

December 27, 1974

To Our Clients

Recent Developments

1. Tender Offers; Open Market Purchases as Constituting a Tender Offer. In Jewelcor Inc., CCH ¶ 80,014 (Avail. Oct. 10, 1974) the offeror purchased 6% of the shares of target in the open market and then filed a Schedule 13D and issued a press release disclosing consideration of the possibility of acquiring control by means of tender offer, open market purchases or private transactions and requested the Staff position as to whether such disclosure constitutes public announcement of a tender offer within Rule 10b-13. The Staff responded that it did not consider the disclosure public announcement of a tender offer for purposes of Rule 10b-13, but did not express any opinion as to whether the purchase of 6%, the disclosure and possible future purchases constitute a tender offer for the purpose of § 14(d). The Staff referred to the pending tender offer hearings on the question of "creeping" tender offers. It is understood that there is litigation by the target against the offeror presently pending.
  
2. Private Placements; Integration. Livens v. William D. Witter, Inc., CCH ¶ 94,906 (D. Mass. 1974) is a pre-Rule 146 private placement decision sustaining the § 4(2) private placement exemption in a situation where there were four financings involving an aggregate of 30 persons all of whom were shown by the issuer to be experienced businessmen and investors and many of whom were personal friends of the promoters and where the investors were advised that (a) the securities were highly speculative, (b) the securities were intended only for sophisticated investors, (c) the existing financial records of the issuer were incomplete and unreliable and (d) additional financing might be required, despite the failure to obtain an investment letter and legend the certificates and despite the failure to provide the financial information not available because of the state of the financial records (the court finding as a fact that the purchasers would not have relied on the missing information). The court rejected

the argument that issuers with incomplete records can effect private placements on the basis of what is available, stating that "companies unable to furnish significant financial information may be compelled to forego" financing except from institutions. The decision also approves SEC Release 33-4552 (Nov. 6, 1972) as the basis on which to determine integration of offerings.

3. Market Information. In Frigitemp Corp. v. Financial Dynamics Fund, CCH ¶ 94,907 (S.D.N.Y. 1974) the court, without discussion of any of the recent learning on the question, squarely holds that Rule 10b-5 is limited to inside corporate information and does not cover material information which is not inside corporate information.
  
4. Projections of Earnings; Rule 10b-5. A projection of earnings is within Rule 10b-5 and violates the Rule if at the time the projection is published, the company fails to disclose facts which might undermine the projection. Failure to disclose that a start-up operation was continuing to capitalize development expenses and was incurring operations problems, constitutes nondisclosure of a material fact in connection with earnings projection. In order for a projection to meet Rule 10b-5 standards the company making the projection must:
  - (1) believe it,
  - (2) not have any reason not to believe it, and
  - (3) have followed a reasonable method of preparation and have a valid basis for it.

Marx v. Computer Sciences Corp., CCH ¶ 94,904 (9th Cir. 1974).

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