April 14, 1972

To Our Clients

RECENT DEVELOPMENTS

Rule 144. Rule 144 will be be effective for the opening of business on Monday. A number of interpretive questions remain. The SEC has stated that it will shortly issue ia compedium of its responses to the significant interpretive requests. The SEC has stated that contrary to footnote 6 to Release No. 5223 promulgating Rule 144, the SEC does not take the position that Rule 144 sales are automatically distributions to which Rule 10b-6 applies. The SEC has also stated that pending revision or rescission of Rule 133 sales of securities acquired in Rule 133 transactions are to be made under the provisions of Rule 133 and not under the provisions of Rule 144. It should be noted that with respect to listed securities, Rule 133 follows old Rule 154 as to the highest volume of trading in the preceding four weeks rather than the average volume and that if the sale is under Rule 133, there is no notice filing requirement. It has been called to our attention that our March 15 memorandum with respect to Rule 144 does not adequately describe the application of Rule 144 to estates that are not affiliates: Where an estate is not an affiliate of the issuer or the estate is an affiliate of the issuer but the sale is by a beneficiary of the estate who is not an affiliate there is no holding period, whether the securities are restricted securities or not restricted securities and the 1% or four-weeks-average-trading volume limitations do not apply but the other conditions as to current information, manner of sale and notice of sale do apply.

Distributions. In a recent conversation with Irving Pollack, Director of the Division of Trading and Markets, Mr. Pollack stated that the SEC does not interpret the Jaffee case as restrictively as it is being interpreted by the securities industry and bar. Mr. Pollack referred to the continuous

feeding out of a large block through a market-maker as the underlying basis of the decision in Jaffee. Mr. Pollack stated that market-makers could purchase and sell "distribution" stock on the basis of ad hoc determinations as to whether they fall within the ambit of Jaffee or not. Single transactions that are not large in relation to total shares outstanding and the general trading market and which can be effected without significant impact on the market would not be within the Jaffee restrictions.

Quarterly Financial Reports. Securities Exchange Act Release No. 9559 issued on April 5, 1972 warns companies that in issuing periodic financial statements it is necessary to explain fully matters needed to compare properly reporting periods. The Release makes specific reference to the need for disclosure of the effect of seasonality, pooling of interests transactions, divestitures, acquisition, changes in accounting practices, year-end adjustments, tax adjustments and unusual transactions. The Release suggests that separate fourth quarter results be published in addition to full year results.

Investment Companies. The SEC has proposed Rule 20a-4 to prohibit adjournment of investment company shareholder meetings for the purpose of soliciting additional votes to carry proposals when a quorum is present. Its purpose is to prevent further solicitation to provide the required number of votes when a large number of negative votes provides sufficient for a quorum but not sufficient to carry a proposal. The SEC has also proposed amending Rule 17g-1 to require that fidelity bonds be based on the amount of the investment companies gross assets. Investment Company Act Release No. 7113 issued April 6, 1972, and Investment Advisers Act Release No. 316 issued the same date relate to performance fee contracts and set forth the SEC interpretations and proposals as to appropriate provisions for such contracts.

Institutional Membership. The NYSE is understood to be considering proposals to eliminate the parent test and substitute therefor a requirement that eligibility for membership be limited to firms that do at least 80% of their business with the public. There would be prohibitions against institutionally affiliated members who meet the 80% test doing more than 20% of the brokerage for affiliated institutions, which would be defined to include banks, pension funds, charitable foundations, investment companies and insurance companies (but not individual discretionary accounts). In addition, Rule 440A would be amended so as to change the present permission to adjust advisory fees in relation to brokerage to a requirement that all advisory contracts entered into by members specifically prohibit adjustments of advisory fees for brokerage. The institutional membership issue will be the subject of Senate Committee hearings commencing next week and it can be expected that there will be considerable activity in this area over the next few months.

AMEX Listing Standards. The AMEX has issued new listing and delisting standards. To be eligible for listing a company needs $4,000,000 of net assets, earnings of $400,000 and 400,000 shares publicly held by 1,200 shareholders with a market value of at least $3,000,000. Delisting will be considered when net assets are less than $2,000,000 and there have been losses in two of the three most recent years or when net assets are less than $4,000,000 and there have been losses in three of the four most recent years. Delisting will also be considered when there have been losses for five years in a row without regard to the amount of assets or if publicly held shares fall below 200,000, the number of stockholders falls below 600 and market value falls below $1,000,000.

Extraterritorial Application of U.S. Securities Laws. A recent federal district court case continues the trend of decisions holding the federal securities laws applicable to foreign transactions involving securities of U.S. companies where fraud is

perpetrated outside the United States on non-U.S. residents by United States persons who use the mails or other means of communication that satisfy the jurisdictional requirements.

Foreign Transactions, Reporting and Recordkeeping. The Treasury Department has issued regulations, effective July 1, 1972, implementing the Foreign Bank Secrecy Act of 1970. Records and reporting will be required with respect to transactions involving transfers of $10,000 or more to or from persons outside the United States. Forms will have to be prepared and filed by all financial institutions such as banks and brokerage firms involved in such transactions. A detailed memorandum with respect to the new regulations will be available shortly.

Put and Call Options. The SEC has again denied a no-action letter with respect to downside out options. This time the SEC letter states that the Division of Corporation Finance takes the position that sales of such options require registration under the 1933 Act. This is a somewhat stronger position than that taken in the Dean Witter letter. The new letter goes on with the same caveats as contained in the Goldman-Sachs letter. The SEC position, of course, raises the question as to whether ordinary options require 1933 Act registration. We understand that the matter is to be discussed with the SEC next week. At the moment it is generally understood that the SEC has not extended its registration position to ordinary options. If the SEC were to extend its position it would mean the demise of the put and call business as it now exists. The matter bears close watching.

M. Lipton