In the Matter of INVESTORS MUTUAL, INC., INVESTORS STOCK FUND, INC., INVESTORS SELECTIVE FUND, INC., INVESTORS VARIABLE PAYMENT FUND, INC., GAMBLE-SKOGMO, INC., INVESTORS DIVERSIFIED SERVICES, INC.

File Nos. 812-1550, 812-1553, 812-1558, 812-1569, 812-1582, 812-1583

SECURITIES AND EXCHANGE COMMISSION

INVESTMENT COMPANY ACT OF 1940, Section 2(a)(9), Release No. 4595

May 11, 1966

ACTION:

CONTROL OF A COMPANY

Status of Shareholder as Interested Person Entitled to Seek Determination of Question of Control

Scope of Determination as to Control

Shareholder of registered investment company is interested person within the meaning of Section 2(a)(9) of Investment Company Act of 1940 and entitled to file with the Commission application for an order that, contrary to the presumption contained in that Section, a person or group of persons are in control of an investment company's adviser and company controlling such adviser, and the Commission may make a determination relating to a period preceding determination.

Failure to Rebut Presumption of Non-Control

Where group which had gained management control of company in proxy contest sold 15% of voting stock, granted option to purchasers with respect to additional 15-20%, and provided two seats on tenman board for purchasers, but as a result of failure of purchasers to reach accord with 33% stockholder, who had lost proxy contest but was engaged in efforts to regain control and had thwarted management group through power represented by his holdings, purchasers' contemplated succession to management group's holdings and positions did not materialize, and where record did not establish existence of claimed secret agreement between management group and purchasers to transfer control to latter or show that certain actions of company and a controlled company were attributable to controlling influence of purchasers as claimed, held, presumption under Section 2(a)(9) that purchasers did not control company in view of ownership of less than 25% of its stock was not rebutted.

COUNSEL: APPEARANCES:

Randolph Phillips, pro se.

Samuel E. Gates, J. Asa Rountree, Edward Fowler and Peter W. Williamson, of Debevoise, Plimpton, Lyons & Gates, for Investors Diversified Services, Inc.

Holman Jenkens, George C. Anson, Walter M. Spradley and Elton R. Hutchison, of Jenkens, Anson, Spradley & Gilchrist, for John D. Murchison.

G. Duane Vieth, James R. McAlee and James F. Fitzpatrick, of Arnold & Porter; Callahan & Callahan; and Holtzmann, Wise & Shepard, for Gamble-Skogmo, Inc.

Taggart Whipple, Phillip C. Potter, Jr. and Roland W. Donnem, of Davis Polk Wardwell Sunderland & Kiendl, for Investors Mutual, Inc., Investors Stock Fund, Inc., Investors Selective Fund, Inc. and Investors Variable Payment Fund, Inc.

John E. Tobin and Robert M. Loeffler, of Donovan Leisure Newton & Irvine, for Allan P. Kirby, Fred M. Kirby, Allan P. Kirby, Jr. and Charles T. Ireland, Jr.

Solomon Freedman, Alan R. Gordon, Roger W. Kapp and William A. Matthews, for the Division of Corporate Regulation of the Commission.

John C. Wagner and P. L. Thornbury, of Thornbury, Howell & Jeffries, for Murray D. Lincoln, Nationwide Corporation, Nationwide Mutual Insurance Company, Nationwide Mutual Fire Insurance Company and Nationwide Life Insurance Company.

Robert L. Bobrick, for M. Davidhoff.

TEXT: FINDINGS AND OPINION OF THE COMMISSION

I

We have before us two applications under Section 2(a)(9) of the Investment Company Act of 1940 ("Act") n1 seeking certain control determinations with respect to Alleghany Corporation and Investors Diversified Services, Inc. ("IDS"). Alleghany owns about 47.5% of the voting securities of IDS and controls that company.

n1 Section 2(a)(9), among other things, defines "control" as "the power to exercise a controlling influence over the management or policies of a company," and creates rebuttable presumptions that any person who owns more than 25% of its voting securities controls a company and one who does not own such amount does not control it.

The first application was filed on December 19, 1962 by Randolph Phillips, a stockholder of four investment companies ("the Funds") n2 registered under the Act for which IDS serves as investment adviser and principal underwriter, and seeks a determination that in or about October 1962 Bertin C. Gamble and two companies affiliated with him (referred to as the "Gamble Group"), acquired control of Alleghany and IDS. The application alleges that the Gamble Group acquired such control as a result, among other things, of its purchase in October 1962 of 1.5 million shares of Alleghany common stock, or about 15% of the total voting stock, from John D. Murchison, Clint W. Murchison, Jr. and their associates. n3 It further alleges that under Sections 2(a)(4) and 15 of the Act, such acquisition of control terminated by "assignment" the investment advisory and underwriting contracts between IDS and the Funds, which had been entered into in April 1960. n4 Phillips claims that by virtue of such termination the Funds are entitled to a return of all payments made under those contracts, less the actual cost of the services rendered, from the date of termination to the dates in April and May 1963 when new contracts were approved by the shareholders of the Funds. It is conceded that Allan P. Kirby and certain associates were in complete control of Alleghany later in 1963.

n2 Investors Mutual, Inc., Investors Stock Fund, Inc., Investors Selective Fund, Inc., and Investors Variable Payment Fund, Inc.

n3 Phillips' application alleged alternatively that the Gamble Group acquired control of Alleghany and IDS in concert with the Murchisons and their associates on the Alleghany board of directors.

n4 Section 15 of the Act makes it unlawful for any person to act as investment adviser or principal underwriter after assignment of the contract, and requires such a contract to provide for its automatic termination upon assignment. Section 2(a)(4) provides in part: "'Assignment' includes any direct or indirect transfer . . . of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor . . ."

The second application was filed on February 15, 1963 by IDS and sought determinations that Alleghany controlled IDS and that Alleghany was controlled by the Murchisons; by Kirby; by an organized group consisting of Kirby, his sons and Charles T. Ireland, Jr.; and by Murray D. Lincoln and/or companies controlled by or associated with him (the Nationwide companies).

The proceedings with respect to the two applications were consolidated for hearing. Motions to dismiss the Phillips application for lack of jurisdiction were filed by IDS, Gamble-Skogmo, Inc. of the Gamble Group, and John D. Murchison (sometimes referred to hereafter collectively as "respondents"), and were denied by the hearing examiner. Following hearings, the examiner submitted a recommended decision in which he again rejected jurisdictional objections, but found on the merits that, among other things, the evidence did not rebut the statutory presumption that the Gamble Group did not control Alleghany or IDS during the relevant period. n5 The examiner further found that the Murchisons, Kirby, the Kirby Group, and Lincoln and the Nationwide companies in concert with Kirby and the Kirby Group controlled Alleghany during all or part of the relevant period. Respondents filed exceptions to the denial of their motions to dismiss, and Phillips and our Division of Corporate Regulation excepted to the finding that the Gamble Group did not control Alleghany. Briefs were filed and we heard oral argument.

n5 The examiner fixed June 1, 1963 as the end of the relevant period with respect to the issues raised by both the Phillips and IDS applications because in April and May 1963 the shareholders of the Funds approved new advisory and underwriting contracts with IDS. We overrule Phillips' objections to the examiner's consideration of events which occurred subsequent to October 5, 1962, the date on or about which the Phillips application claimed a transfer of control took place. The record, developed in large part through Phillips' examination of witnesses, dealt with events over the entire period, and the inferences to be drawn as to their significance with respect to the existence of control at any particular time, concurrent or otherwise, have been carefully examined. Accordingly, we find no prejudice to Phillips in their consideration. We also find no merit in his objection to the fact that the examiner's recommended decision deals with the issues under both the Phillips and IDS applications.

II

In support of their motions to dismiss the proceedings, respondents urge that we lack jurisdiction to make the determination requested by Phillips because a fund shareholder is not an "interested person" within the meaning of Section 2(a)(9) and Phillips therefore has no standing to make an application under it. They also assert that under that Section we may not make a determination which has retrospective effect. We considered in detail and rejected essentially the same contentions in Fundamental Investors, Inc., n6 although we dismissed the applications there involved because the applicants had instituted actions in court to which we decided to defer on grounds of comity. We agree with the examiner that asserted distinctions between the Phillips application and the applications involved in the Fundamental case are not of substance, and we find no basis for departing in the present case from our views as to the scope of Section 2(a)(9) reached in that case. n7

n6 Investment Company Act Release No. 3596 (December 27, 1962).

n7 We also reject respondents' contention that Phillips did not file or pursue his application in "good faith."

This does not mean that the statute requires that we entertain every shareholder application for a control determination. The Commission need not consider such applications where the statutory objectives would not be served thereby, particularly where alternative avenues of satisfying those objectives are available. n8 Where it appears that the shareholder-applicant will need to resort to subsequent court action to obtain the ultimate relief sought by him, then the recognized policy against "piecemeal" or "split" litigation, the desirability of resolving all issues involved in a controversy in a single action, n9 and the extent to which a control determination by us under Section 2(a)(9) would be relevant to or determinative of the ultimate issues that must be decided by the court are factors relevant to the exercise of our discretion. n10 Under all the circumstances, however, we do not believe that dismissal of the instant application is appropriate. A voluminous record has been developed, a recommended decision has been filed, all issues have been fully briefed and argued, and our determination with respect to the merits of the control issues raised by the Phillips application may serve to preclude any further litigation relating to them. We accordingly deny respondents' motions and turn to a consideration of the control issues.

n8 When claimed violations of other statutes administered by us are brought to our attention we frequently decide not to pursue the route of administrative proceedings because other and preferable avenues of satisfying the statutory objectives are available.

n9 See Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518, 531 (1947); Hammett v. Warner Brothers Pictures, Inc., 176 F.2d 145 (C.A. 2, 1949); Kerotest Manufacturing Co. v. C-O-Two Fire Equipment Co., 189 F.2d 31 (C.A. 3, 1951), aff'd 342 U.S. 180 (1952); Webster- Chicago Corp. v. Holstensson, 132 F. Supp. 287 (D.D.C., 1955); Boots Aircraft Nut Corp. v. Kaynar Manufacturing Co., 188 F. Supp. 126 (E.D.N.Y., 1960).

n10 Compare the judicial doctrine of forum non conveniens which, generally speaking, "involves the dismissal of a case because the forum chosen by the plaintiff is so inappropriate and inconvenient that it is better to stop the litigation in the place where brought and let it start all over again somewhere else." All States Freight v. Modarelli, 196 F.2d 1010, 1011 (C.A. 3, 1952), quoted with approval in Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955). Leading cases applying the doctrine are Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) and Koster v. Lumbermens Mutual Casualty Co., 330 U.S. 518 (1947).

III

We deem it appropriate at the outset to set forth certain general principles which we have considered applicable in reaching our control determinations. The breadth of the definition of "control" in the Act as the "power to exercise a controlling influence over the management or policies of a company" makes it clear that Congress intended to include situations where less than absolute and complete domination of a company is present. In addition to voting power, historical, traditional or contractual associations of persons with companies or a dominating persuasiveness of one or more persons acting in concert or alone may form the basis of a finding of control. n11 "Controlling influence" also means the "act or process, or power of producing an effect which may be without apparent force or direct authority and is effective in checking or directing action, or exercising restraint or preventing free action." n12 A controlling influence need not be actually exercised; the latent power to exercise it is sufficient under the Act. n13 And those exercising a controlling influence need not necessarily be able to carry their point, since such influence may be effective without accomplishing its purpose fully. n14

n11 See The M.A. Hanna Company, 10 S.E.C. 581, 588-589 (1941); The Chicago Corporation, 28 S.E.C. 463, 468 (1948).

n12 Detroit Edison Co. v. S.E.C., 119 F.2d 730, 739 (C.A. 6), cert. denied 314 U.S. 618 (1941). While that case arose under the Public Utility Holding Company Act of 1935, we have held that interpretations of the phrase "controlling influence" as used in that Act are entitled to substantial weight in construing Section 2(a)(9) of the Investment Company Act. The Chicago Corporation, supra.

n13 See The M.A. Hanna Company, supra; Transit Investment Corporation, 23 S.E.C. 415, 420 (1946); The Chicago Corporation, supra.

n14 See Detroit Edison Co. v. S.E.C., supra; The Chicago Corporation, supra.

We agree with and reaffirm these principles. In applying them, however, it must be borne in mind that control determinations involve issues of fact which cannot be resolved by the use of a mathematical formula. They require a careful appraisal of the over-all effect of the various relationships and other circumstances present in the particular case, some of which may point to one inference while others to an opposite one. n15 And where two equally reasonable inferences may be drawn from a set of circumstances, one consistent with the presumption established in the statute and the other not, it is the former which we must adopt, since the person seeking to rebut the presumption has the burden of proving the contrary by a preponderance of the evidence.

n15 See Rochester Telephone Corp. v. U.S., 307 U.S. 125 (1939); The Chicago Corporation, supra, at p. 472; Telescript CPS Inc., Securities Act Release No. 4644, p. 4 (September 30, 1963).

In this case, unlike the situation in many other cases where control has been an issue, the period under consideration is brief and the relationships of the principals involved were in a state of flux. Even the basic facts are in many respects not clear, and varying inferences may be drawn from them. As noted, the examiner concluded that the Gamble Group did not control

Alleghany or IDS during the relevant July 1962 to June 1963 period and that the Murchisons and Kirby did have such control. On the basis of our review of the extensive record and an assessment of all the facts, in particular the large holdings and forceful attitudes retained by Kirby and the Murchisons, we agree with those conclusions. n16

n16 Phillips did not press the alternative allegation in his application that the Gamble Group controlled Alleghany "in concert with" the Murchisons and their associates on the Alleghany board of directors, and we agree with the examiner's conclusion that this allegation has not been established.

For some years prior to 1961 Alleghany was controlled by Kirby. Kirby first became a shareholder and director of Alleghany in 1937, was president of the company from 1939 to 1958, and in the latter year became chairman of the board and chief executive officer. In May 1961, after a bitter proxy contest, a slate of directors supported by the Murchison brothers defeated the Kirby slate and all but one of Alleghany's officers were replaced. In addition to John Murchison, who became president and chief executive officer, the new directors and officers consisted largely of persons previously associated with the Murchisons. The new Alleghany management in turn caused the replacement of seven of the nine directors of IDS in July 1961. W. Grady Clark, one of the holdover directors, was continued as IDS president and chief executive officer, while Clint W. Murchison, Jr. was elected Chairman of the Board.

Between May 1961 and October 5, 1962, the Murchisons, directly and through wholly-owned and majority-owned companies, owned or controlled about 2.4 million shares, or approximately 24% of Alleghany's outstanding common stock, while Kirby owned or controlled about 33%. Following his defeat in the proxy contest, Kirby actively sought to regain working control of Alleghany. He retained Charles T. Ireland, Jr., who had been president of Alleghany prior to May 1961, as a full-time consultant to help him accomplish that objective. As noted above their efforts met with success in 1963.

In July 1962, at the instigation of an investment banker, discussions were begun between Gamble and the Murchisons, who had been frustrated by Kirby's unyielding opposition to their programs in Alleghany, looking toward the purchase by members of the Gamble Group of some or all of the Alleghany stock held by the Murchisons. After discussions between Gamble, Kirby and Ireland with respect to the replacement of the Murchison interests, Gamble-Skogmo entered into preliminary agreements with the Murchisons on August 14, 1962, which were followed by formal contracts dated October 4 and 5, 1962 providing for: (1) the immediate purchase by Gamble-Skogmo and an affiliate of 1,500,000 shares of Alleghany common stock from the Murchisons and others for whom the latter acted, for a cash consideration of $10 per share; (2) a non-assignable "call" issued by the Murchisons to Gamble-Skogmo and exercisable through May 31, 1963, covering an additional 2,000,000 shares of Alleghany stock at $10 per share, with the Murchisons having an option to "put" 2,000,000 shares to Gamble-Skogmo at the same price in June 1963 if the call was not exercised (referred to as the "put and call agreement"); n17 and (3) an option by Gamble-Skogmo, if either the call or put was exercised, to put to the Murchisons any additional Alleghany securities otherwise acquired by Gamble-Skogmo prior to September 20, 1963, up to the equivalent of 1,000,000 shares of common stock, at a price equal to Gamble-Skogmo's average cost but not more than $10 per share. n18

n17 The agreement provided that the Murchisons could satisfy their obligations upon exercise of either the call or the put by delivery of a minimum of 1,500,000 shares. The purchase price was to be payable by the issuance of 5% notes by Gamble-Skogmo, and Gamble-Skogmo agreed to pay an amount equivalent to interest of 5% to the date of purchase on the aggregate price of the stock it purchased.

n18 The contracts also included a further put and call agreement with respect to 80,000 shares of IDS voting stock and 20,000 shares of non-voting stock owned by the Murchisons or their associates.

On October 5, 1962, the purchase and sale of the 1,500,000 shares was consummated. As a result, Gamble-Skogmo and an affiliate owned approximately 15% of the voting stock of Al-

leghany. Four days later Gamble and an associate were elected to the Alleghany board of directors and Gamble was also elected to the 5-man executive committee. At the next board meeting, on December 13, 1962, Gamble succeeded John Murchison as president. At the same meeting, however, Gamble, having failed to reach an accord with Kirby as to the future management of Alleghany and having learned that Kirby had formed an alliance with the Nationwide Group to acquire joint working control of Alleghany and that the Nationwide Group had accumulated a large amount of Alleghany stock commencing with stock purchases in October 1962, announced that he had decided "sometime back" to sell his holdings unless he could buy Kirby's stock. It was thereafter quickly made clear to Gamble, if he had not already been aware of the fact, that his acquisition of Kirby's shares was not feasible, and beginning in January 1963 Gamble sought to sell his shares to the Nationwide Group although no agreements materialized. In October 1963, Gamble-Skogmo sold to Kirby and two associates 1.6 million shares out of about 1.8 that it concurrently obtained on exercise of its call with the Murchisons, which had been extended. In December 1963, a Kirby slate of directors was elected, and Kirby once again became Chairman of the board and Ireland president.

Phillips and the Division contend that as early as August 1962 or at least by October 5, 1962, when the formal Murchison-Gamble contracts had been signed and 1.5 million shares had been transferred to the Gamble Group, the latter acquired the potentiality or latent power of exercising a controlling influence over Alleghany which constitutes "control" within the definition of Section 2(a)(9). The Division points principally to the arrangements for transfer of stock under those contracts, the understanding that Gamble could have two seats on the board of directors, and the assertedly small pecuniary interest in Alleghany retained by the Murchisons. Phillips further asserts that in addition to the written agreements, there were secret oral agreements between the Murchisons and Gamble providing for the transfer to the Gamble Group of the Murchisons' entire equity in Alleghany, a complete "changeover" in the Alleghany board and the election of Gamble as president, with the purpose and effect of transferring the control possessed by the Murchisons to the Gamble Group. In support of this contention he relies principally on various statements made by Gamble and his attorney in the discussions with Kirby and Ireland before and after the Gamble-Murchison preliminary agreements of August 14, 1962. Finally, both Phillips and the Division argue that the Gamble Group actually exercised a controlling influence over Alleghany's management and policies on a number of occasions.

We recognize that an investment as large as that made by the Gamble interests would be likely in some circumstances to carry with it a power to exercise a controlling influence. It is clear however that the Alleghany situation was marked by an unusual lineup of forces and personalities which was not disturbed by the Gamble Group's acquisition of a 15% stock interest. n19 That stock interest as such was not of major consequence in the Alleghany power structure in view of the facts that the Murchisons and their associates at all times relevant hereto still retained more stock than had been transferred to the Gamble interests and Kirby owned substantially more. And in the circumstances the Gamble Group's right to acquire additional shares by exercise of its call did not, in our opinion, materially alter the control situation that prevailed. The record does not show that the existence of the call, which, as noted, was coupled with a put, resulted in any change in the attitudes of the Murchisons with respect to the management and control of Alleghany or that they became responsive to Gamble's wishes. As to the two board seats made available to Gamble, they represented only 20% of the total board. The eight other directors, all except one of the officers, and four members of the executive committee were the Murchisons or persons who had a history of association with and had been selected by the Murchisons, and none of them had had any previous association with Gamble. That certain of them had sold their shares or placed them under the put and call agreement does not warrant the inference that they thereupon assumed allegiance to Gamble. We agree with the examiner that the record shows that the Murchisons continued to exercise a

dominant role and to retain a substantial pecuniary interest in Alleghany following the execution of the agreements with the Gamble Group.

n19 The record does not in our opinion provide a sufficient basis for finding, as urged by the Division and Phillips, that the put and call agreement in reality amounted to an outright purchase by the Gamble Group of at least 1.5 million shares. Although they stress that the agreement required Gamble-Skogmo to pay a "consideration" which was equivalent to 5% interest on the purchase price of 1.5 million shares, the same rate as that payable on the notes to be issued in payment of the purchase price, this amount was payable whether or not the call was exercised and thus possessed the normal attribute of consideration for a call. While there was no express consideration designated for the Murchisons' put, the explanation would seem to lie in the interrelationship between the put and the other aspects of the arrangements negotiated by the parties, including the additional put which was a feature of value to the Gamble Group.

The Gamble-Kirby discussions to which Phillips points do not substantiate his claim of a secret agreement for transfer of control. The record shows that on the occasion of a meeting with Kirby and Ireland held at Gamble's request on August 1, 1962, Gamble or his attorney said, among other things, that Gamble had made a firm deal with the Murchisons to acquire about 3.5 million shares of Alleghany stock and their entire holdings in IDS, that Gamble would be president of Alleghany, and that Kirby could become Chairman of the Board of Alleghany and a director of IDS, but that the "changeover" of the Alleghany board would have to proceed slowly. n20 In addition, Gamble asked Kirby whether he wanted anyone removed from the Alleghany board at that time. Kirby, while indicating pleasure at the prospect of the Murchisons' departure from the Alleghany picture, was essentially non-committal. Gamble testified that he believed Kirby was favorable to his plans and that he would not have proceeded further had Kirby objected. In fact there was no meeting of the minds.

n20 Our findings regarding the statements made at the various meetings between all or some of these persons are based on Ireland's testimony, which the examiner credited.

On August 6, 1962, Ireland found Kirby drawing up his own slate of directors for Alleghany and pointed out that Gamble had in mind for Kirby only one board seat and the Chairmanship of the Board. Kirby replied that this was a "ridiculous thought" since Gamble could not suppose that Kirby would agree to such an arrangement, and that Ireland's impression of Gamble's plans must be inaccurate. Ireland promptly informed Gamble of the wide misunderstanding and of Kirby's determination to return to control of Alleghany, and over the next three days he repeatedly urged Gamble not to make any permanent commitments until he, Gamble, reached an accord with Kirby. Gamble questioned whether Ireland was speaking for Kirby, but rejected Ireland's suggestion that he telephone or go to see Kirby.

On October 10, 1962, the day following the election of Gamble and his associate to the Alleghany board, Gamble told Kirby that he had understood that what Kirby wanted was to get the Murchisons out and that he had accomplished this for Kirby; that they might have to proceed slowly as to a shift in the board of directors but there was no need for concern since "everybody was getting off the Board"; and that Alleghany's vice-president who headed its staff was "clearing everything" with Gamble. And in another meeting about 2 weeks later between Ireland and Gamble's attorney, when Ireland pointed out that Gamble had not offered Kirby any real participation in the management of Alleghany and Ireland stated that Kirby would not determine his own position until he ascertained the nature of the arrangements between Gamble and the Murchisons, the attorney repeated that the Murchisons were out of the picture, and that "the Gambles" were "in" but could not perform as though they were in until the Funds could hold shareholder meetings to approve a shift in control.

We agree with the examiner that neither the above discussions nor the record as a whole establish the existence of any secret agreements between the Murchisons and Gamble. We think Phillips' arguments take too little account of Kirby's power and are inconsistent with Gamble's decision in December 1962 to sell out when he learned he could not achieve a satisfactory agreement with Kirby. There can be no question that both Gamble and the Murchisons

were aware when they entered into their agreements that an accord with Kirby was of utmost importance to Gamble. Absent such accord Gamble, if he succeeded to the Murchison position, would be faced with the same type of opposition which had thwarted the Murchisons and with a possible proxy fight. It was for that reason that he sought out Kirby before he entered into the preliminary agreements and again thereafter to obtain the latter's views on various major policy questions, and to induce him to return to the management of Alleghany, though in a subsidiary position. Because of Kirby's extreme hostility to the Murchisons and the expectation that the call would be exercised, Gamble sought an understanding with Kirby based on the premise that the Murchisons were "out" and that Gamble was successor to their control position. Under these circumstances, we think the representations of Gamble and his attorney presenting the departure of the Murchisons and the strength of Gamble's own position as accomplished facts were overstatements made for bargaining purposes. They cannot be taken at face value. It is true that Gamble's action in entering into the agreements with the Murchisons, notwithstanding Ireland's warnings of disagreement, seems on its face inconsistent with his dependence on Kirby's cooperation. The explanation for such action may lie in his confidence that he would ultimately be able to reach an accord with Kirby along his terms. In any event, it seems clear to us that while Gamble desired to attain a controlling influence in Alleghany, he was aware that his status in Alleghany during the course of his negotiations with Kirby was of a tenuous nature and it was only resolved, and then in a negative manner, when he learned of the Kirby-Nationwide alliance.

Phillips and the Division also stress the fact that the purchase price of $10 per share under the Gamble-Murchison agreements was approximately $2 above the market price of the Alleghany stock in August 1962, asserting that this differential constituted a premium paid for control. The investment banker who initiated the Gamble-Murchison negotiations testified that he suggested the $10 price, based on a net asset value of the shares of between $10 and $12 per share. n21 He also testified that net asset value was a common basis for determining the purchase price of big blocks of stock. Gamble also testified that he viewed the $10 price as being related to the net asset value. Under the circumstances we are unable to draw the inference that the $10 price agreed upon included a premium for a transfer of control. Moreover, an inference that any premium was related to the contemplated transfer pursuant to the put and call agreement of the presumptively controlling block owned by the Murchisons and their associates is equally as reasonable as is an inference that the premium was for an immediate transfer of control.

n21 Alleghany's assets consisted for the most part of its IDS shares and other marketable securities.

As additional support for his claim that there was an agreed transfer of control to Gamble, Phillips points to certain actions taken by the Alleghany and IDS boards which were assertedly forecast by Gamble and his attorney to Kirby and Ireland in the course of their meetings in August and October 1962. Those actions include the election of Gamble as president in December 1962; a request by IDS in September 1962 for deferral of Commission action on a prior request for an advisory report regarding a proposed recapitalization of IDS and the subsequent withdrawal in May 1963 of the request for an advisory report; the declaration of a dividend by Alleghany in March 1963; and the decision in May 1963 to sell Alleghany's investment in Savill-Mahaffey Mortgage Company. The Division, while not associating itself with Phillips' conspiracy theory, cites those actions as instances of the actual exercise of a controlling influence by Gamble.

Although Gamble told Ireland on August 1 that he would be president of Alleghany, the record does not support the assertion that his election to that position on December 13 was pursuant to an understanding as to a transfer of control or evidenced his possession of a controlling influence. It is uncontradicted that John Murchison, whom Gamble succeeded as president,

had assumed the presidency with reluctance following the proxy contest and had thereafter engaged in efforts to find a qualified successor. According to testimony of both John Murchison and Gamble, which the examiner credited, Murchison told Gamble on the morning of December 13 that he had decided to resign and suggested that Gamble assume the presidency and Gamble reluctantly acceded. While there may be reason, as Phillips suggests, to scrutinize with particular care the testimony of interested persons, we find no basis for disagreeing with the examiner's acceptance of this testimony. Gamble, after assuming the presidency, was not active in that role and did not, so far as the record indicates, use the office to advance any position or cause. And Phillips himself has apparently conceded that Gamble "did not maintain himself in control" after he learned of the Kirby-Nationwide alliance shortly before the December 13 board meeting at which he was elected president.

With respect to the IDS recapitalization proposal, the record shows that in the fall of 1961, IDS applied to this Commission for an order permitting it to split its non-voting stock on a ten-for-one basis, in connection with a ten-for-one split of all of its outstanding stock. Kirby filed a brief with respect to the application in which he expressed his opposition to any recapitalization of IDS which did not assure continued effective control of IDS by Alleghany. On April 27, 1962, we denied the application. n22 Two days prior thereto, IDS had filed a request for an advisory report with respect to the fairness of a plan under which each share of non-voting stock would be converted into one share of voting stock. A recapitalization on this basis would have reduced the percentage of Alleghany's ownership of IDS voting stock from 47.8% to about 24%. Kirby filed a statement opposing the plan, but no statement was filed by Alleghany. At the August 1, 1962 Gamble-Kirby conference Gamble expressed his agreement with Kirby's position, and at their October 10 discussion he advised Kirby that he had "gotten the word" to IDS that the pending plan should not be pushed forward. The Division and Phillips point out that on September 28, 1962 counsel for IDS requested that Commission action on the advisory report be deferred, and they urge that in light of IDS' active prosecution of the plan in the face of Kirby's opposition prior to Gamble's advent on the scene such request reflected the exercise of a controlling influence by the Gamble Group over the management and policies of IDS and Alleghany.

n22 Investors Diversified Services, Inc., 40 S.E.C. 1107.

The record does not disclose the basis for the deferral request by IDS counsel, n23 and Gamble testified that in the fall of 1962 he did not know the status of the proceedings with respect to the plan, that he had had no discussion with anyone at IDS or IDS' counsel prior to October 5, and that he believed he had not been advised of the deferral request prior to that date. In our view, not withstanding the Gamble statement to Kirby, it would be purely speculative to attribute the deferral request to Gamble's influence. And there is no basis for attributing to Gamble's influence the withdrawal some seven months later of the request for an advisory report following the approval by the Alleghany board of a new plan that had been formulated by a firm previously retained by Alleghany for that purpose. n24

n23 The Division sought to introduce evidence regarding conversations between its then Director and counsel for IDS between July and September 1962. It made an offer of proof which was to the effect that prior to September 28, counsel had requested that the steps leading to a Commission determination be taken promptly but that on that date he had requested that the matter be deferred because negotiations were then under way between Alleghany and Kirby whose progress might be impaired by Commission action on the advisory report. We ruled by minute order that the proffered testimony was not of sufficient probative value to warrant its introduction. It may be noted that there was nothing in the offer of proof linking the deferral request to Gamble.

n24 The examiner found that the course of events related to the new plan reflected an instance of conflict between the Murchisons and Gamble in which the latter was unable to prevail. At the March 14, 1963 board meeting, which Gamble did not attend because of a death in the family, the board, with Clint Murchison dissenting, went on record as favoring the new plan, which called for the issuance of 1.05 shares of new voting stock for each old share of voting stock and 1 share of new voting stock for each share of non-voting stock. Gamble's associate on the board voted in favor of the plan, although the minutes of the meeting were later

amended to indicate that he had abstained from voting. Prior to the next board meeting, at which the board was to vote on casting the IDS shares owned by Alleghany in favor of the new plan at a special IDS stockholders' meeting, Gamble's attorney told Ireland that while Gamble opposed the plan, he felt his position would lose if the matter came to a vote. The attorney requested that Kirby notify the board of his opposition to the plan. Kirby sent a telegram to the board threatening legal action if the board voted in favor of the plan, and as a result of this threat and subsequent negotiations between Alleghany and Kirby, the board took no further action regarding this matter during the relevant period.

While in view of our other findings we do not consider it necessary to resolve this question, we are inclined to agree with the examiner's conclusion that Gamble's request for Kirby intervention and the prediction that absent such intervention the Gamble forces would be unable to prevent an affirmative vote reflect a lack of influence by the Gamble Group during the period the new plan was under consideration.

As to the declaration of a dividend, the record shows that on March 14, 1963, the Alleghany board of directors, by a vote of 5 to 3, declared a dividend of 11(per share on the common stock, the first such dividend since the Murchisons had won the proxy contest. Gamble did not attend the meeting, but his associate on the board voted for the dividend, while John Murchison was among those who voted against it. The only discussion reflected in the minutes of the meeting relates to the ability of Alleghany to pay a dividend in view of the provisions of a certain loan agreement, and the record does not indicate whether there were at any time discussions regarding dividends between Gamble and the Murchisons or other members of the board. Although Gamble was desirous of receiving dividends, under these circumstances we do not consider that there is an adequate basis for concluding that the dividend action was reflective of the possession or exercise of a controlling influence in Alleghany by Gamble.

With respect to Savill-Mahaffey, the record shows that in or about August 1962, Alleghany had acquired 72% of the outstanding stock of that company and an option to acquire the balance. At the Gamble-Kirby talks on October 10, 1962, Gamble told Kirby that one of the Murchisons had indicated that if Gamble objected to retention of Savill-Mahaffey the former owner would be glad to take it back. Some seven months later, after Gamble had abandoned his attempts to secure a controlling position in Alleghany and had begun steps to dispose of the shares he had acquired, the Alleghany board, at its meeting of May 8, 1963, authorized the granting of an option to the president and former principal stockholder of Savill-Mahaffey to acquire all of that company's stock held by Alleghany as well as the earlier option. There is nothing in the record to indicate that it was an objection by Gamble to retention of the investment which precipitated the board's action, and Gamble testified that it was reported to the board that the management of Savill-Mahaffey was "unhappy" with the transaction and wanted to repurchase the stock and that "if you didn't have management you didn't have much of a company." The hearing examiner, noting that testimony, concluded that the board was concerned with the soundness of the investment and that the reversal of the earlier purchase was simply the result of the exercise of sound business judgment. We find no basis for disagreeing with that conclusion. That Alleghany's annual stockholders report for 1962, issued in March 1963, contained a favorable presentation of Savill-Mahaffey's operations does not, as Phillips has argued, refute Gamble's testimony as to the situation two months later or warrant any inference that it was an objection by Gamble that precipitated the Alleghany board's action of May 8, 1963. n25

n25 We find equally unpersuasive other asserted instances of Gamble control, relating to Alleghany's investments and the employment contract of an IDS official.

At their meeting of October 10, 1962, Gamble told Kirby that at the board meeting the preceding day he had "stopped the proposals of at least some of the . . . directors that Alleghany move into a series of small situations," and that he preferred large investments in a few situations rather than a large number of small investments. The examiner found that since the record did not disclose whether the "proposals" represented the view of a majority or even a substantial number of the directors, the Gamble statement had little value as an indicium of control. Phillips urges that if these proposals represented only the views of a minority, there was nothing to "stop." He also points to the fact that whereas in August 1962 the board had authorized the relatively small Savill-Mahaffey investment, at the October 9 meeting, after Gamble and his associate had taken

their places with the board, it was decided (according to the minutes) "to suspend mortgage banking acquisition efforts." We have previously indicated our view that Gamble over-emphasized the strength of his position in his discussions with Kirby, but even accepting at face value Gamble's statement to Kirby regarding his action, it was too cryptic to warrant the inference Phillips would have us draw. Nor can that statement be related to the apparent change of policy voted at the October 9 meeting which related only to mortgage banking acquisitions and not to "small situations" generally.

Early in 1962, Thomas W. Moses, who had been president of two companies in which the Murchisons had an interest, was employed by IDS as Executive Vice-President under a five-year employment contract with the understanding that he would replace the incumbent president at the beginning of 1963, with the latter replacing Clint Murchison as Chairman of the Board. These changes were actually effected on February 13, 1963. Gamble testified that on or about September 19, 1962, he expressed to Clint Murchison an objection with respect to the length of Moses' employment contract. According to Gamble, Murchison agreed that he and his brother would assume the contract after two years if the board of directors of IDS wished them to do so. We cannot attach to this agreement any significance insofar as Gamble's control of Alleghany or IDS at the time is concerned.

On the other hand, we are unable to agree with the hearing examiner that the absence of Gamble control was evidenced by the continued prosecution of litigation by Alleghany against Kirby which Gamble did not favor. The testimony regarding efforts made by Gamble to obtain a halt to the litigation is vague and in part inconsistent. Moreover, the action taken by Alleghany was pursuant to the recommendation of independent counsel that, "as prudent men," the directors should have Alleghany take over the prosecution of the suit, and it may well be that the board members may have considered themselves legally obligated not to abandon the litigation. In this connection, it is noteworthy that subsequent to Kirby's return to control of Alleghany, further affirmative action was taken by Alleghany in prosecution of this litigation. See Alleghany Corporation v. Kirby, 333 F.2d 327 (C.A. 2, 1964), aff'd en banc 340 F.2d 311 (C.A. 2, 1965).

On the basis of our findings herein, we affirm the examiner's conclusion that the Murchisons controlled Alleghany throughout the relevant period; and for the reasons set forth in the recommended decision, we affirm his further conclusion that Kirby and the Kirby Group controlled Alleghany during such period. n26

n26 No exceptions have been filed regarding the examiner's findings with respect to the issues raised by the IDS application by any of the parties or participants in the proceedings relating to that application.

Subsequent to the close of the hearings, Phillips moved to dismiss the IDS application, urging principally that it was moot because it sought a determination as to the existing control situation and that that situation was no longer in doubt in view of the subsequent acquisition of undisputed control by Kirby and his associates. We find no basis for disturbing the examiner's denial of that motion. We think the question Phillips raises is essentially academic since we could properly make determinations regarding the full control spectrum in the context of the issues raised by his own application.

We have considered all exceptions to the recommended decision of the hearing examiner. To the extent such exceptions involve issues which are relevant and material to the decision in this case, we have by these findings ruled upon them. We hereby expressly sustain such exceptions to the extent that they are in accord with the views here set forth and we hereby expressly overrule them to the extent that they are inconsistent with such views.

An appropriate order will be entered.

By the Commission (Chairman COHEN and Commissioners WOODSIDE, OWENS, BUDGE, and WHEAT.