

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

No. 77-2054

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

AMINEX RESOURCES CORPORATION,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

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BRIEF OF THE SECURITIES AND EXCHANGE COMMISSION, APPELLEE

PRELIMINARY STATEMENT

This is an appeal by Aminex Resources Corporation ("Aminex") from orders of the district court (per Corcoran, J.) which enjoined the defendant from further violations of the periodic reporting requirements of the federal securities laws--laws which are designed to furnish public investors with a continuing and accurate fund of vital corporate information necessary to enable such investors to make intelligent, informed investment decisions, and to evaluate the performance of corporate management.

The Securities and Exchange Commission ("Commission") instituted this enforcement proceeding in order to halt Aminex's repeated, persistent, and willful violations of these reporting requirements, and in order to secure Aminex's prospective compliance with them. This appeal arises from the orders, entered by the court below, granting summary judgment in favor of

the Commission, and enjoining Aminex from similar future violations-- orders entered only after Aminex conceded its numerous violations of law, and after Aminex declined to raise a dispute as to any material fact. In brief, the district court found that the undisputed facts before it demonstrated a protracted pattern of illegal conduct which endured despite changes in Aminex's management and a radical reversal in Aminex's financial affairs. Because Aminex's opening brief seeks merely to find a method by which it can avoid any responsibility for its admittedly unlawful conduct, the Commission respectfully submits this answering brief urging affirmance of the decision below.

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Where the defendant conceded in the court below that, on at least 16 separate occasions during the past five years, it had repeatedly failed to file timely and proper periodic and current reports, as required by the federal securities laws, did the district court abuse its discretion in permanently enjoining the defendant from further violations of the reporting requirements of the Securities Exchange Act of 1934?

STATEMENT PURSUANT TO RULE 8(b) OF THIS COURT

This is an appeal from orders entered by the United States District Court for the District of Columbia in Securities and Exchange Commission v. Aminex Resources Corporation, Civil Action No. 77-0493, on September 12 and October 12, 1977. This case has not otherwise been before this Court or any other court, as defined in Rule 8(b). Counsel for the Commission is not aware of any related case that is now pending in, or may be presented to, this Court or any other court.

COUNTERSTATEMENT OF THE CASE

The Proceedings Below

This is an appeal by Aminex from orders of the United States District Court for the District of Columbia, entered on September 12 and October 12, 1977, in an action for injunctive relief brought by the Commission (A. 2, 190-196, 215). 1/ These orders granted the Commission's motion for summary judgment, permanently enjoined Aminex from violating the reporting provisions of the federal securities laws, 2/ and denied Aminex's motion to reconsider and set aside the order granting the Commission's motion for summary judgment.

On March 21, 1977, the Commission filed its complaint for an injunction, seeking to compel Aminex to comply with the reporting requirements of Section 13(a) of the Securities Exchange Act of 1934, and the rules and regulations thereunder (A. 1, 3-11). Simultaneously, the Commission filed a motion for a preliminary injunction, seeking an order compelling Aminex to file the several reports which were then delinquent (A. 1, 52-54).

1/ References herein to the Joint Appendix are denoted as "(A. ___)", and references to appellant's brief as "(Br. ___)."

2/ Section 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78m(a), and the rules and regulations thereunder.

A hearing was held on March 31, 1977, and, on that date, the court below entered a preliminary injunction and an order compelling Aminex to file its delinquent reports (A. 66-72). On April 13, 1977, Aminex filed its answer to the Commission's complaint, admitting that, on numerous occasions, it had failed to file required reports or had filed such reports late or without necessary information (A. 1, 73-80). On June 30, 1977, the Commission filed its motion for summary judgment and an affidavit in support thereof (A. 2, 81, 109-116). The district court granted this motion and entered a permanent injunction against Aminex on September 12, 1977, in a decision published at [1977-1978] CCH Fed. Sec. L. Rep., ¶96,174.

Counterstatement Of The Facts

The common stock of Aminex, a publicly-held corporation with approximately 850 shareholders, is traded in the over-the-counter market (A. 47, 115). In April, 1972, Aminex registered those securities with the Commission pursuant to Section 12(g) of the Securities Exchange Act, 15 U.S.C. 781(g) (A. 12-13), thereby becoming subject to the reporting requirements of Section 13(a) of the Securities Exchange Act, and the rules thereunder, 17 CFR 240.13a-1 et. seq. 3/ During the next five

3/ The Rules and reports here in issue are the annual report on Form 10-K, required by Rule 13a-1, 17 CFR 240.13a-1; the quarterly report on Form 10-Q, required by Rule 13a-13, 17 CFR 240.13a-13; and the current report on Form 8-K, required by Rule 13a-11, 17 CFR 240.13a-11. The timing requirements for these reports are set forth in the General Instructions to Form 8-K, Form 10-Q and Form 10-K, 3 CCH Fed. Sec. L. Rep. ¶¶31,002, 31,031 and 31,102. See also, 17 CFR 249.308a. The content of these reports is described at nn. 15, 16 and 18, infra.

years, and until the trial court's entry of a preliminary injunction, Aminex repeatedly violated the fair disclosure requirements of these provisions by failing to file timely and proper reports with the Commission. This pattern, which involved at least sixteen (16) different reports, began immediately after the company became subject to the reporting requirements, and continued until the company was compelled to file its then delinquent reports by the trial court's order of March 31, 1977, despite numerous requests by the Commission's staff to cure these delinquencies. 4/

In sum, in its five-year reporting history, Aminex failed to comply with the reporting requirements of the Act with respect to four of six annual reports on Form 10-K, six of fourteen quarterly reports on Form 10-Q, and at least six current reports on Form 8-K. 5/

4/ See, n. 6, infra.

5/ The following chart sets forth, in reverse chronological order, Aminex's recurring reporting violations:

<u>Form</u>	<u>Report As of</u>	<u>Date Due(a)</u>	<u>Date Filed</u>	<u>Days Late(a)</u>
8-K	Jan., 1977	Feb. 10, 1977	Apr. 21, 1977	70
10-Q	Oct. 31, 1976	Dec. 15, 1976	Apr. 21, 1977	127
8-K	Oct., 1976	Nov. 10, 1976	Nov. 26, 1976	16
10-Q	Jul. 31, 1976	Sept. 14, 1976	Apr. 21, 1977	219
10-Q	Apr. 30, 1976	Jun. 14, 1976	Apr. 21, 1977	311
10-K	Jan. 31, 1976	Apr. 30, 1976	Apr. 21, 1977	356
10-K	Jan. 31, 1975(b)	May 1, 1975	Aug. 4, 1975 (amendment)	95
8-K	Oct., 1974	Nov. 11, 1974	Dec. 9, 1974	28
10-Q	Apr. 30, 1974	Jun. 14, 1974	Jun. 17, 1974	3
10-K	Jan. 31, 1974(c)	May 1, 1974	Nov. 20, 1974	203
10-K	Oct. 31, 1973(d)	Jan. 29, 1974	Feb. 28, 1974 (amendment) Aug. 19, 1974 (amendment)	30 202
10-Q	Jan. 31, 1973(e)	Mar. 19, 1973	Apr. 4, 1973 (amendment)	16
8-K	Dec., 1972	Jan. 10, 1973	Jan. 29, 1973	19
8-K	Nov., 1972	Dec. 11, 1972	Jan. 29, 1973	49
8-K	May, 1972	Jun. 12, 1972	Jun. 23, 1972	11
10-Q	Apr. 30, 1972	Jun. 14, 1972	Jun. 19, 1972	5

(footnote continued)

Transactions in the company's securities in the over-the-counter market were consummated during this period on the basis of deficient and outdated information. And, Aminex invariably failed to honor undertakings and

5/ (footnote continued)

- (a) These dates and number of days late were computed in accordance with the General Instructions to the Forms. See pp. 12-13 & nn. 15, 16, 18, infra.
- (b) Although a Form 10-K annual report for the fiscal year ended January 31, 1975, was filed by Aminex on or before the due date, it was filed improperly, without the required auditor's report. The auditor's report and substantial new information were filed on August 4, 1975 (A. 172, 181). On March 10, 1976, Aminex wrote to the Commission concerning a second amendment to its Form 10-K for the fiscal year ended January 31, 1975, stating that, due to "severe financial limitations, * * *" the company would not be able to respond to the Commission's requests and that "the limited nature of the * * * report [is] the best we can do under the circumstances" (A. 20).
- (c) In 1974, Aminex changed its fiscal year end from October 31 to January 31 (A. 4, 74).
- (d) Although Aminex's Form 10-K annual report for the fiscal year ended October 31, 1973, was filed on or before the due date, it was filed improperly, without the required auditor's report. Substantial new information was filed on February 28, 1974, and the required auditor's report was filed on August 19, 1974 (A. 172, 181).
- (e) Although Aminex's Form 10-Q quarterly report for the fiscal quarter ended January 31, 1973 was filed on or before the due date, it was filed improperly, and it was amended substantially on April 4, 1973 (A. 173-174, 181).
(A. 3-11, 17, 73-80, 165-166, 171-178, 181-186).

commitments it made to the Commission's staff regarding the filing of its reports. 6/ Finally the Commission, pursuant to Section 12(k) of the Securities Exchange Act, 15 U.S.C. 781(k), suspended trading in Aminex's common stock for a ten-day period commencing December 9, 1976, because of the lack of current public information about the company (A. 47). Thereafter, until reasonably current financial information about Aminex became available, public trading was effectively precluded by Rule 15c2-11, 17 CFR 240.15c2-11, which prohibits broker-dealers from publishing quotations unless the public has access to such

6/ The Commission's staff reminded Aminex of its filing delinquencies on several occasions during this period. For example, on July 20 and December 20, 1976, the Commission's staff notified the company that its Form 10-K annual report for the year ended January 31, 1976, had not been filed (A. 21-22, 36). The staff also warned Aminex that, in light of its reporting violations, the staff was obligated to consider recommending enforcement action to the Commission (A. 34-35, 41-44). In response to these admonitions, Aminex repeatedly stated that it intended to file the delinquent reports, but postponed its undertakings to begin necessary audits and to file the reports. In a Form 8-K current report, dated August 4, 1976, after Aminex's annual report for its 1976 fiscal year was 96 days overdue, the company undertook to begin preparing the financial statements for that report upon its anticipated "receipt of sufficient income within 60 days from the date hereof * * * " (A. 27). In an amendment to that Form 8-K, filed on September 22, 1976, this undertaking was delayed, until 60 days after September 10, 1976 (A. 30-33). On October 28, 1976, Aminex informed the staff that it expected that the delinquent reports would be filed in 90 days (A. 14). On November 1, 1976, Mr. Matusow, the president of Aminex, said that preparation of the 1976 annual report would begin in about a month (A. 14-15). Aminex stated on December 22, 1976, that the audit would be started immediately after January 1, 1977 (A. 37-38). Yet, on January 4, 1977, Aminex postponed that undertaking until the third week in January and stated that, hopefully, the delinquent reports would be filed by May 1, 1977 (A. 15). Counsel reiterated the May 1 date on January 10, 1977 (A. 39-40), but, on that same date, Mr. Matusow stated that he expected that the reports would be filed by the end of May (A. 15-16).

information. 7/

In August 1976, Jerome Matusow acquired control of Aminex and was elected president and Chief Executive Officer of the company (A. 123). 8/ Yet, although Mr. Matusow immediately had the power to effect any changes necessary to cure Aminex's filing delinquencies and knew that he should do so, 9/ he left this crucial area to Robert

7/ At the time the Commission suspended trading in Aminex's stock in December, 1976, the most recent publicly available financial statements of Aminex reported information as of October 31, 1975 and the latest certified financial statements reported information as of January 31, 1975. When more recent financial information was finally made available in the reports filed in April and May, 1977, pursuant to the trial court's order compelling such filings, it indicated that the company had undergone radical financial changes. Aminex reported assets of \$2,900,164 and negative stockholders' equity of \$9,513 as of January 31, 1975 (A. 13); positive stockholders' equity of \$721,768 as of October 31, 1975 (A. 13); assets of approximately \$164,000 and negative stockholders' equity of \$412,683 as of January 31, 1976 (A. 131); and assets in excess of \$90,000,000 and stockholders' equity in excess of \$4,000,000 as of January 31, 1977 (A. 125).

8/ A Form 8-K current report for the month of August, 1976, dated August 4 and filed August 10, 1976, revealed that "Mr. Matusow will be able to control the business and affairs of [Aminex]", but stated that "Mr. Matusow is not presently an officer or director of [Aminex]" (A. 24). The Form 10-K annual report for the fiscal year ended January 31, 1977, filed May 23, 1977, states, however: "Mr. Matusow has been [Aminex's] President and Chief Executive Officer since August, 1976" (A. 115). Mr. Mack's affidavit of April 4, 1977, states that "[i]n June 1976 I persuaded Jerome Matusow to become President of Aminex * * * " (A. 63).

Aminex asserts that Mr. Matusow did not initially "have the power to run the company * * * " (Br. 6). However, Mr. Matusow stated that since August, 1976, he has been able "to control the operations of Aminex" (A. 123).

9/ Mr. Matusow is no stranger to the reporting requirements of the Securities Exchange Act. He had previously been enjoined from certain violations of the antifraud provisions of the Securities Exchange Act in connection with the securities of Great American Industries, Inc. Securities and Exchange Commission v. Great American Indus., Inc., Judgment of Permanent Injunction as to Frederick J. Pagnani and Jerome Matusow and Consent Thereto, 66 Civil Action No. 1734 (S.D. N.Y., Mar. 30, 1972). In that

(footnote continued)

Salisbury, the company's past president (A. 200-202), who had amply demonstrated his inability to insure that Aminex complied with the law. Mr. Matusow admittedly did not take steps to cure Aminex's reporting violations until January 1977, months after he had acquired control of Aminex (A. 126-127, 133, 137, 204). Indeed, during Mr. Matusow's first several months in office, not only were the past filing deficiencies left uncorrected, but four new reporting violations occurred. 10/

The District Court's Opinion

The district court issued a Memorandum and Order setting forth the basis for its decision to grant the Commission's motion for summary judgment and enter a permanent injunction compelling Aminex to comply with the reporting requirements of the Act. The court noted that there was no dispute

9/ (footnote continued)

action, Mr. Mack, Aminex's Chairman of the Board, and other of Mr. Matusow's codefendants were enjoined from certain violations of the reporting and antifraud requirements of the Securities Exchange Act. Securities and Exchange Commission v. Great American Indus., Inc., Judgment of Permanent Injunction as to Walter S. Mack, Bernard D. Marren and Irving Stolz, and Consent Thereto, 66 Civil Action No. 1734 (S.D. N.Y., Mar. 30, 1972). See also, Securities and Exchange Commission v. Great American Indus., Inc., 407 F.2d 453 (C.A. 2, 1968), certiorari denied, 395 U.S. 920 (1969), reversing, 259 F. Supp. 99 (S.D. N.Y., 1966).

10/ Aminex's Form 10-Q quarterly reports for the fiscal quarters ended July 31 and October 31, 1976, and Form 8-K current reports for the months of October 1976 and January 1977, were due during this period, but were not timely filed. See n. 5, supra.

as to past violations and that "[t]he standard to be applied in determining whether to issue a permanent injunction is whether there is a reasonable likelihood, in view of a defendant's past conduct, that there will be future illegal activity" (A. 194). Recognizing that "[i]n ruling on a motion for summary judgment, a court's function is to determine whether a genuine issue of fact exists, not to resolve any existing factual issues," the court concluded that the record was sufficient to determine whether there was a reasonable likelihood that Aminex would violate the statute in the future (A. 193).

In reaching the conclusion that such a cognizable danger of future violations existed, the court pointed to the "numerous past delinquencies," and the fact that, despite the "'drastic change' in management, financial status and business operations" (A. 194, 195), 11/ public investors were "not made fully aware of these 'drastic changes' until the company filed various reports in April and May, 1977 under this Court's order" (A. 195). The court also observed that, although "defendant alleges, in part, that [the numerous past delinquencies] were attributable to its former president[,] * * * the current president's affidavit indicates that he did not place a priority on timely filing until six months after his arrival," and that "six reporting delinquencies either continued or originated during this period * * * " (A. 194-195, 195). 12/

11/ By characterizing the undisputed changes in management as "drastic," the court gave Aminex the benefit of all favorable inferences which could be drawn from the facts. The Commission had argued that, due to the fact that a majority of the board's membership was the same during the relevant time period, no significant change in management had occurred (A. 97).

12/ The court also considered Aminex's contention that "its delinquencies were not willful in that they were caused by financial pressures", but concluded that such factors did not excuse Aminex's conduct (A. 196).

All of these facts were either acknowledged or proffered by Aminex (e.g., A. 123-129; see page 15, infra). Aminex's filing practices during Mr. Matusow's tenure persuaded the court that, despite his assertion that "newly instituted procedures and new found financial stability will assure timely compliance in the future" (A. 194-195), there was "presently a reasonable likelihood" of future violations (A. 196). Accordingly, the district court found that no material facts were in issue and that the Commission was entitled to a permanent injunction as a matter of law.

ARGUMENT

THE DISTRICT COURT CORRECTLY DETERMINED THAT THE PUBLIC INTEREST REQUIRED THE IMPOSITION OF AN INJUNCTION DIRECTING AMINEX TO COMPLY WITH THE REPORTING REQUIREMENTS OF THE SECURITIES EXCHANGE ACT OF 1934

A. The Reporting Requirements of the Securities Exchange Act Secure Essential Information for Investors

The injunction issued by the district court below merely compels Aminex to file timely, accurate and complete reports required by law, so that important corporate events and the results of Aminex's operations will be made public. The reporting requirements with which Aminex must comply were viewed by the Congress that adopted them as "the minimum which is requisite for the adequate protection of investors." ^{13/} Aminex's repeated failure to comply with the law in the past made it impossible for public investors interested in Aminex stock to make informed investment judgments and for Aminex shareholders to evaluate the capacity of its officers and directors to manage their investment. As the House Committee considering the Securities Exchange Act noted:

"The idea of a free and open public market is built upon the theory that competing judgments of buyers and sellers as to

^{13/} S. Rep. No. 792, 73d Cong., 2d Sess. 11 (1934).

the fair price of a security brings about a situation where the market price reflects as nearly as possible a just price. * * * [T]he hiding and secreting of important information obstructs the operation of the markets as indices of real value.

* * *

"The reporting provisions of the [Securities Exchange Act] are a very modest beginning to afford * * * long denied aid * * * in the way of securing proper information for the investor."

H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11, 13 (1934). In this context, the need for the injunctive decree entered below is perhaps best evidenced by Aminex's assertion (Br. 7) that the reports it repeatedly and knowingly failed to file were mere "formal SEC filings"; rather, as we have seen, the reports at issue here are an essential element of the disclosure mechanism of the federal securities laws. 14/

A company's registration of its securities with the Commission pursuant to Section 12(g) of the Securities Exchange Act, obligates it to file the reports the Commission prescribes pursuant to Section 13(a) of the Act. Among the reports which must be filed are annual reports on Form 10-K, to be filed within 90 days after the close of the company's fiscal year, 15/ quarterly reports on Form 10-Q, to be filed within 45 days after the close of each of

14/ Aminex's assertion that the district court elevates "forms over substance" (sic) (Br. 7) demonstrates Aminex's cavalier attitude respecting the reporting requirements of the federal securities laws and, thus, the heightened need for an injunction. Cf., Securities and Exchange Commission v. First American Bank & Trust Co., 481 F.2d 673, 682 (C.A. 8, 1973).

15/ Rule 13a-1, 17 CFR 240.13a-1; 17 CFR 249.310; Form 10-K, General Instructions Item A, 3 CCH Fed. Sec. L. Rep. ¶31,102. Form 10-K--the Commission's annual report--requires disclosure of such matters as the certified financial statements of the issuer, a summary of the issuer's operations, a description of the properties owned or leased by the issuer, the number of shareholders of record for each class of equity securities, a description of changes in the amount of the outstanding equity securities, and a description of material changes in the issuer's business.

the first three quarters of each fiscal year, 16/ and current reports on Form 8-K. 17/ Prior to the recent amendments to Form 8-K, these reports were to be filed within 10 days after the close of any month in which certain significant corporate events occurred. 18/

The Commission's reporting rules are designed to strike a balance between the investing public's right to prompt dissemination of material corporate information and the regulatory burden on reporting companies. In recognition of the practical problems which arise in the business affairs of reporting companies, the Commission has established filing deadlines which afford an adequate opportunity to prepare reports containing the requisite financial and other material information, and procedures affording limited relief from the reporting requirements under certain circumstances. 19/ And, in particular, the Commission entertains requests to modify the reporting requirements from issuers which have ceased or severely curtailed their operations. 20/

16/ Rule 13a-13, 17 CFR 240.13a-13; 17 CFR 249.308a. Form 10-Q—the Commission's quarterly report—requires the disclosure of such items as gross sales, net income or loss, items of extraordinary income or loss, and a summary of the issuer's capital structure and stockholders' equity.

17/ Rule 13a-11, 17 CFR 13a-11; 17 CFR 249.308.

18/ Securities Exchange Act Release No. 12619 (Jul. 12, 1976), 41 Fed. Reg. 29784 (1976). During the relevant period, these events included major litigation, significant acquisitions or dispositions of assets, and changes in control of the company. The form also provided a vehicle for disclosure of other material information. After February 28, 1977, a Form 8-K current report is due within 15 days after the occurrence of specified events or 10 days after the end of a month in which an item of voluntary disclosure occurred. Securities Exchange Act Release No. 13156 (Jan. 13, 1977), 42 Fed. Reg. 4424 (1977).

19/ Rule 12b-21, 17 CFR 240.12b-21; Rule 12b-25, 17 CFR 240.12b-25. Aminex was cognizant of these procedures, having requested extensions of time to file certain of its reports. Securities and Exchange Commission, File No. 0-6064-2.

20/ Securities Exchange Act Release No. 9660 (Jun. 30, 1972), 37 Fed. Reg. 22978 (1972).

B. The District Court Correctly Determined That No Genuine Issue of Material Fact Existed.

Aminex comes to this Court seeking to overturn the district court's grant of summary judgment, contending that it is entitled to a trial to resolve factual issues. And yet, Aminex does not even question the district court's finding that "there was no dispute that defendant had violated the Exchange Act filing requirements at least 16 times from 1972 to 1977" (A. 193); rather, it asserts that the question of the "reasonable likelihood" that it will engage in future violations cannot be decided without a trial (Br. 15-19). 21/ But, Aminex's dispute does not involve any of the facts

21/ Aminex's assertion, that "whether there is such a 'reasonable likelihood' of future violations is normally considered a question of fact which can not be decided without a trial" (Br. 16), is incorrect. If this were so, the Commission could never, as a practical matter, obtain summary judgment because the reasonable likelihood of future violations is an essential element in the Commission's civil enforcement actions. And, as we note below (p. 17 and n. 29, *infra*), summary judgment has often been granted to the Commission in such actions.

The cases cited by Aminex (Br. 16) are not to the contrary. Securities and Exchange Commission v. North American Research and Development Corp., 59 F.R.D. 111 (S.D. N.Y., 1972), merely represents an instance in which a court refused to grant the Commission's motion for summary judgment, where that motion was based only upon the findings made on the preliminary injunction motion, and the district court had not previously found violations of the law. Another case cited by Aminex, Securities and Exchange Commission v. First Guardian Securities Corp., 95 F. Supp. 580 (S.D. N.Y., 1950), held that an answer denying contentions made in the complaint was sufficient to present a genuine issue of fact. Regardless of the validity of that holding nearly three decades ago, Rule 56 of the Federal Rules of Civil Procedure has been amended since that decision, and Rule 56(e) now makes clear that allegations or denials contained in pleadings are not sufficient to defeat a summary judgment motion supported as provided in the rule. 6 J. Moore, Federal Practice ¶56.01[1], at 56-14 (2d ed., 1976). At least to the extent that Great Western Land & Development, Inc. v. Securities and Exchange Commission, 355 F.2d 918 (C.A. 9, 1966), in interpreting summary judgment procedure after the amendment of Rule 56, relies upon the First Guardian decision, the sole authority cited by the Great Western court, we submit that it is erroneous. At any rate, in contrast to this case, Great Western presented a situation involving activity proscribed by the registration provisions of the Securities Act, 15 U.S.C. 77e(a), 77e(c), where the defendants

(footnote continued)

forming the basis for the district court's ruling, rather it involves the court's conclusion that there was a reasonable likelihood that Aminex will violate the law in the future. 22/ Indeed, it would be futile for Aminex to argue that any of these facts were in contention. The "numerous past delinquencies in filing" and the continuance or origination of delinquencies during Mr. Matusow's tenure as president (A. 194, 195), relied upon by the district court, were admitted by Aminex (e.g., A. 181-186). Other facts proffered by Aminex 23/--past financial pressures, the "newly instituted procedures and new found financial stability" under Mr. Matusow's tenure, 24/ and the "'drastic change' in management, financial status and business operations" --were accepted by the court for the purposes of its summary judgment ruling,

21/ (footnote continued)

asserted that their new mode of operation did not involve a security and that, when the Commission questioned their conduct, they promptly ceased this activity. See also, n. 25, infra.

22/ Aminex apparently confuses the question of whether there is a dispute as to any material fact with the question of whether there is a reasonable likelihood of future violations of the law. "Reasonable likelihood" is not itself a fact; rather, it is a conclusion which a court may reach on a motion for summary judgment if the facts, on which this conclusion is based, are undisputed. See Securities and Exchange Commission v. Koracorp Indus., Inc., [Current] CCH Fed. Sec. L. Rep. ¶96,370, at 93,277 (C.A. 9, Feb. 6, 1978), petition for rehearing en banc pending. Aminex's attempt to raise a disputed issue of fact, by disagreeing with the trial court's legal conclusion, cannot affect the propriety of the district court's summary disposition of this action. 6 J. Moore, Federal Practice ¶56.15[3], at 56-485 (2d ed., 1976); cf., Thompson v. Evening Star Newspaper Co., 129 U.S. App. D.C. 299, 394 F.2d 774, certiorari denied, 393 U.S. 884 (1968).

23/ E.g., A. 123-129; see A. 204.

24/ Of course, Aminex's "assertions as to [Mr. Matusow's] personal integrity are irrelevant to the issues presently before the Court. [Mr. Matusow] and [Aminex] are simply not one and the same." Securities and Exchange Commission v. Falstaff Brewing Corp., [1977-1978] CCH Fed. Sec. L. Rep. ¶96,117, at 92,024 (D. D.C., 1977), appeal pending, No. 77-1885 (C.A. D.C.).

but the court concluded that they did not excuse the violative conduct which continued subsequent to Mr. Matusow taking control of Aminex (A. 194-195, 195, 196). Thus, the district court reached its legal conclusions from facts not disputed by Aminex. Aminex failed to raise a genuine issue as to any material fact, and the district court properly determined that summary judgment was appropriate. 25/

The essential purpose of the summary judgment procedure provided in Rule 56 of the Federal Rules of Civil Procedure is to deter useless trials where there is no genuine issue of material fact. 26/ In light of this salutary function, this Court has long recognized the value of the summary judgment procedure in making possible the prompt disposition of controversies on their merits without a trial, if there is no real dispute as to the salient facts,

25/ Representations by Aminex's current management that it does not intend to engage in future violations do not create a genuine issue as to any material fact. The district court did not dispute their good faith or credibility. Thus, Great Western Land & Development, Inc. v. Securities and Exchange Commission, supra, 355 F.2d 918, on which Aminex relies (Br. 16-17), is inapposite. In the circumstances present there, the Ninth Circuit found that "the [district] court acted too precipitately in fixing upon its disbelief [of the defendants' assurances] at this stage of the proceedings * * *." Id. at 919. Similarly, in Securities and Exchange Commission v. National Student Marketing Corp., 360 F. Supp. 284, 299 (D. D.C., 1973), also cited by Aminex (Br. 18, 21), the court found that summary judgment could not be entered in favor of certain defendants, because, inter alia, the undisputed facts did not demonstrate their sincerity. And, in Securities and Exchange Commission v. Koracorp Indus., Inc., supra, [Current] CCH Fed. Sec. L. Rep. ¶96,370, the court reversed the district court's grant of summary judgment in favor of certain defendants, where there were significant disputes as to each defendant's responsibility, but held that reasonable likelihood could be determined on motions for summary judgment.

26/ Aminex's argument, that summary judgment was inappropriate because "by the time of trial, the Court would have had the opportunity to observe Aminex's conduct for a longer period * * * " (Br. 19), is superfluous. Where, as here, the legal standards for summary disposition have been met, any such opportunity for observation is unnecessary and, in any event, compliance with the law while under scrutiny of the court and the onus of a preliminary injunction has no bearing on whether Aminex will comply in the future.

and has stated its belief that the important functions served by this procedure would not be fulfilled if courts view their power too restrictively. 27/

Particularly where the government sues under a prophylactic or remedial statute 28/ to protect the public interest, summary judgment is an effective tool by which an enforcement agency with limited manpower and resources is able to police serious violations of the law where no contested, material, evidentiary facts exist. See, e.g., Securities and Exchange Commission v. Geyser Minerals Corporation, 452 F.2d 876 (C.A. 10, 1971). 29/

Since the only questions raised in an action to enjoin future violations of the reporting requirements of the Securities Exchange Act are whether (i) the defendant is or has been violating, and (ii) there is a reasonable likelihood that the defendant will again violate the requirements, summary judgment has been found appropriate in these types of cases. 30/ As this Court has stated: "Conflict concerning the ultimate and decisive conclusion to be drawn from

27/ See Washington Post Co. v. Keogh, 125 U.S. App. D.C. 32, 35, 365 F.2d 965, 968 (1966), certiorari denied, 385 U.S. 1011 (1967). See also, United States v. General Motors Corp., 171 U.S. App. D.C. 27, 48, 518 F.2d 420, 441 (1975).

28/ See, e.g., Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 195, 200 (1963) (Investment Advisers Act, like other securities legislation, must be construed flexibly to effect its remedial objectives).

29/ See also, Securities and Exchange Commission v. Golconda Mining Co., 291 F. Supp. 125 (S.D. N.Y., 1968), affirmed without opinion, No. 32979 (C.A. 2, Mar. 22, 1969); Securities and Exchange Commission v. Latta, 250 F. Supp. 170 (N.D. Cal., 1965), affirmed, 356 F.2d 103 (C.A. 9), certiorari denied, 384 U.S. 940 (1966); Securities and Exchange Commission v. Searchlight Consol. Mining & Milling Co., 112 F. Supp. 726 (D. Nev., 1953); Securities and Exchange Commission v. Payne, 35 F. Supp. 873 (S.D. N.Y., 1940).

30/ See, e.g., Securities and Exchange Commission v. Western Orbis Co., [1975-1976] CCH Fed. Sec. L. Rep. ¶95,522 (D. D.C., 1976); Securities and Exchange Commission v. Kalvex Inc., 425 F. Supp. 310 (S.D. N.Y., 1975); Securities and Exchange Commission v. Data Lease Financial Corp.,

undisputed facts does not prevent rendition of a summary judgment, when that conclusion is one to be drawn by the court." Fox v. Johnson & Wimsatt, Inc., 75 U.S. App. D.C. 211, 219, 127 F.2d 729, 737 (1942). Accord, Cody v. Aktiebolaget Flymo, 146 U.S. App. D.C. 345, 352, 452 F.2d 1274, 1281 (1971), certiorari denied, 405 U.S. 990 (1972); Douglass v. First National Realty Corporation, 141 U.S. App. D.C. 233, 236, 437 F.2d 666, 669 (1970).

C. The District Court Correctly Determined To Enter a Permanent Injunction.

A district court has broad discretion to enjoin, at the instance of the Commission, future violations of law where past violations have been shown; and a trial court's "determination that the public interest requires the imposition of a permanent restraint should not be disturbed on appeal unless there has been a clear abuse of discretion." Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (C.A. 2, 1972). 31/

In such remedial actions, the Commission appears, "not as an ordinary litigant, but as a statutory guardian charged with safeguarding the public interest in enforcing the securities laws." Securities and Exchange Commission

30/ (footnote continued)

Civil Action No. 74-1860 (D. D.C., Feb. 14, 1975) (reproduced at A. 187-189); Securities and Exchange Commission v. Realty Equities Corp., [1972-1973] CCH Fed. Sec. L. Rep. ¶93,545 (D. D.C., 1972); Securities and Exchange Commission v. Atlas Tack Corp., 93 F. Supp. 111 (D. Mass., 1950).

31/ See also, Securities and Exchange Commission v. Shapiro, 494 F.2d 1301, 1308 (C.A. 2, 1974); Securities and Exchange Commission v. MacElvain, 417 F.2d 1134, 1137 (C.A. 5, 1969), certiorari denied, 397 U.S. 972 (1970); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 250 (C.A. 2, 1959).

v. Management Dynamics, Inc., 515 F.2d 801, 808 (C.A. 2, 1975). As the Court of Appeals for the Fifth Circuit has noted in an analogous enforcement action:

"[t]he injunctive processes are a means of effecting general compliance with national policy as expressed by Congress, a public policy judges too must carry out--actuated by the spirit of the law and not begrudgingly as if it were a newly imposed fiat of a presidium."

Mitchell v. Pidcock, 299 F.2d 281, 287 (C.A. 5, 1962) (violation of Fair Labor Standards Act).

Aminex states that a permanent injunction is a "drastic remedy" (Br. 19). ^{32/} Yet, the Supreme Court, in a case involving the Investment Advisers Act of 1940, referred to injunctive relief obtained by the Commission as a "mild prophylactic." Securities and Exchange Commission v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 193 (1963) (preliminary injunction). And, the permanent injunction entered by the district court "serves only to require observance by [Aminex] of the relevant provisions of the federal securities laws. It imposes no hardship or sanction whatsoever unless compliance with the law is deemed to be a hardship or a sanction." Securities and Exchange Commission v. IMC International, Inc., 384 F. Supp. 889, 894 (N.D. Tex.) (citation omitted), affirmed without opinion, 505 F.2d 733 (C.A. 5, 1974), certiorari denied sub nom. Evans v. Securities and Exchange Commis-

^{32/} The sole authority cited by Aminex for this proposition, Securities and Exchange Commission v. Bausch & Lomb, Inc., 420 F. Supp. 1226 (S.D. N.Y., 1976), affirmed, 565 F.2d 8 (C.A. 2, 1977), merely quotes the decision of the district court in Securities and Exchange Commission v. Koracorp Indus., Inc., [1975-1976] CCH Fed. Sec. L. Rep. ¶95,532 (N.D. Cal., 1976), which has recently been reversed, as to all but one defendant, by the Ninth Circuit Court of Appeals. Securities and Exchange Commission v. Koracorp Indus., Inc., supra, [Current] CCH Fed. Sec. L. Rep. ¶96,370.

Aminex also asserts that the permanent injunction is "grossly unfair" to its shareholders (Br. 24). But it was Aminex that was "grossly unfair" to its public investors when it repeatedly failed to file required reports in a timely and proper fashion.

tion, 420 U.S. 930 (1975). 33/

Where past violations of the law have been shown, the necessity for injunctive relief is demonstrated where there is a reasonable likelihood of future violations on the part of a defendant. 34/ Several factors are particularly relevant in determining whether or not there exists a reasonable likelihood of future violations. For example, the courts have pointed out that such a likelihood may be inferred from past violations, 35/ and even the cessation of illegal activity prior to the institution of an

33/ See also, Securities and Exchange Commission v. Graye, 156 F. Supp. 544, 547 (S.D. N.Y., 1957) (preliminary injunction granted) (footnote omitted), where the court (Kaufman, J.) stated:

"I fail to see any injury resulting to defendant by the granting of this injunction. As was stated in Securities and Exchange Commission v. Otis, D.C. Ohio, 1936, 18 F. Supp. 100, 101, affirmed Otis v. Securities and Exchange Commission, 6 Cir., 1939, 106 F.2d 579; 'If in fact defendant has no intention of again offending, it will not be injured by an injunction.' The injunction does not seek to put defendant out of business. * * * It does not seek to harm defendant, but rather to protect the public. Compliance will mean continuation."

Accord, Securities and Exchange Commission v. Northeastern Financial Corp., 268 F. Supp. 412, 416 (D. N.J., 1967).

34/ E.g., Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807 (preliminary injunction); Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100; Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 249-250; Securities and Exchange Commission v. IMC Int'l, Inc., supra, 384 F. Supp. at 893; "[O]f course, [an injunction] can be utilized even without a showing of past wrongs." United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

35/ E.g., Securities and Exchange Commission v. Koracorp Indus., Inc., supra, [Current] CCH Fed. Sec. L. Rep. ¶96,370, at 93,274; Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807; Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1100; Securities and Exchange Commission v. Keller Corp., 323 F.2d 397, 402 (C.A. 7, 1963) (preliminary injunction); Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 249-250;

(footnote continued)

enforcement action would not bar injunctive relief. 36/ In addition, "factors suggesting that the infraction might not have been an isolated occurrence are always relevant." 37/ Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807. And, promises of reformation and good faith representation of an intention to comply in the future are not "conclusive or even necessarily persuasive * * *." Securities and Exchange Commission v. Koracorp Industries, Inc., [Current] CCH Fed. Sec. L. Rep. ¶96,370 at 93,274 (C.A. 9, Feb. 6, 1978), petition for rehearing en banc pending.

In this case, Aminex repeatedly violated the law during an extended period of time. The Commission notified Aminex that its filing record was deficient and warned the company that enforcement action would be

35/ (footnote continued)

Securities and Exchange Commission v. J & B Indus., Inc., 388 F. Supp. 1082, 1084, 1086 (D. Mass., 1974) (preliminary injunction); Securities and Exchange Commission v. IMC Int'l, Inc., supra, 384 F. Supp. at 894; Securities and Exchange Commission v. M. A. Lundy Assoc., 362 F. Supp. 226, 232 (D. R.I., 1973) (preliminary injunction).

36/ E.g., Securities and Exchange Commission v. Koracorp Indus., Inc., supra, [Current] CCH Fed. Sec. L. Rep. ¶96,370, at 93,274; Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 807; Securities and Exchange Commission v. Manor Nursing Centers, Inc., supra, 458 F.2d at 1101; Securities and Exchange Commission v. Keller Corp., supra, 323 F.2d at 402; Securities and Exchange Commission v. Culpepper, supra, 270 F.2d at 249; Securities and Exchange Commission v. Universal Service Ass'n, 106 F.2d 232, 239-240 (C.A. 7, 1939), certiorari denied, 308 U.S. 622 (1940); Otis & Co. v. Securities and Exchange Commission, 106 F.2d 579, 583-584 (C.A. 6, 1939); Securities and Exchange Commission v. J & B Indus., Inc., supra, 388 F. Supp. at 1084, 1086; Securities and Exchange Commission v. IMC Int'l, Inc., supra, 384 F. Supp. at 894.

37/ Significantly, in Securities and Exchange Commission v. Bausch & Lomb, Inc., supra, 420 F. Supp. at 1244, upon which Aminex relies (Br. 16, 18, 20, 21), the district court found "no pattern of past violations suggesting that defendants should be enjoined."

considered. 38/ However, these efforts did not bring about compliance with the law. Aminex repeatedly postponed its undertakings to file delinquent reports; its failures to file continued uncured, and additional reporting violations arose. 39/ According to Aminex, "as of late December [1976], [it] was a 'new' company; it had new management, new finances and a new business" (Br. 10). Yet, Aminex's illegal conduct did not cease; indeed, two additional violations originated in December 1976 and January 1977. Only after the trial court entered an order compelling the filing of delinquent reports, violation of which would have been punishable by contempt, did Aminex correct its reporting deficiencies. 40/ Judicial compulsion was the only weapon which had the desired effect of modifying Aminex's illegal behavior. Here, the

38/ Thus, the facts of this case are distinct from those present in Securities and Exchange Commission v. Comstock Tunnel & Drainage Co., [1972-1973] CCH Fed. Sec. L. Rep. ¶93,712 (D. D.C., 1973), upon which Aminex relied in the court below. In Comstock, the court found that the company diligently attempted to comply with comments made by the Commission, that the Commission had made no comments on certain filings at issue for the seven years preceding the institution of the action, and that "at no time in the past 12 years, * * * did the Staff ever state * * *" that certain deficiencies should be corrected. Id. at 93,155.

39/ Aminex contends that "no funds" were available to pay experts to prepare the reports during Mr. Matusow's initial months in office (Br. 6). However, the purported "reasons for the past violations-- poor finances and weakened management" (Br. 19) do not excuse compliance with the law. See Securities and Exchange Commission v. Realty Equities Corp., supra, [1972-1973] CCH Fed. Sec. L. Rep. ¶93,545.

Moreover, since Mr. Matusow acquired nearly 4,000,000 shares of Aminex's common stock in August 1976 (A. 25), it is disingenuous for Aminex to now suggest that he was "saving a business for its public shareholders" (Br. 7). He was attempting to save the business for himself and chose, until 1977, to ignore the company's public shareholders by failing to fulfill Aminex's reporting obligations.

40/ Aminex may have complied with the court's order when it filed five delinquent reports in April 1977; however, the reports were due long before the court entered its order (see n. 5, supra) and plainly were not, contrary to Aminex's assertion, "timely filed * * *" (Br. 13).

undisputed, objective facts before the trial court more than counterbalanced any good intentions. Under these circumstances, the trial court's conclusion --that, in order to assure Aminex's continued adherence to the reporting requirements imposed by law, the public interest required a permanent judicial restraint--should not be disturbed. "Surely the Commission should not be required to keep [this company] under surveillance and to bring a subsequent injunction if [it] commence[s] again" its unlawful activities. Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 250 (C.A. 2, 1959).

In reversing a district court decision on which Aminex relies, and mandating the entry of a permanent injunction, the Court of Appeals for the Fifth Circuit was not persuaded by the defendants' arguments that they should not be saddled with their predecessors' violative conduct. Securities and Exchange Commission v. Continental Tobacco Company of South Carolina, Inc., 463 F.2d 137, 162 (C.A. 5, 1972), reversing, 326 F. Supp. 588 (S.D. Fla., 1971), cited by Aminex as [1970-1971] CCH Fed. Sec. L. Rep. ¶93,162 (S.D. Fla., 1971). 41/ There, as here, the successors engaged in conduct similar to their predecessors. Id. Mr. Matusow's failure to insure compliance with the law until after the

41/ Nor do the remaining cases cited by Aminex (Br. 22-23) demonstrate that the changes in Aminex obviated the need for a permanent injunction. Sargent v. Genesco, Inc., [1972-1973] CCH Fed. Sec. L. Rep. ¶93,506 (M.D. Fla., 1972), is a private action in which, in contrast to an action brought by the Commission, a showing of irreparable harm is necessary to obtain injunctive relief. See, e.g., Securities and Exchange Commission v. Management Dynamics, Inc., supra, 515 F.2d at 808. In Securities and Exchange Commission v. Casper Rogers & Co., 194 F. Supp. 589 (S.D. N.Y., 1961), the court denied a preliminary injunction where the violation had been cured, prior to the entry of any court order. In Securities and Exchange Commission v. American Beef Packers, Inc., [1977-1978] CCH Fed. Sec. L. Rep. ¶96,079 at 91,876 (D. Neb., 1977), "[t]he present management was not involved in any of the violations of securities law." Furthermore, in each of these cases, "the denial of an injunction * * * was, as always, discretionary." Securities and Exchange Commission v. Shapiro, supra, 494 F.2d at 1308 n. 6. Thus, these cases do not support Aminex's contention that the court below was required, as a matter of law, to deny the injunction sought by the Commission.

entry of a court order demonstrates that a permanent injunction is necessary to protect the public interest. Furthermore, whatever the abilities and intentions of members of Aminex's new management, they are not bound to the company and may leave at any time. And, in any event, compliance with a court order is certainly not dispositive of what would happen in the future, absent such a restraint.

Although Aminex gratuitously asserts that recent reports "have been most thorough and complete" (Br. 24), the quality of these reports as disclosure documents is not an issue in this case. Merely because the Commission, "in this proceeding, [has] never questioned [the reports'] accuracy or completeness" (Br. 13), is not "a finding * * * that such * * * report[s] [are] true and accurate on [their] face or that [they are] not false or misleading." Section 26 of the Securities Exchange Act, 15 U.S.C. 78z. And, any willful representation to the contrary to a purchaser or seller of securities is punishable by fine or imprisonment. Id.; Section 32(a) of the Securities Exchange Act, 15 U.S.C. 78ff(a).

In summary, this is not a case of a single isolated mistake or transgression, but rather a situation demonstrative of a company's undisputed, long-standing disregard for the "clear and unequivocal" reporting requirements of the securities laws. Securities and Exchange Commission v. IMC International, Inc., supra, 384 F. Supp. at 893. The undisputed facts fully support the district court's exercise of its broad discretion by issuing an injunction to protect the public interest--a remedy which does no more than mandate compliance with requirements Aminex is otherwise obligated to obey.

CONCLUSION

For the foregoing reasons, the grant of summary judgment in favor of the Commission and the entry of a permanent injunction should be affirmed.

Respectfully submitted,

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February, 1978

STATUTORY APPENDIX

Section 13(a), Securities Exchange Act of 1934,
15 U.S.C. 78m(a):

Periodical and Other Reports

Section 13. (a) Every issuer of a security registered pursuant to section 12 of this title shall file with the Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) such information and documents (and such copies thereof) as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to section 12, except that the Commission may not require the filing of any material contract wholly executed before July 1, 1962.

(2) such annual reports (and such copies thereof), certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports (and such copies thereof), as the Commission may prescribe.

Every issuer of a security registered on a national securities exchange shall also file a duplicate original of such information, documents, and reports with the exchange.*

Rule 13a-1, Securities Exchange Act of 1934,
17 CFR 240.13a-1:

ANNUAL REPORTS

17 CFR § 240.13a-1 Requirements of annual reports.

Every issuer having securities registered pursuant to section 12 of the Act shall file an annual report on the appropriate form authorized or prescribed therefor for each fiscal year after the last full fiscal year for which financial statements were filed in its registration statement. Registrants on Form 8-B, § 249.308b of this chapter, shall file an annual report for each fiscal year beginning on or after the date as of which the succession occurred. Annual reports shall be filed within the period specified in the appropriate form. At the time of filing the annual report, the registrant other than a person registered under the Public Utility Holding Company Act of 1935 or the Investment Company Act of 1940 shall pay to the Commission a fee of \$250, no part of which shall be refunded.

Rule 13a-11, Securities Exchange Act of 1934,
17 CFR 240.13a-11:

17 CFR § 240.13a-11 Current reports on Form 8-K (§ 249.308 of this chapter).

(a) Except as provided in paragraph (b) of this section, every registrant subject to § 240.13a-1 shall file a current report on Form 8-K within the period specified in that form unless substantially the same information as that required by Form 8-K has been previously reported by the registrant.

(b) This section shall not apply to foreign governments, foreign private issuers required to make reports on Form 6-K (17 CFR 249.306) pursuant to Rule 13a-16 (17 CFR 240.13a-16), issuers of American Depositary Receipts for securities of any foreign issuer, or investment companies required to file quarterly reports pursuant to Rule 13a-12 (17 CFR 240.13a-12).

Rule 13a-13, Securities Exchange Act of 1934,
17 CFR 240.13a-13:

17 CFR § 240.13a-13 Quarterly reports on
Form 10-Q (§ 249.308a of this
chapter).

(a) Except as provided in paragraphs (b) and (c) of this section, every issuer which has securities registered pursuant to section 12 of the Act and which is required to file annual reports pursuant to section 13 of the Act on Form 10-K (§ 249.310 of this chapter), 12-K (§ 249.312 of this chapter) or U5S (§ 249.450 of this chapter) shall file a quarterly report on Form 10-Q (§ 249.308a of this chapter) within the period specified in General Instruction A to that form, for each of the first three fiscal quarters of each fiscal year of the issuer, commencing with the first such fiscal quarter which ends after securities of the issuer become so registered.

(b) The provisions of this rule shall not apply to the following issuers:

(1) Investment companies required to file quarterly reports pursuant to § 240.13a-12; or

(2) Foreign private issuers required to file reports pursuant to § 240.13a-16.

(c) Part I of the quarterly report on Form 10-Q need not be filed by the following issuers:

(1) Life insurance companies and holding companies having only life insurance subsidiaries for quarters in fiscal years ending on or before December 25, 1978, if they do not meet the tests specified in § 210.3-16(t) (1) (i) (B);

(2) Mutual life insurance companies; or

(3) Mining companies not in the production stage but engaged primarily in the exploration for or the development of mineral deposits other than oil, gas or

coal, if all the following conditions are met:

(i) The registrant has not been in production during the current fiscal year or the two years immediately prior thereto; except that being in production for an aggregate period of no more than eight months over the three-year period shall not be a violation of this condition.

(ii) Receipts from the sale of mineral products or from the operations of mineral producing properties by the registrant and its subsidiaries combined have not exceeded \$500,000 in any of the most recent six years and have not aggregated more than \$1,500,000 in the most recent six fiscal years.

(d) Public utilities, common carriers and pipeline carriers which submit financial reports to the Civil Aeronautics Board, the Federal Communications Commission, the Federal Power Commission or the Interstate Commerce Commission may, at their option, in lieu of furnishing the information called for by Part I of Form 10-Q, file as exhibits to reports on this form copies of their reports submitted to such Board or Commission for the preceding fiscal quarter or for each month of such quarter, as the case may be, together with copies of their quarterly reports, if any, for such periods sent to their stockholders.

(e) Notwithstanding the foregoing provisions of this section, the financial information required by Part I of Form 10-Q, or financial information submitted in lieu thereof pursuant to paragraph (d) of this section, shall not be deemed to be "filed" for the purpose of section 18 of the Act or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

Forms, Securities Exchange Act of 1934,
17 CFR 249.308, 249.308a and 249.310:

17 CFR § 249.308 Form 8-K, for current reports.

This form shall be used for the current reports required by Rule 13a-11 or Rule 15d-11 (§ 240.13a-11 or § 240.15d-11 of this chapter).

17 CFR § 249.308a Form 10-Q, for quarterly reports under section 13 or 15(d) of the Securities Exchange Act of 1934.

Form 10-Q shall be used for quarterly reports under section 13 or 15(d) of the Securities Exchange Act of 1934, required to be filed pursuant to § 240.13a-13 or § 240.15d-13 of this chapter. A report on this form shall be filed within 45 days after the end of the first three fiscal quarters of each fiscal year, but no quarterly report need be filed for the fourth quarter of any fiscal year.

17 CFR § 249.310 Form 10-K, annual report pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934.

This form shall be used for annual reports pursuant to section 13 or 15(d) of the Securities Exchange Act of 1934 for which no other form is prescribed.