To Our Clients:

Recent Developments

1. Rule 10b-5; Scope of Duty. In White v. Abrams, CCH ¶ 94,457 (9th Cir., Mar. 15, 1974) the Court, in what bids to be a landmark 10b-5 decision, rejects absolute liability, negligence and scienter as appropriate for defining the scope of the duty under 10b-5 and substitutes a "flexible duty standard" to be determined on an ad hoc basis taking into account the relationship of plaintiff and defendant, the defendant's access to the information as compared to the plaintiff's , the benefit to the defendant of his relationship with the plaintiff, the defendant's awareness of plaintiff's reliance on the relationship with the defendant and the defendant's activity in initiating the transaction. Based on these factors, the 9th Circuit would impose a duty of "extreme care" where there is initiation by and access in the defendant and reliance by the plaintiff , but where the relationship is so casual that a reasonably prudent man would not rely upon it the duty is "not to misrepresent intentionally material facts."

2. Projections; Prospectus Liability for a Bad Estmate. In Beecher v. Able, CCH ¶ 94,450 (S.D.N.Y. Mar. 22, 1974), still another of the Douglas Aircraft 1966 Debenture cases, the Court held that the company was liable under § 11 of the 1933 Act for estimating a break-even year when in retrospect it lost $5 million for the year. The Court held that a prospectus earnings estimate must be based on facts from which a reasonably prudent investor would conclude that it was highly probable that the estimate would be achieved and that if the validity of the assumptions underlying the estimate are in doubt they must be disclosed so that the reasonably prudent investor can weigh them in evaluating the estimate. The Court states that among the factors to be considered are, (1) the company's history of meeting projections, (2) care exercised in reviewing estimates, (3) doubts expressed by employees involved in preparing the projections, (4) failure to obtain facts that reasonably could have been ascertained and (5) the reasonableness of the underlying assumptions. The Court also held that failure to be precise as to the use of proceeds of the offering and failure to disclose pre-tax loss when net loss isn't a tax rate function also violated § 11.

3. Rule 134; Bond Ratings May be Included in Broker's Calender of Pending Underwritings. Although not expressly provided for in Rule 134, Moodys and S&P bond ratings may be included in periodic calendars of pending underwritings distributed by brokers and underwriters. Halsey Stuart & Co., CCH ¶ 79,725 (Avail. Feb. 20, 1974).

4. Rule 10b-5; Purchaser-Seller Requirement; Formation of Holding Company to Enable Diversification not a "Sale". In Penn Central Securities Litigation, CCH ¶ 94,452 (3d Cir., Mar. 14, 1974) the Court held that notwithstanding fundamental changes in the nature of the shareholders investment following the reorganization of a railroad into a holding company, that is not the kind of transaction within 10b-5. This is contrary to the position the SEC takes under Rule 145. The Court also rejected the argument for a private damage right of action under § 13(a) of 1934 Act for filing false reports with the SEC on the ground that this would erode the purchaser-seller requirement of § 18(a) which expressly provides liability for such false reports and of § 10(b) and held that § 18(a) is the exclusive damage remedy for a § 13(a) violation.

5. Tender Offers; Private Negotiated Purchases from Insiders and Limited Open-Market Purchases by a 30% Holder do not Constitute a Williams Act "Tender Offer"; No Private Right of Action by a Target Company for Margin and Investment Company Act Violations by Aggressor. In Nachman Corp. v. Halfred, Inc., CCH ¶ 94,445 (N.D. Ill. 1973) the Court states that for Williams Act purposes "tender offer" should extend beyond its conventional meaning to offers likely to pressure shareholders into making uninformed, ill-considered decisions to sell, i.e. offers with the same impact as the conventional "tender offer." The Court then goes on to find that negotiations by a 30% holder to buy out 40 insiders with substantial holdings at varying prices above the quoted market coupled with substantial open-market purchases (about 3-1/2% of outstanding shares) at a premium were not a tender offer because none of the sellers was "pressured." In addition the Court held that a target company, absent a 14(d) or 14(e) Williams Act disclosure violation, cannot enforce against an aggressor in a tender offer violation of the margin regulations and violation of the 1940 Act to which the target is not a party. While we agree with the Court's policy rationale for defining "tender offer", we question the validity of all three of the Court's holdings.

M. Lipton.