To Our Clients

Recent Developments

(1) Annual Reports. The SEC has adopted new rules as to the contents and dissemination of annual reports to shareholders, effective December 20, 1974 for all companies whose fiscal years end thereafter. The new rules provide:

(a) Financial Statements. The annual report must contain certified financial statements for the last two years, 10-point or larger type must be used and any differences between the 10K financials and the annual report financials must be noted and reconciled in the annual report financials.

(b) Five-Year Summary of Operations. The annual report must contain a five-year summary of operations, which may be in any form deemed suitable by management, but which must be accompanied by the newly instituted management analysis of the summary required in the 10K. To avoid any question of disclosure liability it is recommended that if a five-year "highlights" summary is used, there also be included the 10K summary and a cross reference from the highlights to the full summary.

(c) Description of Business. The annual report must contain a description of the business done during the past year which will indicate the general nature and scope of the business of the company and its subsidiaries. This does not have to be the same as the 10K description.

(d) Lines of Business Information. The same kind of line of business reporting now required in the 10K must be included in the annual report.

(e) Management Information. Directors and executive officers must be identified and information as to their principal occupation or employment included.

(f) Market and Dividend Information. The annual report must include high and low prices and dividend payments for the last eight quarters.

(g) Format. The format of the annual report remains in the discretion of management. Charts and graphs are encouraged, but they must be consistent with the underlying financials or data.

(h) Dissemination. Companies must canvass brokers and nominees to determine quantities of annual reports required for beneficial holders and then supply and pay for dissemination to such holders by the brokers and nominees. The annual report or proxy statement must include a bold face undertaking to supply without charge (except as to exhibits for which a reasonable charge is permitted) a copy of the 10K.

(2) Definition of Security; Guarantees as Securities for 8K and 10K Reporting Purposes. The SEC staff has reversed its former position and now takes the position that parent company guarantees of leases or other contracts, which leases or contracts are not themselves securities, are not reportable as the issuance of separate securities for either 8K or 10K purposes. Guarantees of notes are not reportable for 8K purposes but are reportable for 10K purposes unless the guarantee itself is exempt from the 1933 Act other than because issued in a private placement. Rosenman Colin Kaye Petchek Freund & Emil, CCH ¶79,987 (Avail. Sept. 16, 1974).

(3) Rule 146; Non-U.S. Purchases. Non-U.S. purchasers may be excluded for the purpose of the 35 purchaser limitation under Rule 146. Salt Cay Beaches Ltd., CCH ¶79,985 (Avail. Oct. 14, 1974).

(4) Rule 144; Private Purchase of Unrestricted Securities from an Affiliate makes the Securities "Restricted". In Citizens and Southern Realty Investors, CCH ¶79,980 (Avail. Aug. 30, 1974) the SEC takes the position that securities originally issued in a registered public offering, subsequently purchased by an affiliate in the open market and then sold by the affiliate to another affiliate of the issuer in a private transaction under §4(1) of the 1933 Act are restricted securities in the hands of the second affiliate and therefore subject to the two year holding period.

(5) Eurobonds; Exemption from 1933 Act Registration. The Singer Company, CCH ¶79,979 (Avail. Sept. 3, 1974) sets forth in detail the post IET SEC staff position on the applicability of the 1933 Act registration requirements to a typical Eurobond offering. Essentially if arrangements are made to limit the offering to non-U.S. persons and to prevent resales to U.S. persons prior to 90 days after the offering, registration is not required.

(6) Margin Requirements. Inadvertent under margining in violation of maintenance margin Rules 431 and 432 of the NYSE, acquiesced in by the customer, do not give rise to a basis for recovery by the customer of the market losses suffered. The balance in a SMA can be used as purchasing power to meet the initial margin requirements of Reg. T. McCormick v. Esposito, CCH ¶94,795 (5th Cir. Sept. 13, 1974).

(7) Commercial Paper. The Penn Central commercial paper case, Welch Foods, Inc. v. Goldman, Sachs & Co., CCH ¶94,806 (S.D.N.Y. Sept. 30, 1974), shows the extreme dangers involved in handling commercial paper that is used for anything other than the traditional "current transactions" or is sold outside the traditional institutional market. Not only will the commercial paper not be exempt from the fraud provisions of the 1934 Act, but could require registration under the 1933 Act. While most dealers have reviewed and revised their commercial paper practices, it is an area in which the law is being held to require far more than was heretofore the general practice; a further review is recommended.

(8) Short Swing Profits - §16(b). Provident Securities Co. v. Foremost-McKesson, Inc., CCH ¶94,811 (9th Cir. Sept. 19, 1974) limits the Kern County Land case unorthodox transaction exception to other than cash or assets for stock transactions and other than voluntary transactions; holds that the date of sale is the date when a binding contract is signed rather than the closing date; holds that the purchase by which a noninsider becomes a 10% insider is not within §16(b); and implies that a distribution by a coporate insider to its shareholders is not a sale within §16(b) -- a point that is open to serious question. See also Makofsky v. Ultra Dynamics Corp., CCH ¶94,832 (S.D.N.Y. Oct. 16, 1974) similarly limiting the unorthodox transaction exception.

(9) Freeze Outs. Levine v. Biddle Sawyer Corp., CCH ¶94,816 (S.D.N.Y. Oct. 7, 1974), in addressing a motion to dismiss a complaint, indicates that use of a short form merger for the sole purpose of freezing out a minority shareholder in a close corporation is itself a 10b-5 violation.

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