

February 27, 1974

To Our Clients

Recent Developments

1. 16b - Short Swing Profits - Tender Offer Traps. In Allis-Chalmers Mfg. Co. v. Gulf & Western Industries, Inc., 240 SRLR A-3 (N.D. Ill. Jan. 30, 1974) the argument that Kern Cty. Land Co. v. Occidental Pet. Co. exempts from § 16(b) all unorthodox purchases and sales arising out of the competing tender offer situations was rejected and the court held that where the purchase or sale was voluntary, not economically or legally coerced (such as by way of merger), it is covered by § 16b. The court also rejected the argument that value and price were to be determined in the least favorable manner to the defendant and held that in an exchange offer context the proper standard is a realistic interpretation of fair market value on the basis of the evidence. This appears to be another precedent for the addition of carrying costs to purchase price in § 16b cases.

2. NYSE Eliminates Surprise Audits. NYSE Rule 418 has been amended to eliminate the surprise audit requirement.

3. Rule 145 - Reincorporation to Enable Short Form Cash Merger. A two-step short form cash merger in which the acquired company must first migrate to a state with a short form statute through a reincorporation merger is covered by Rule 145 and its registration requirement must be met to accomplish the reincorporation step. Modern Foods, Inc., 240 SRLR C-4 (Avail. Feb. 8, 1974).

4. Discretionary Accounts as Securities. In Marshall v. Lamson Bros., CCH ¶94,383 (Jan. 8, 1974) the court rejected the "pooling" rationale of the Milnarik case and held that an individually managed discretionary commodities account is a "security" for purposes of both the 1933 and 1934 Acts. This runs counter to the general understanding that nonpooled discretionary accounts are not securities and if this is the law its effect would be to destroy the discretionary account management business in that each customer would have a "put" at any time his account showed a loss. The potential liabilities and other problems are so great that it is hoped that the SIA will seek a clarifying rule or corrective legislation.

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