WACHTELL, LIPTON, ROSEN & KATZ January 14, 1975

To Our Clients:

Recent Developments

1. Tender Offers; Management of Target Has a Rule 10b-5 Duty Not to Oppose a Tender Offer for Personal Reasons. In Grossman, Faber & Miller v. Cable Funding Corp., CCH ¶ 94,913 (D. Del., Dec. 16, 1974) the court stated that if target company management engages in a campaign to defeat one tender offer and insure the success of a competing tender offer for personal reasons rather than the best interests of the target and its shareholders, such conduct might be a scheme to defraud within Rule 10b-5 as well as a breach of common law fiduciary duty.

2. Indemnification and Contribution Among Persons Who have Violated the Proxy Regulations. In Gould v. American Hawaiian Steamship Co., CCH ¶ 94,919 (D. Del., Dec. 19, 1974) the court held that in light of the regulatory purpose of the proxy rules indemnification is not available on a comparative fault basis. Recognizing that most of the cases under §§ 10(b) and 17(a) have permitted indemnity on a comparative fault basis, the court distinguished those cases on the ground that they involve fraudulent or intentional conduct and that shifting liability to the more culpable defendant does not defeat the purpose of the sections of the securities law prohibiting fraud. Because § 14(a) is intended to encourage due diligence by those responsible for a proxy solicitation, permitting indemnity would defeat the purpose of § 14(a). The court held that contribution is available among those liable for a § 14(a) violation and that depending on the circumstances such contribution might be pro rata or on a comparative benefit basis.

This case clearly supports the growing use of contractual contribution on a comparative benefit basis. Greater attention should be paid to supplementing the traditional boilerplate indemnity provisions with comparative benefit contribution provisions.

3. Short Swing Profits; Underwriters as 10% Holders; Rule 16b-2. In Perine v. William Norton & Co., CCH ¶ 94,922 (2d Cir., Dec. 20, 1974) the court reiterated the Second Circuit position that the purchase by which a person becomes

a 10% holder is within 16(b) and can be matched against a sale within six months. Based on the SEC's amicus position, the court also held that Rule 16b-2 exempts an underwriter whose only insider relationship with the issuer is the purchase of more than 10% in connection with the distribution, even though such underwriter purchases more than half the distribution. Clause (a)(3) of Rule 16b-2, which literally limits the exemption to underwriters who do not underwrite more than half the distribution, was held to be intended only for pre-existing insiders -- not 10% holders who become such only through the distribution.

4. Short Swing Profits; Transactions by a Spouse. Where the spouse of a 16(b) insider shares a common home with the insider, the spouse's transactions will be considered the insider's transactions for 16(b) purposes. Whiting v. Dow Chemical Co., CCH ¶ 94,924 (S.D.N.Y., Dec. 24, 1974).

5. Short Swing Profits; Defensive Merger to Defeat a Tender Offer. In American Standard, Inc. v. Crane Co., CCH ¶ 94,924 (2d Cir., Dec. 20, 1974) the court carried Kern County to its logical extreme and held that the sale by the defeated tender offeror of the stock of the rescuer received on the defensive merger within six months of the purchase of the target shares by the defeated offeror was not within 16(b) because the sale was of the shares of a different issuer. The court reiterated its earlier holding in Kern County that the defensive merger is neither a sale nor a purchase for 16(b) purposes. Again the decision was basically premised on the subjective approach that the defeated tender offeror situation does not present a situation of possible speculative abuse.

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