WACHTELL, LIPTON, ROSEN & KATZ

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To Our Clients

At the recent PLI Fifth Annual Securities Regulation Institute several important points were made by senior Staff members of the SEC:

1. Investment bankers opinions delivered in connection with Rule 145 business combinations will be treated by the SEC as the opinion of "experts" for 1933 Act purposes, and while at the moment the SEC is leaving the issue to eventual judicial determination, the clear implication is that the SEC considers investment bankers who deliver opinions in connection with mergers to be underwriters within the 1933 Act. In view of this we recommend that investment bankers obtain underwriting agreement representations and indemnities in connection with such opinions. [The Hayden Stone-Topper case described in yesterday's "Wall Street Journal" shows that the SEC will hold a broker who participates in the preparation of a private placement memorandum to a stringent due diligence standard.]

2. For the purpose of the required disclosure of contemplated new issue sales to discretionary accounts, the SEC does not consider that obtaining the consent of the account with respect to the specific underwriting removes the account from discretionary status. A question is still being raised as to whether a broker-dealer can sell as a principal (either underwriting securities or trading account securities) to a discretionary account without the specific consent of the account. As previously indicated senior Staff members are of the opinion that such sales without specific consent are violations.

3. A securities analyst who calls a company to obtain confirmation of an earnings estimate or other material information and who obtains the same becomes an "insider" subject to insider trading restrictions.

4. Outside directors have a duty to keep themselves informed as to material matters and the Staff of the SEC will recommend action against outside directors who, when faced with wrongdoing by management, fail to take action to protect the public.

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