WACHTELL, LIPTON, ROSEN & KATZ

July 1, 1974

To Our Clients

Recent Developments

1. Acquisitions; Conglomerate Mergers; Potential Competition. The Supreme Court decision in the Washington Bank case on June 26 following the Second Circuit decision in the Missouri Portland Cement case on June 10 appears to confirm the trend away from finding antitrust violations on the basis of potential competition, rather than actual horizontal competition or a real vertical relationship, first adumbrated by the March decision of the Supreme Court in the General Dynamics case. This is a most favorable sign for the "big" mergers such as Mobil Oil-Marcor.

2. Tender Offers; Antitrust Defense; Preliminary Injunction Standards; Disclosure of Future Plans. Judge Friendly's opinion in Missouri Portland Cement Co. v. Cargill, Inc., CCH ¶ 94,595 (2d Cir. June 10, 1974) indicates a major shift in attitude toward granting a preliminary injunction at the request of a target company defending against a tender offer on the typical antitrust and Williams Act disclosure grounds. Judge Friendly rejects the customary morale, long range planning and unscrambling bases for finding a balance of hardship in favor of the target. As to Williams Act disclosure, the opinion quotes with approval Susquehanna Corp. v. Pan American Sulphur Co., 423 F.2d 1075, 1085-86 (5th Cir. 1970):

> Though the offeror has an obligation fairly to disclose its plan in the event of a takeover, it is not required to make predictions of future behavior, however tentatively phrased, which may cause the offeree or the public investor to rely on them unjustifiably.... Target companies must not be provided the opportunity to use the future plans provisions as a tool for dilatory litigation.

3. Notes as "Securities"; Bank Loans; Certificates of Deposit. Bellah v. First Nat. Bank of Hereford, CCH ¶

94,597 (5th Cir. June 14, 1974) holds, in a well reasoned opinion that will be a leading case, that short term bank loan notes and short term certificates of deposit are exempt under § 3(a)(10) of the 1934 Act on the rationale of the dichotomy between commercial paper and investment paper.

4. Rule 144; Holding Period; Employee Stock Plans Requiring Future Services. Where the employer-issuer has a repurchase option (or other forfeiture provision) with respect to securities sold to an employee whose employment terminates, the two year holding period under 144(d)(1) does not begin as to any such securities, or portion thereof, until the repurchase option (or other forfeiture provision) lapses. Bourns, Inc., CCH ¶ 79,820 (Avail. Jan. 28, 1974). In Ralph M. Parsons Co., CCH ¶ 79,821 (Avail. Mar. 11, 1974) the Staff position was stated as:

> [T]he holding period for restricted shares of stock purchased under a plan [containing forfeiture provisions based on future employment] will begin to run only when full consideration has been provided by the purchaser, which consideration includes in addition to the cash paid for the stock, the future performance of substantial services, i.e., continued employment of the purchaser, in the instant case.

5. Registration of Foreign Investment Companies. In Kredietbank, CCH ¶ 79,824 (Avail. June 2, 1974) the Staff indicates that it will apply the Rule 7d-1 criteria applicable to Canadian investment companies to investment companies organized in other foreign countries and states that the basic policy consideration is that shareholders have assurance not just of a convenient legal forum to protect their rights but also that the federal securities laws and the Anglo-American common law rights of shareholders can be enforced. The Staff indicates, however, that this does not exclude investment companies organized in non-common law jurisdictions. With the demise of the interest equalization tax this could be an area of growing activity.

6. Accounting; Capitalization of Interest. The SEC will not permit non-utility companies which had not as of June 21, 1974 disclosed an accounting policy of capitaliz-

ing interest costs to adopt such a policy in the future. Companies that capitalize interest will be required to make full disclosure of the effect thereof on net income and the balance sheet; footnote disclosure will no longer suffice. Sec. Act. Rel. No. 5505 (June 21, 1974) CCH ¶ 79,828.

7. Mutual Funds; NASD Antireciprocal Rule. The SEC will hold a public hearing on September 10 on the question of loosening the restrictions on sales reciprocals.

M. Lipton