November 12, 1973

To Our Clients

Recent Developments

(1) Annual Reports. A recent speech by Commissioner Sommer presages SEC action with respect to annual reports. Among possible required disclosures are:

(1) A description of the business.
(2) Line of business disclosures consistent with 10-K requirements.
(3) Explanation of material changes in financial condition and results of operations and of material nonrecurring items.
(4) Identification of principal executives and directors, with disclosure of the principal occupation of outside directors.
(5) Accounting policies and changes therein.

(2) Free-Riding. The NASD Free-Riding and Withholding Interpretation has been amended effective December 1, 1973. Brokers and their employees and their immediate families are totally prohibited from buying hot issues. Entities such as partnerships and corporations in which a restricted person has any beneficial interest are to be treated the same as the restricted person. The informal 10% guideline as to disproportionate is grudgingly and qualifiedly acknowledged. One round lot, no matter what proportion of the brokers allocation, will not be considered disproportionate. All "senior officers" of institutional investors, whether or not concerned with investments, are restricted.

(3) Net Capital. The SEC has taken the position that the receivable arising from a tender of securities owned by a broker-dealer, accepted by the offeror and delivered to the depositary bank against a receipt is an allowable asset for the purpose of computing net capital pursuant to Rule 15c3-1. Westchester Trading Corp., CCH ¶ 79,538 (Avail. Oct. 6, 1973)

(4) Cooperative Apartments as Securities. 1050 Tenant Corp. v. Jakobson, ¶ 94,177 (S.D.N.Y. Oct. 11, 1973) holds that the shares representing ownership in the typical cooperative apartment house are "securities" within the 1933 Act.

(5) Sale of Unregistered Stock as 10b-5 Violation. Rotstein v. Reynolds & Co., ¶ 94,179 (N.D. Ill. May 30, 1973) holds that while 10b-5 is cumulative with § 12, mere sale of unregistered stock without more does not violate 10b-5 and is governed by the one-year limitation period applicable to § 12(1).

(6) Underwriters - Prospectus Disclosure of Disciplinary Proceedings against Underwriters. Dictum in Koss v. SEC, ¶ 94,182 (S.D.N.Y. Oct. 17, 1973) raises the question of the necessity to disclose in the prospectus any pending disciplinary proceedings against an underwriter. "The fact that an administrative proceeding is pending against the underwriter of securities is material to the purchaser of securities and, a fortiori, to their issuer." It appears that this now must be a matter covered by the usual underwriters questionnaire and, at the very least, considered by counsel and covered by an opinion if not disclosed.

(7) Short Swing Profits. The Fourth Circuit in Gold v. Sloan, ¶ 94,186 (Oct. 19, 1973) has applied the Occidental opportunity for abuse rationale to the question of insider sales within six months after a "forced" merger holding that the true insiders who could have had inside information were liable but that the insiders who were out of power and not participants in the merger discussions were not liable. A dissenting opinion rejects the Occidential rationale to sales following a merger.

(8) Rule 10b-5 - Purchaser-Seller Requirement. Further inroad on the purchaser-seller requirement is made in Manor Drug Stores v. Blue Chip Stamps, ¶ 94,191 (9th Cir. Oct. 15, 1973) where a consent decree buying opportunity (a step beyond the aborted contract exception) is held sufficient to satisfy the requirement.

M. Lipton