SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
MARKET REGULATION

December 15, 1980

Mr. G.J. Casillo
John Muir & Co.
61 Broadway
New York, New York 10006

Dear Mr. Casillo:

This is in response to your letter of March 18, 1980, to Mr. Anthony Lucarelli of The New York Stock Exchange (NYSE) on behalf of John Muir & Co. ("Muir") which questions a NYSE interpretation of subparagraphs (b)(1) and (b)(2) of Rule 15c3-3 (17 CFR 240.15c3-3).

I understand the pertinent facts to be as follows: Muir in making deliveries of securities was creating deficiencies during the day in the quantity of certain issues of securities required to be in its possession or control rather than removing securities from bank loan on the same day. The firm was waiting until its computer system calculated the current excess deficit status and then acted to remove any deficit position. In response to discussions with staff members of the NYSE, Muir changed its procedures so that securities are being removed from bank loan on the same day as delivery. Muir does not believe, however, that this is required.

Paragraph (b)(1) provides:

> "A broker or dealer shall promptly obtain and shall thereafter maintain the physical possession or control of all fully-paid securities and excess margin securities carried by a broker or dealer for the account of customers."

You concede that if this paragraph stood on its own, the NYSE interpretation would be correct. You rely however upon paragraph (b)(2) which states:

> "A broker or dealer shall not be deemed to be in violation of the provisions of paragraph (b)(1) regarding physical possession or control of customers' securities if, solely as the result of normal business operations,

> temporary lags occur between the time when a security is required to be in the possession or control of the broker or dealer and the time that it is placed in his physical possession or under his control, provided that the broker or dealer takes timely steps in good faith to establish prompt physical possession or control."

You contend that you are taking timely steps as required by (b)(2) to establish prompt physical possession or control. You are removing securities from bank loan the same day a deficit appear on your excess deficit listing. You cannot do this on the same day the securities are delivered because it is physically impossible to post all movements of securities to your excess deficit listing each day in order to establish which securities at the close of business will be in deficit. This "temporary lag" (one day), you claim, occurs solely as the result of normal business operations. You point out that paragraph (d)(1) of the Rule permits a broker or dealer the next business day following the determination of a deficiency to issue instructions for the release of a bank lien and two business days following the issuance to obtain physical possession or control of the securities.

The Commission in Securities Exchange Act Release No. 34-9922 (January 2, 1973) released the Division of Market Regulation's interpretation that:

> "the rule is interpreted to prohibit any delivery . . . . of securities that would create or increase a deficiency in the quantity of securities by class and issuer required to be in possession or control of a broker or dealer."

That interpretation reiterates the Rule's strictures on possession and control of customers' securities, and makes clear that no deficiency can be deliberately created by delivery out of securities. 1/

1/ The Rule permits same day receipt and delivery (turnaround) of a security which is received as a result of the settlement of a transaction (same day receipt and

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Paragraph (b)(2) was not designed to countenance the creation of a deficit, by the delivery out of securities required for possession or control, as you have argued. That paragraph was designed to modify the requirements of paragraph (b)(1) only to the extent that a broker or dealer would not be deemed to be in violation of the possession or control requirements immediately upon the daily determination required by paragraph (d) of the Rule when a deficit did not arise from the deliberate action of the broker or dealer. For example, a customer may have paid for securities the preceding day which the broker or dealer has failed to receive from another broker or dealer.

Accordingly, it is the view of the Division that the NYSE was correct in its interpretation that Muir may not deliver securities that would create or increase a deficiency in the quantity of securities by class and issuer required to be in its possession or control.

Yours very truly,

Michael A. Macchiaroli

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Branch Chief

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redelivery does not include securities received as a recall from bank or stock loan, from safekeeping or from any control location), even if such security of such class and issuer are required for possession or control, provided that such turnaround does not create or increase a deficiency.