WACHTELL, LIPTON, ROSEN & KATZ

To Our Clients November 22, 1974

Recent Developments

1. Freezeouts - Going Private. A series of current cases and statements by SEC Commissioners and senior Staff members have raised questions as to both the substantive and disclosure aspects of the freezeout and tender offer methods of going private. Schlick v. Penn-Dixie Cement Corp., CCH ¶ 94,853 (2d Cir. Oct. 31, 1974) is indicative of the trend toward expanding Rule 10b-5 beyond disclosure in these situations to encompass the substantive question of fairness. Broder v. Dane, 172 N.Y.L.J. p. 1, col. 3, Nov. 22, 1974, is the latest of the cases to enjoin a going-private transaction. This is a fast changing area of the law and it can no longer be assumed that it is possible to go private in every situation. Senator Clark of Iowa is currently investigating this area with a view toward legislation.

2. Sale of Control at a Premium. While there is yet no case holding that sale of a control block at a premium is illegal, there have been several recent indications that the courts may be ready to move in that direction. Chris-Craft Industries, Inc. v. Piper Aircraft Corp., CCH ¶ 94,856 (S.D.N.Y. Nov. 6, 1974) is the most recent: "But even if CC could have realized the full value of its 'plurality position' by a sale, it is not at all clear that the premium, if any, realized thereby could be properly retained by CC".

3. Freezeouts - Investment Banker's Opinion and Report as an Exhibit to the Proxy Statement. There have been at least three decisions within the past month in cases where freezeout mergers were attacked for failure to include the full report by the investment banker as part of the proxy statement. So far the score is 2 to 1 in favor of inclusion. Even Tanzer v. Haynie, 172 N.Y.L.J. p. 1, col. 6, Nov. 21, 1974, which held that non-inclusion was not a sufficient basis for a preliminary injunction, recognized it as a point of substance. It would appear that such reports are now necessary exhibits to merger and similar proxy statements and, unless the SEC adopts an exclusionary rule or guideline, they should be included in all such proxy statements.

4. Pension Reform Act of 1974. In addition to the "prudent man" standard of investment management for pension funds contained in the Act, there are stringent prohibitions against conflicts between pension fund investment managers and the funds they manage. One of the prohibitions is

against broker affiliates of investment advisers doing commission business with the pension funds. For those pension funds now being managed by member firms or advisers with broker affiliates this prohibition goes into effect on June 30, 1977. Our comprehensive report on the investment management aspects of the Act will be available next month.

5. Mutual Fund Advertising and Distribution. The SEC has adopted Rule 134 which permits wider discretion in mutual fund advertising; amended Rule 22d-1 to permit quantity discounts on group mutual fund sales; proposed liberalization of the guidelines on performance charts in mutual fund propectuses; authorized the Staff to approve brokers not affiliated with a no-load fund charging fees to customers for purchase of shares of such a fund; and approved the NASD proposed maximum sales load rule.

6. Mutual Funds - Recapture. Fogel v. Chestnutt, CCH ¶ 94,850 (S.D.N.Y. Oct. 29, 1974) essentially rejects Moses v. Burgin and holds that a fund adviser has no duty to establish a broker affiliate in order to recapture commissions for the benefit of the fund. The decision does indicate that where recapture is "freely available", then it is mandatory. Thus recapture of tender fees would be required for any fund adviser with a broker affiliate, but the adviser would not be required to establish a broker affiliate for this purpose. Even where the adviser has a broker affiliate, it would not be required to recapture through reciprocals.

7. Margin Regulations. A foreign bank which regularly buys and sells securities in the U.S. is a broker-dealer within Reg. T and not eligible for the "bank" exemption which is limited to domestic banks. UFITEC v. Carter, CCH ¶ 94,841 (Cal. Sup. Ct. Oct. 24, 1974).

8. Short Swing Profits. Short swing transactions in which both the purchase and the sale occur after an officer or director resigns are not within § 16(b) even though part or all of the transactions are required to be reported under Rule 16a-1(e). Lewis v. Varnes, CCH ¶ 94,849 (S.D.N.Y. Oct. 30, 1974).

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