WACHTELL, LIPTON, ROSEN & KATZ

February 6, 1975

To Our Clients

Recent Developments

1. Change in Accounting for Debt Retirement at Less than Principal Amount. The FASB has proposed a change in accounting principles which would change the treatment of early debt retirement at less than par from ordinary income to an extraordinary item in the income statement. In addition, the new principle would require extensive footnote description of the transaction. it appears that still another creative accounting device is about to disappear.

2. Investment Companies - Stock Loans. The SEC has amended its guidelines on stock loans by investment companies to permit the borrower to share in the fee paid to the placing broker provided that the directors of the investment company "determine that the fee paid to the placing broker is reasonable and based solely upon the services rendered and that they separately consider the propriety of the fee paid to the borrower," and that such fees not be used to compensate any affiliate of the investment company. Adams Express Co., CCH ¶ 80,043 (Avail. Oct. 9, 1974).

3. Williams Act - Investment Companies Managed by a Common Adviser Constitute a Group. The Staff has reiterated the position that commonly managed investment companies which in the aggregate acquire more than 5% of a company's stock are required to file under § 13(d). Stewart Fund Managers Ltd., CCH ¶ 80,047 (Avail. Aug. 9, 1974).

4. Definition of Security - Form 8-K. Even though no note is issued, a revolving credit agreement is a "security" for 8-K reporting purposes. The entire amount of the credit should be reported when the agreement is entered into and the takedowns should be reported as they take place. Bingham, Dana & Gould, CCH ¶ 80,048 (Avail. Oct. 28, 1974).

5. Tender Offers - Open Market Purchases. There has been considerable confusion as a result of the continued purchase programs of Gulf & Western and others and the Gould-ITE situation as to whether open-market purchases

by a person who has announced intention to acquire control or who is seeking to increase a control position are permitted under the Williams Act. In Cargill, Inc. and Missouri Portland Cement Co., CCH ¶ 80,050 (Avail. Oct. 31, 1974) the SEC refused a no-action letter to a 19% holder who wished to make open market and privately negotiated purchases with a view toward acquiring control. It continues to be our opinion that, despite the cases such as, D-Z Investment and Nachman to the contrary, open market, block and private purchases by persons seeking control should be avoided. The SEC Staff is presently considering new rules in this area and, until they are announced, we believe that the risk of an adverse decision is such that it is preferable to use the formal tender offer route.

6. Rule 144 - "Underwriters Compensation Stock". In Sycor, Inc., CCH ¶ 80,064 (Avail. Nov. 18, 1974) the SEC interpreted Rule 144 as being available for stock purchased in a private placement by a broker who did not participate in the underwriting prior to an underwriting and which was "locked up" and registered pursuant to the NASD requirements. The SEC continues to take the position that Rule 144 is not available for underwriters' "cheap stock".

7. Small Private Placements. Rule 240 permitting private placements of not more than $100,000 in twelve months by companies with less than 100 security holders will be effective March 15, 1975. Securities issued in Rule 240 transactions will be restricted securities for the purposes of Rule 144.

8. Rule 10b-5 -- Disclosure - Buyer's Opportunity to Investigate does not Relieve Seller of Duty to Disclose. In Metro-Goldwyn-Mayer, Inc. v. Ross, CCH ¶ 94,944 (2d Cir. Jan. 13, 1975) the Court held that the Rule 10b-5 duty to disclose all material facts is not discharged merely by giving access to company records and allowing a buyer to make his own investigation.

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