor was present, the Commission indicated that other criteria entered tangentially into their decision to suspend: e.g., suspension by the exchanges or speculation that the company was experiencing financial difficulties.\textsuperscript{56} The Commission usually timed the lifting of its order with the filing of the various reports and their dissemination to the shareholders. In one instance,\textsuperscript{57} the SEC had to bring an injunctive action against the company to compel filings for which it was delinquent. Only after compliance with the injunction did the Commission terminate its suspension order.

In twenty-three situations,\textsuperscript{58} the Commission’s action was taken pending clarification of reports appearing in newspapers or of rumors circulating in the financial community with respect to recent company developments. For example, in \textit{Nucleonic Corporation of America},\textsuperscript{59} the Commission’s action was precipitated by questions which arose as to releases the company disseminated concerning a purportedly new nuclear detection device for medical diagnosis. After the company issued a clarifying statement relating the facts of the invention to its shareholders, the Commission terminated its order.

Various securities law violations were the reasons for suspension of trading in eight instances.\textsuperscript{60} Usually the suspensions were made in conjunction with

\textsuperscript{56} Compare Webb & Knapp, Inc., \textit{supra} note 55 and Tel-A-Sign, Inc., \textit{supra} note 55, with Belock Instrument Corp., \textit{supra} note 55.

\textsuperscript{57} Penrose Indus. Corp., \textit{supra} note 55.


\textsuperscript{59} \textit{Supra} note 58. Nucleonic’s common stock was traded on the over-the-counter market and on June 3, 1967, the day before the suspension was initiated, the stock was traded at 11. The day after suspension was terminated, June 25, 1967, the stock was traded at 1.

the filing of a complaint by the SEC seeking to enjoin the companies from further violations of the acts. In Coditron Corporation, the company itself requested the SEC to suspend trading in its common stock because information had been brought to its attention indicating possible irregularities in its recent offering which was made pursuant to a claimed intrastate exemption from the Securities Act's registration requirements.

The Commission on its own initiative or on request by the company has suspended trading to permit dissemination of company releases and reports or SEC announcements concerning the institution of administrative proceedings. With few exceptions, the suspensions in these circumstances have never lasted more than one month; as soon as there was proper dissemination, the trading ban was lifted.


61. For example, in J. J. Newberry Co., supra note 60, the Commission suspended trading because it questioned the validity of a tender offer which was made for approximately one-half of the company's common stock. The next day the Commission announced that the temporary suspension of trading would be terminated; in the interim, the SEC had filed a complaint seeking to enjoin the tender offer. On the day before the suspension the common stock was traded at 23\frac{3}{8}. The day after the suspension was terminated, it had dropped to 20\frac{7}{8}.

62. Supra note 60.


coupled with a lack of current financial information, has been the SEC's most frequently used criterion to suspend trading. In all such cases, the securities have been exclusively traded on the over-the-counter market, thus possibly explaining scarcity of information about the company.

Remedies

Thus far the legislative history behind the relevant sections and the criteria upon which the SEC finds an "emergency" have been shown. There have been no cases testing either the interpretation given the sections by the SEC, or, assuming the SEC's interpretation is correct, the constitutionality of the sections. This is because, as the analysis of the cases tends to indicate, the SEC presumably has not used a suspension order in an inappropriate situation.

Suppose, however, the SEC suspends a security upon a mistaken belief of fact, or the aggrieved company contends that the SEC is without a statutory basis upon which to suspend trading in its stock. There are only two possible courses of action the company could take. It might appeal the decision directly to the courts or bring a collateral action to obtain judicial review of the summary action.

Judicial Review


68. 5 U.S.C. § 551 (12) (Supp. II 1965-66). With regard to exclusion of judicial review by statute, the Administrative Procedure Act provides:
Act demonstrates a high degree of concern that orders of the Commission be appealable; to that end, there was discussion in committee, as well as a floor debate, regarding insertion of the word "order" at various points in the act to insure court review. Some legislators seemed to be under the misimpression that use of the word "order" would in itself guarantee judicial intervention. However, such is not the case; there must be not merely an order, but an order pursuant to a proceeding. In any event, neither of the sections under consideration contain the magic word "order." With Congress so conscious of this word's importance, there is little room for doubt that summary suspensions were not intended to be statutorily appealable to the courts.

Extraordinary Remedies

In the absence of statutory provisions for judicial review of suspension orders, resort must be made to two of the so-called "extraordinary remedies"—injunction and prohibition. The statutory remedy of declaratory judgment may also be employed. The primary and most expeditious method of bringing the matter before the courts is by use of an injunction. In the lead case of *American School of Magnetic Healing Company v. McAnnulty,* the use of the equitable injunction as a means for review of administrative action was firmly established.

A preliminary injunction may be granted on advance notice to the defendant and, if granted, would bar the defendant from performing designated acts during the pendency of the basic law suit. In the case of a summary suspension, however, a great deal of damage is done when the suspension order is initially issued. This damage could not be avoided by preliminary injunction, since the aggrieved company would not be in a position to afford the few days necessary to bring the motion before the court for argument. Initially, therefore, in this situation, an *ex parte* temporary restraining order would be a desirable remedy for the company, since it may be issued without notice and could bar the SEC from taking the threatened action until a hearing on the

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(a) This chapter [Judicial Review] applies, according to the provisions there- of, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.


69. See 78 Cong. Rec. 8090-93, 8098-99 (1934).

70. *Id.* at 8092 (remarks of Congressman Wadsworth).


72. 187 U.S. 94 (1902).

motion for a preliminary injunction. Federal Rule of Civil Procedure 65(b) provides:

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party . . . can be heard in opposition . . . . (Emphasis added.)

A company seeking a temporary restraining order in a suspension case may encounter difficulty in clearly showing an immediate threat of irreparable injury. Congress has expressed its intent in Section 19(a) (4) that suspensions shall be issued *ex parte* in the Commission's discretion to protect the public investor. Thus it may be necessary for the company to overcome a presumption that the Commission is acting in the public interest and perhaps protecting the public from irreparable injury. This is far more difficult than simply demonstrating that an initial or successive suspension will cause the price of the company's stocks to fall.

Another method of review, the one most commonly combined with the injunction, is declaratory judgment. The Declaratory Judgment Act provides:

In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration . . . . Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such. 74

A company seeking judicial relief from an initial or successive suspension may be able to obtain a declaration of the legality of the SEC's action. A district court, under its general federal question equity jurisdiction, 75 is empowered to correct agency conduct in excess of its delegated powers and contrary to a specific prohibition of the act establishing it. 76 The test to be applied in determining whether the Declaratory Judgment Act, which constitutes a narrow exception to the customary avenues of review, may be invoked is "whether the Commission has stepped plainly beyond the bounds of its statutory authority, or has acted in clear defiance of [plaintiff's] constitutional rights to [his] irreparable damage." 77

In applying this test, courts have been reluctant to find that an agency has

overreached its statutory authority, and this reluctance has resulted in very strict constructions of the test. In *M.G. Davis & Company v. Cohen*, a broker-dealer brought an action for declaratory relief against the SEC, seeking a determination that proceedings brought against him by the Commission were not timely under Rule 15b-6. In denying the relief sought, the court stated: "This is not a case where there has been 'an attempted exercise of power that had been specifically withheld.'" On appeal, the Second Circuit Court of Appeals reached the same result, but mollified somewhat the district court's rule that the power had to be specifically withheld, stating:

The other claim [that the Commission had overstepped the limits of its power], if established, would amount to no more than a reasonably possible interpretation of a somewhat ambiguous statute in a manner which would most protect the class which the Commission was established to protect. In neither case could the excess be considered so extreme as to warrant a district court to upset the orderly course of review procedures.

Both courts were hesitant to find that the SEC exceeded its authority. Suspension cases, however, must be distinguished in one important aspect from these and similar holdings. Ever present in such determinations is the court's belief that the claimant should first exhaust his administrative remedies before seeking a judicial declaration of the issue. In the case of a summary suspension, of course, there are no administrative remedies to exhaust, and therefore a court may be more willing to grant declaratory relief by construing the "in excess of statutory authority" test more liberally.

The most recent pronouncements of the Supreme Court in an action brought pursuant to the Declaratory Judgment Act reveal a willingness to depart from a rigid test and allow the equitable relief sought. Recognizing the necessity for equitable relief where there is no adequate remedy at law, the Court held in *Abbott Laboratories v. Gardner* that the exercise of judicial power to enjoin allegedly erroneous regulatory action by the Commissioner of Food and Drugs is permissible, unless Congress has explicitly prohibited it, and provided the controversy is "ripe" for judicial determination. The Court stated that "[t]hese regulations purport to give an authoritative inter-

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79. 17 C.F.R. § 240.15b6-1 (1967).
80. *M. G. Davis & Co. v. Cohen*, supra note 78, at 135.
84. *Supra* note 83.
pretation of a statutory provision . . . [and] its promulgation puts petitioners in a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate. Justice Fortas dissented and noted that the Court's ruling was "novel in its breadth and destructive in its implications . . . But this dissent is based on a situation where Congress had provided a method of judicial review for the agency's action and the government therefore should not be prematurely brought to a halt. Suspension cases would seem to fit squarely into the area the majority in Abbott sought to help since no adequate remedy at law exists, and such cases can also be distinguished from situations upon which Justice Fortas' dissent was based since no statutory review is provided.

Another possible remedy, the writ of prohibition, is available to prevent action, judicial in nature, by an administrative body, when the power to deal with the subject matter is beyond the statutory jurisdiction of the agency. The writ runs against the tribunal and does not lie to prevent purely "administrative" acts. Yet if the proceedings have been completed, prohibition will not lie, since it issues only to prevent the commission of a future act and not to correct past errors. Although the application of prohibition to summary suspension would appear to be appropriate because all the conditions for use of the remedy are readily fulfilled, the amount of time required to reach the courts destroys its effectiveness. Additionally, this remedy has been only infrequently used by the courts; it is suggested that in seeking a review of administrative action, prohibition accomplishes nothing that an injunction and declaratory judgment do not better accomplish.

In attempting to restrain the issuance of a suspension order, the basic lawsuit could be approached on either or both of the following theories. The SEC's interpretation of congressional intent might be challenged as incorrect. If the SEC's interpretation is held to be an accurate reflection of congressional intent on number of suspensions, then the summary suspension provision itself could be attacked as a violation of due process or as an unconstitutional delegation of Congress's power over interstate commerce. In neither approach is there even a degree of certainty of success. The prevailing view that the Commission has power to issue successive suspensions is well entrenched by reason

85. Id. at 152.
86. Gardner v. Toilet Goods Ass'n, supra note 83, at 177 (dissenting opinion).
87. Ibid.
88. Comparison can be made between suspension cases which involve an informal summary procedure and other informal agency actions for which there are no administrative remedies to exhaust prior to invoking extraordinary remedies. For a discussion of recent Supreme Court decisions in the latter class, see Sultan, Supreme Court Review of "Informal" or Threatened Agency Action, 18 Ad. L. Rev. 55, 59-60 (1965).
90. Ibid.
of the power's continued and increased exercise itself. If, as suggested, it is challenged on the basis of congressional intent, it is likely to be upheld.

Should the courts interpret the statute as the SEC does, the very idea of limitless deprivation without any form of hearing, trial, or even a simple meeting with authorities could carry the sections beyond the most permissive limits of fifth amendment due process. Still another constitutional objection is the very delegation under the commerce clause of so uncircumscribed a power. As earlier noted, the keystone of constitutionality in delegating powers is the promulgation of sufficient guidelines to govern application of the power. Here, there are no guidelines. The mere requirement that continued suspension will necessitate the issuance of a new order every ten days, presumably after some *ex parte* administrative review and a determination that the “emergency” still exists, may afford some protection, as the Act is presumably administered by men of good faith, but constitutional exigencies are not founded in the bedrock of administrative good faith.

The process of constitutional invalidation seems more likely, though more arduous and less satisfactory from the standpoint of protracted litigation. In attempting a constitutional argument, the court might avoid the constitutional question and find another basis for their decision. It is possible in that situation that the court would then revert to the interpretation argument, treat the committee reports as inconclusive of congressional intent, and construe the sections narrowly as allowing, by the very language of the statute, only one suspension.

**Conclusion**

The SEC's greatly increased exercise of its summary suspension powers has brought into question the possible limitations on those powers. Since nothing has been litigated on this subject and all information concerning suspensions must be gathered from the SEC's releases, no definitive resolution of the issue can be reached at this point. Analysis of the legislative history of Sections 19(a)(4) and 15(c)(5) and the criteria for issuance of suspensions have been, at most, informative on this issue. The following conclusions, however, can be drawn.

First, there is not unanimity, nor has there ever been, on the interpretation of these sections or on the extent of the Commission's summary suspension powers. But the Commission's interpretation is well-entrenched in practice and unlikely to be upset if challenged judicially. Secondly, there is a diligent effort to invoke suspension with a conscientious fairness. This is not to say that the Commission's successive use of the power is correct, but only that, as the cases indicate, the applications to date have been, almost without exception, in the best interests of the public investor. Of course, there is always
the possibility that the SEC might suspend a security upon a mistaken belief of fact, and apart from this, even the most judicious application cannot save an unconstitutional act, nor engraft undelegated authority on a delegated power.

These conclusions reflect a need for a practical, if only partial, solution of the serious difficulties arising from *ex parte* summary suspension and its successive application. As has been shown, the SEC believes it may indefinitely suspend trading in a security and bar any administrative hearing or relief to a company or its shareholders. In practice, however, the Commission staff will, if requested, in some instances represent the views of a company when seeking a suspension, or a company may informally urge its position upon the Commission after the initial ten-day suspension but before a renewal. Of course, a representation of a company's position by the same staff which is simultaneously requesting suspension is faint praise indeed. And, although an after-the-fact opportunity for the company to explain its position may prevent successive suspensions, one suspension may have done irreparable damage.

Despite these obvious shortcomings, the informal proceedings which allow a threatened or suspended company some representation before the Commission go a long way toward eliminating possible inequities in the areas of initial suspension and successive application. It is therefore recommended that Congress make such proceedings mandatory. At the very least, this would eliminate successive suspensions based on mistake of fact and assure that all suspensions are issued only in the direct interest of the public, and not as an enforcement-tool which provides an easy way for the SEC staff to coerce companies into following its suggestions.