To Our Clients

Recent Developments

1. Directors Responsibility; Creative Accounting. The SEC complaint in the Penn Central case alleges that outside directors who fail to police management disclosures as to earnings and financial condition and thereby do not prevent 10b-5 and other violations by the company participate in the company's violations. The complaint brings home again the oft noted caution that the day of "creative" accounting is past and all directors, inside and outside, run a grave risk of liability or worse if they countenance these practices.

2. Rule 10b-5; Suitability; Broker's Duty to Know Security. A broker who does not solicit the order or recommend the security, but who merely receives and executes an order for a sophisticated client has a minimal duty, if any at all, to investigate and disclose material facts to the customer. Canizaro v. Kohlmeyer & Co., CCH ¶ 94,515 (E.D. La. Feb. 6, 1974).

3. Tender Offers; Disclosure by Offeror. Two-year information in summary form by a private-company offeror as to sales, net income, assets, net current assets and net worth was held sufficient in Missouri Portland Cement Co. v. Cargill, Inc., CCH ¶ 94,507 (S.D.N.Y. Apr. 15, 1974) to satisfy the Williams Act disclosure requirements in an opinion which adopts and approves the Corenco rationale. The court also held that nondisclosure of indefinite plans to make large capital investments to expand the target's business and of the possibility of antitrust violations where such violations were not obvious did not violate the Williams Act.

4. Rule 10b-5; Liability without Privity to Open Market Purchasers; Purchaser-Seller Requirement. Sargent v. Genesco, Inc., CCH ¶ 94,496 (5th Cir. April 11, 1974) contains an extensive review of the elements of a 10b-5 damage action and holds that neither privity nor contemporaneous open market trading by plaintiff and defendant are necessary for a 10b-5 cause of action -- actual reliance on misstatements or material misstatements that affected the market are sufficient. The court also adhered to the Birnbaum purchaser-seller requirement, refusing to adopt the Seventh Circuit holding in Eason.

5. Rule 10b-5; Aiding and Abetting. The Seventh Circuit has backed off its prior statements as to aiding and abetting a 10b-5 violation through inaction and has reformulated the test to be: "the party charged with aiding and abetting had knowledge of or, but for a breach of duty of inquiry, should have had knowledge of the fraud, and that possessing such knowledge the party failed to act due to an improper motive or breach of a duty of disclosure." Hochfelder v. Midwest Stock Exchange, CCH ¶ 94,499 (7th Cir. Apr. 10, 1974).

6. "Float Policy". Professional Care Services, Inc., CCH ¶ 79,770 (Avail. Apr. 15, 1974) reflects the previously noted abandonment by the SEC of the staff policy of refusing a no action position solely on the basis that the amount of securities to be sold was large in relation to the float, i.e., exceeded what could be sold under the volume limits of Rule 144.

7. Investment Companies; Broker Pooling Clients Funds for Purchase of CDs. In Warren W. York & Co., CCH ¶ 79,758 (Avail. Apr. 4, 1974) the staff took the position that a broker which pools its clients funds for the purpose of buying cds, commercial paper or similar money market instruments is selling investment contracts in the pooled fund and therefore securities within the meaning of the 1940 Act (and the 1933 Act). The problem can be avoided if instead of pooling the broker allocates the cds or other instruments to specific accounts with tagging and other procedures exactly like those followed when the broker holds in street name large denomination certificates for several accounts.

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