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To Our Clients:

RECENT DEVELOPMENTS

Tender Offer Defense -- Damages and Indemnification. H.K. Porter Co. v. Nicholson File Co. CCH ¶ 94,083 (1st Cir. July 30, 1973) follows the Second Circuit decision in Chris-Craft sustaining a cause of action for damages by the offeror or target under § 14(e), accepts the Birnbaum purchaser-seller limitation on Rule 10b-5 and holds that § 14(e) is the exclusive remedy in tender offer cases. The opinion emphasizes the Congressional intent to protect the shareholders of the target and leaves open the question whether the offeror should be awarded damages from the target itself, as distinguished from management, where the net effect is to the detriment of the target's shareholders. Following this same reasoning the court also questions indemnification by the target of persons held liable for damages in a successful tender offer defense.

Railroad Holding Companies -- Looting. In a landmark decision the First Circuit has held that following sale of the stock of a railroad corporation the railroad can sue the former owner for damages for looting -- improper dividends, overcharges for services, acquisitions through the parent rather than the railroad -- in short, many of the transactions

that have been typical for railroad holding companies in the past decade. Bangor and Aroostook Ry. v. Bangor Punta Operations, Inc. CCH ¶ 94,093. The Court's rationale for rejection of the hoary learnings of Home Fire -- that a person who was not a stockholder at the time of the alleged mismanagement may not later sue derivatively, nor if he becomes the sole owner may he cause the corporation to sue -- is the special public interest in railroads which exist not only for the benefit of their shareholders, but for the general public good. This case will undoubtedly be cited as one of the touchstones in the development of judicial recognition of social responsibility of corporations. The divestiture of railroads by the holding companies they spawned may now be impossible.

Railroads -- ICC Approval of Credit Agreements and Advances. In Ex parte No. 275, Expanded Definition of Term "Securities", the ICC has interpreted § 20a as covering advances to and from affiliates of carriers and various other forms of financing not previously subject to ICC approval. The definition is now all encompassing and carriers will need ICC approval for every form of financing.

Pooling of Interests -- Treasury Stock. In Acct. Rel. No. 146 (Aug. 24, 1973) the SEC stresses that all

acquisitions of treasury stock within 2 years of a business combination are presumed to be in contemplation of the combination and therefore destroy the pooling unless it is absolutely clear that the purpose was an acquisition treated as a purchase, options, stock dividends or similar use; the Release sets forth specific criteria for determining taint in certain situations and basically requires systematic patterns of repurchase for at least two years. The taint can be cured by selling the treasury stock before the combination.

Equal Opportunity Doctrine. Gould v. American Hawaiian Steamship Co. CCH ¶ 94,103 (D. Del. Aug. 17, 1973) rejects the incorporation of the equal opportunity doctrine in Rule 10b-5 but reiterates the requirement of full disclosure of different treatment of categories of shareholders.

Rule 10b-5 -- Purchaser-Seller Limitation -- Accountants Liability. A plaintiff who purchased shares of a company (not through defendant brokers) has no cause of action against brokers for the company who failed to disclose that the company was trading in securities in a manner which might cause the company to suffer material losses. An accountant who is retained to prepare reports for a company for internal uses unconnected with issuance of securities or annual reports and

published financial statements has no liability under 10b-5 on the ground that his action was not "in connection with the purchase or sale" of the company's securities. Landy v. FDIC CCH ¶ 94,094 (3d Cir. July 30, 1973).

Rule 10b-4. In du Pont Glore Forgan, Inc. CCH ¶ 79,479 (Avail. July 26, 1973) the staff indicates that a short sale after tender of a long position may violate the 10b-4 prohibition against short tendering.

Subordinated Bank Loans to Brokers. The FRB has advised in a letter dated July 11, 1973, CCH ¶ 79,488, that a bank loan to a broker will not be deemed indirectly secured by securities within Reg. U even though the principal assets of the broker are securities, if the loan agreement is subject to the subordination and notice requirements of the net capital rules and there is no provision giving the lender a "handle" on the broker's assets.

Broker-Dealers -- Records. The SEC has proposed an interpretation of the requirement that broker-dealer records be current. 1934 Act Rel. No. 10329 (Aug. 9, 1973). The proposal in outline form is:

Order tickets	-	concurrent with the order
Confirmations	-	same day or next day
Blotters, cash and securities	-	no later than the following day
General ledger	-	at least monthly and as frequently as is necessary (including daily) to assure compliance with segregation and net capital rules
Customers ledgers	-	settlement date for securities transactions, next day for other transactions
Subsidiary ledgers	-	two days after transaction
Fail ledgers	-	settlement date, next day for resolution of fails
Securities records	-	no later than next day
Option records	-	no later than next day
Account cards	-	prior to any transaction
Personnel records	-	at or prior to commencement of employment
Trial balance	-	seven days after month end
Customers reserve deposits	-	no later than one hour after opening of banks on second business day after weekly or monthly computation per Rule 15c3-3(e)

Underwritings -- Rule 139. Rule 139 does not permit an underwriter to change its recommendation from hold to buy after it has become a member of the underwriting group. Bache & Co. CCH ¶ 79,459 (Avail. July 30, 1973).

Rule 144. A provision in a private placement agreement that the investors will give notice to the company prior to public sale and that such sales will be through a broker selected by the investors and the Company results in integration pursuant to 144(e)(3)(F), Optel Corp. CCH ¶ 79,452 (Avail. June 29, 1973), but when such restrictions have expired aggregation will no longer result from the provisions of the agreement alone, Optel Corp. CCH ¶ 79,465 (Avail. July 30, 1973).

Underwriters' Liabilities -- Class Actions. Unicorn Field, Inc. v. The Cannon Group CCH ¶ 94,087 (S.D.N.Y. July 26, 1973) contains a good summary of the authorities that privity is necessary under § 12 so that a defrauded buyer can only sue his immediate seller under that section; there is no cause of action for damages under § 5; the better view is that there is no cause of action for damages under § 17(a) (but this is largely academic in view of 10b-5); § 11 is limited to buyers who bought shares covered by the registration statement or who can trace their shares to the registered shares; the § 11 and 10b-5 plaintiffs are separate classes; and plaintiffs should bear the cost of notice to the class in the typical underwriting class action.

Inadvertent Investment Companies. GPI, Inc. CCH ¶ 79,437 (Avail. July 12, 1973) reflects a staff position that CDs are cash items or investment securities depending on the use to which they are put -- cash items if the operations of the business require such amounts of liquid assets; investment securities if not needed for operations and merely an investment and that even when investment securities exceed 40% of assets, the 3(b)(1) exception for operating companies does not come into question until investment income exceeds operating income.

First National Bank of Boston CCH ¶ 79,444 (Avail. July 12, 1973) takes the position that a stock loan program by a bank for its trust accounts with the cash collateral invested in money market instruments on a pooled basis would have to register under the 1940 Act if more than 100 trusts were involved.

Investment Companies -- Shareholder Mailings. Allstate Enterprises Stock Fund CCH ¶ 79,438 (Avail. July 22, 1973) permit a fund to eliminate duplicate mailings to accounts with the same primary record owner after notice and failure of the shareholder to make written request for duplicate mailings.

Hedge Funds. In Rami Hofshi CCH ¶ 79,441 (Avail. July 20, 1973) the staff, in an investment club context, took the position that the "manager-organizer" would have to register under the Advisers Act if the club has more than 14 members.

Investment Company Act Applications. Rule 0-2 has been amended so that a proposed form of public notice now must be filed with an application under the 1940 Act.

Brokerage Recapture. The pass through by the management company of soliciting dealer fees for the benefit of the fund does not violate Rule 10b-13; there is an implication by the SEC staff that such recapture and pass through is mandatory. Affiliated Fund CCH ¶ 79,496 (Avail. Aug. 16, 1973).

The NYSE proposal to amend Rule 385 so as to make unavailable the 40% nonmember access discount for pension accounts by defining as "affiliated" managed institutional accounts has been rejected by the SEC. The net effect is that an investment management company can obtain the discount through a subsidiary broker on transactions for private and pension accounts. CCH ¶ 79,495 (Aug. 29, 1973).

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