To Our Clients

Recent Developments

1. Brokerage for Managed Accounts; 100/0 Could Become 0/100. S. 249 and H.R. 4111 presently would enact a 100/0 test for all managed accounts other than those of individuals. On Friday, April 11, the Senate Subcommittee will hold a public hearing on a complete reversal which would permit members to do the brokerage for managed accounts.

2. Brokerage Transactions with Advisory Clients. The Investment Advisers Act proscribes principal transactions with an advisory client unless the adviser makes prior written disclosure and obtains the clients consent. A broker who separately charges for research reports is an adviser and must register under the Advisers Act. In preparation for unbundling after May 1, the SEC has proposed a rule which would render the Advisers Act proscription not applicable to printed material or publicly announced oral recommendations in each case distributed to 35 or more people.

The SEC release proposing the new rule contains an interesting summary of the SEC view of the duties of a broker to a client who relies on the broker for advice:

> "[I]f a broker-dealer has a relationship of trust and confidence with its customers and as principal sells to those customers securities which it recommended to them, the broker-dealer is required to disclose to such customers the nature and extent of its adverse interest, including (1) the best price at which the securities could be purchased in the open market, and (2) the cost to the broker-dealer of the securities to be sold.
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> "A broker-dealer which recommends to customers a transaction in securities in which the broker-dealer is making an over-the-counter market, and who proposes to act as a principal in such transaction, may be required to disclose to the customer that it is a market-maker. An investment adviser who issues publicly distributed materials has the duty to disclose to his customers any facts which might tend to call into question the presumption that the adviser is dispensing disinterested investment advice."

3. Suitability; Churning. Churning is a violation of Rule 10b-5 for which there is a cause of action but does not give rise to an implied federal cause of action for violation of the relevant stock exchange rules. Jenny v. Shearson, Hammill & Co., [Current] CCH Fed. Sec. L. Rep. ¶ 95,021 (S.D.N.Y. Mar. 11, 1975).

4. Securities Act Liability; Statute of Limitations. Fischer v. International Telephone and Telegraph Corp., [Current] CCH Fed. Sec. L. Rep. ¶ 95,072 (E.D.N.Y. Mar. 20, 1975) holds that the date a security "is first offered to the public for the purpose of § 13 of the 1933 Act is not earlier than the effective date of last amendment to the registration statement and not later than the date when the prospectus is released to, or other solicitation is made of, the public."

5. Damages. Abrahamson v. Fleschner, [Current] CCH Fed. Sec. L. Rep. ¶ 95,028 (S.D.N.Y. Mar. 4, 1975) contains an excellent summary of the cases discussing damages for violation of the securities laws. The case holds that where the plaintiff realizes his original cost and defendant has not profited, the plaintiff cannot recover. The case also holds that all payments such as dividends and profits (and by implication tax benefits) are to be included in determining whether there has been damage.

6. Inside Information; Derivative Action by a Corporation. Judge Kaufman's dissent in Schien v. Chasen, 478 F.2d 817 (2d Cir. 1973) - in which he took the position that a tippee was not liable to the corporation the securities of which the tippee traded on inside information - has been approved by the Supreme Court of Florida as the law of Florida. In addition, Florida, by adhering to the requirement that there be actual damage to the corporation to support a derivative action, rejects the New York holding in Diamond v. Oreamuno, 24 N.Y. 2d 494 (1969) that directors and officers are liable to the corporation for inside information violations. Schien v. Chasen, 296 BNA Sec. Reg. L. Rep. H-1 (Sup. Ct. Fla., Mar. 13, 1975).

7. Going Private. The Second Circuit has affirmed without discussion the Wells, Rich case and the SEC is asking certain companies which have gone private or made major repurchases to answer a sweeping questionnaire.

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