

July 26, 1972

To Our Clients

Sale of Investment Advisers. Judge Bauer of the Northern District of Illinois in Kukman v. Baum, decided July 10, 1972, reached the direct opposite result from Judge Friendly in Rosenfeld v. Black and held that an investment adviser could be sold at a profit. Judge Bauer rejected the sale of fiduciary office rationale of Rosenfeld v. Black and the undue burden rationale of proposed Section 15(g) (not enacted in the 1970 amendments to the 1940 Act) and concluded that Congress intended to approve the 1958 Ninth Circuit holding in Insurance Securities.

In Newman v. Stein, 2d Cir., June 29, 1969, Judge Friendly in affirming the decision upholding the \$5,000,000 Dreyfus Fund settlement undertakes an interesting analysis of how Rosenfeld v. Black might be confined to its unique circumstance of a retiring investment adviser.

It is interesting to speculate about the effect of these opinions on the pending legislation.

Institutional Access and Relationship between Brokerage and Money Management. The staff of the House Subcommittee on Commerce and Finance has published comments to the effect that:

(1) The breakpoint on negotiated rates should be reduced as soon as possible.

(2) There is no evidence to support the predominant public business limitation on institutional membership and if this approach is taken it should be the MWSE 50/50 test not the NYSE-SEC 80/20 test.

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(3) Individual discretionary accounts should be considered public business, but pension funds, investment companies, insurance companies should be considered non-public. (This seems inconsistent with the basic position opposing limiting institutional membership and probably is explainable on the basis of a feeling that the NYSE is being "cute" in defining public business so as to satisfy as many members as possible.)

(4) The conflicts between brokerage and money management do not require separation. Disclosure is adequate to deal with the problems.

Disclosure of Material Events. Judge Waterman has supplemented the Second Circuit position in Texas Gulf Sulphur with a discussion of the timing of disclosure in inside information situations. In Radiation Dynamics, Inc. v. Goldmuntz, No. 71-1443, July 5, 1972, the issue was posed in the context of insider purchases during a period of merger negotiation. The "commitment" for purchase was before it was known that merger would take place. The closing was after. The jury found that the merger was not "reasonably possible" at the time of commitment. Judge Waterman said:

"It was to effectuate the purpose of the Rule that we stated in SEC v. Texas Gulf Sulphur, supra at 853 n. 17, 'that the time that an insider places an order, rather than the time of its ultimate execution, be determinative for Rule 10b-5 purposes.' See Ryan v. J. Walter Thompson Company, 453 F.2d 444, 447 (2 Cir. 1971); Fershtman v. Schectman, 450 F.2d 1357, 1360 (2 Cir. 1971). In keeping with such purposes, we hold that Judge Pollack correctly instructed the jury when he stated that the time of a 'purchase of sale' of securities within the meaning of Rule 10b-5 is to be determined as the time when the parties to the transaction are committed to one another. A party

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does not, within the intendment of Rule 10b-5, use material inside information unfairly when he fulfills contractual commitments which were incurred by him previous to his acquisition of that information, for, as Judge Pollack instructed the jury, the Rule imposes 'no obligation to pull back from a commitment previously made by the buyer and accepted by the seller because of after acquired knowledge.' The goal of fundamental fairness in the securities marketplace is achieved by such a determination.

"In conclusion we add that we do not believe, as argued by RDI, that the concept of commitment is an improperly vague concept, or an ethical one only. 'Commitment' is a simple and direct way of designating the point at which, in the classical contractual sense, there was a meeting of the minds of the parties; it marks the point at which the parties obligated themselves to perform what they had agreed to perform even if the formal performance of their agreement is to be after a lapse of time. The term has the added benefit of being readily understandable by the jury."

M. Lipton