

To Our Clients

Recent Developments

1. Energy Crisis.

The SEC has issued a release calling attention to the requirement that companies make prompt disclosure of the impact of the energy crisis on present and prospective operations. The SEC release indicates that where the impact may be material both a press release and a current report either on Form 8-K or on Form 8 as an amendment to the last 10-K is required. This is a matter that should receive immediate attention.

2. Corporate Repurchases of Securities.

The SEC has revised and released for further comment proposed Rule 13e-2 under the 1934 Act, relating to repurchase of outstanding securities by the issuer. As revised, the proposed rule continues the requirements that repurchases be made through only one broker on any given day; no bid for a repurchase transaction be made until after an independent opening transaction; no bid be made at a price higher than the highest current independent bid or the last sale, whichever is higher; no bid be made during the last half-hour of trading and the repurchases on any day not exceed 15% of the average daily trading volume during the preceding four weeks. The SEC has made a number of welcome revisions to the approach taken in the initial proposal, the principal ones relating to block purchases, NASDAQ-traded securities, and purchases by broker-dealers of their own securities. The provisions of the proposed rule are now substantially being followed by the staff in granting 10b-6 exemptions for repurchases by companies that have convertibles, warrants or nonexempt employee securities outstanding and therefore are deemed to be "in distribution" for purposes of Rule 10b-6.

The SEC proposes to replace the former \$250,000 minimum for "blocks" with a sliding minimum based on market price:

Market Price	Minimum "Block"
Less than \$10	\$ 50,000
\$10 - 20	75,000
\$20 - 35	125,000
\$35 - 50	175,000
\$50 or more	200,000

Alternatively the issuer may treat as a "block" any purchase equal to:

- (1) at least 20 round lots and
- (2) at least 150% of average daily trading volume in the preceding four calendar weeks (if daily volume data is available) or 2/25 of 1% of the outstanding securities of the class (if daily volume data is not available).

"Block" purchases are exempt from the volume limitations but subject to the price limitations; if unsolicited, and not executed through a broker or dealer, "block" purchases are exempt from both the volume and price limitations.

Issuers bidding through a broker-dealer in the OTC market cannot enter the market on any day until after the first independent bid has been entered, and must withdraw from the market one-half hour before termination of Level I Service. Where the security is traded on an exchange and over NASDAQ (or on more than one exchange) the 15% volume limitation is applied separately to trading on the exchange and on NASDAQ (or on each exchange).

In addition to the other restrictions imposed by the proposed rule, a broker-dealer seeking to repurchase its own securities must use another broker-dealer to execute trades, and must give over the timing and control of trades to an "independent agent". Unsolicited block purchases are exempt from this rule if the broker-dealer notifies the Seller, in writing, that it is purchasing for its own account.

Purchases by employee benefit plans will not have to be made by a formal "trustee", to be exempt from the rule, as originally proposed; such purchases, if made by an independent agent, not controlled or supervised by the Company, will be exempted. Other exemptions include purchases of securities pursuant to "a bona fide tender offer" and purchase of unlisted securities for which there is "no dealer market" (no test specified for determining whether there is a dealer market). The SEC proposal includes an exemption to Rule 10b-6 which will cover purchases made under Rule 13e-2 when the Company has outstanding convertibles, warrants or nonexempt employee securities plans.

The SEC has asked for comments on the question of whether it should require disclosure with respect to the repurchase program and the manner thereof, including disclosure

of information of the type now customary in repurchase tender offers. The SEC has also asked for comments as to whether "control" persons should be exempted from the restrictions of the proposed rule.

3. SEC Reports - Extension of Time for Filing.

The SEC has proposed Rule 12b-25 and a form for the purpose of obtaining extensions of time to file periodic reports. The limit is two extensions of 30 days each. The first would be deemed granted, if not denied; and the second would be deemed denied, if not granted.

4. Antitrust.

In U.S. v. NASD, (D.C. Dec. 14, 1974) and Gordon v. NYSE, (S.D.N.Y. Dec. 3, 1973) the courts respectively held that the price maintenance provisions of § 22 of the Investment Company Act of 1940 and the fixing of commission rates by exchanges subject to SEC supervision under the Securities and Exchange Act of 1934 are not subject to court antitrust attack. These holdings represent a very significant limitation on the self-regulatory exposure to antitrust attack opened by the Thill case.

5. Options.

The SEC has revised proposed Rules 9b-2 and 238 so that discretionary option trading accounts and down-and-out options would be proscribed. The comment period expires February 1, 1974.

6. Liability for Margin Violations.

Gordon v. DuPont Glore Forgan, Inc., (5th Cir. Dec. 10, 1973) refuses to follow the Pearlstein case in the Second Circuit and holds that a customer who takes advantage of his broker by failing to disclose that his account was undermargined could not recover losses suffered after he became aware of the undermargining.

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