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To Our Clients

Recent Developments

1. Negotiated Rates; Paying Up for Research. In a recent speech SEC Commissioner John Evans suggested that money managers move to a method of operation under which the management fee would include all services other than bare execution charges. The manager would purchase all needed services -- including research -- for cash. This would eliminate the "churning" conflict problem. Commissioner Evans said, "Because costs for obtaining services would represent an expense to the money manager, it would be in his economic interest to consider carefully those costs and either obtain desired services at the lowest cost from others or develop an internal capabilty to provide the service. Thus, competitive forces would tend to assure that only needed services are produced and that charges for such services are reasonable. Money management fees would not be subject to reductions such as an off-set of brokerage produced by accounts under management because brokerage would provide only for execution, and competition between money managers for customers would determine the reasonableness of money management fees." 299 BNA S.R.L.R. AA-1 (Apr. 16, 1975)

2. Going Private; Short-form Merger: Rule 10b-5. In Green v. Sante Fe Industries, Inc., 298 BNA S.R.L.R. A-6 (S.D.N.Y. Mar. 27, 1975) the court followed Popkin v. Bishop to the effect that the federal securities laws are limited to disclosure and there is no substantive Rule 10b-5 fairness requirement and held that a Delaware short-form merger freeze-out is not a violation of Rule 10b-5. But see paragraph 3 below.

3. Applicability of Rule 10b-5 to Fairness and Corporate Mismanagement. In the IOS cases decided this week by the Second Circuit, Judge Friendly indicates a view that the Supreme Court vitiated the "corporate mismanagement" exception to Rule 10b-5 in the Bankers Life case. This may adumbrate a departure from Popkin v. Bishop and be a major step toward federal corporation law.

4. Window Dressing Loans; Aiding and Abetting Rule 10b-5 Disclosure Violations. A bank which makes window dressing loans to a borrower aids and abets the borrower's Rule 10b-5 disclosure violation. Odette v. Shearson Hammill & Co., Inc., [Current] CCH Fed. Sec. L. Rep. ¶ 95,038 (S.D.N.Y. Mar. 24, 1975).

5. Indemnification. The Odette case also held indemnification is not available to a defendant who negligently violates § 12(2) of the 1933 Act. The opinion reviews all of the indemnification cases starting with Globus I and concludes that it would violate the policy of the federal securities laws to permit indemnification for the negligence violations such as § 12(2) and § 14(a)(9) of the 1934 Act, as well as for the scienter or actual knowledge violations such as § 17(a) of the 1933 Act, § 15(c) of the 1934 Act and Rule 10b-5. The Court did permit a contribution claim. This decision prompts reiteration of the advice to a include an alternative contribution clause wherever indemnification is provided for what might be a federal securities law claim.

6. Sale of Control at a Premium. The Second Circuit opinion in Chris-Craft Industries, Inc. v. Piper Aircraft Corp., [Current] CCH Fed. Sec. L. Rep. ¶ 95,058 (2d Cir., April 11, 1975) removes part of the cloud cast by the dictum in the District Court opinion on sale of a control block at a premium. The Second Circuit said that a person who has a control block, but is not in control, can sell the block at a premium. There is an implication in the opinion, however, that where a person is in actual control, there may be a duty to provide equality of opportunity to all shareholders to participate in a premium price.

7. Mutual Funds; Mergers; Rule 22c-1 Preempts State Appraisal Statutes. ICA Rel. No. 8752 (Apr. 10, 1975) sets forth the SEC Staff position that Rule 22c-1 preempts state appraisal statutes and accordingly such statutes (which might give electing shareholders an election to pick an earlier date net asset value than the value on the date of actual redemption) do not apply to mutual fund mergers.

8. § 16(b)--Short Swing Profits: Purchase and Sale Shortly after Resigning Corporate Office not within § 16(b). In Lewis v. Mellon Bank, 299 BNA S.R.L.R. A-4 (Apr. 10, 1975) the Third Circuit held that a director who retired and then within the next two days exercised a stock option granted more than six months prior to retirement and and sold stock on the same day as the option exercise purchase, was not liable under § 16(b). The Court interpreted § 16(b) as not applying unless the inside relationship existed at the time of purchase *or* sale, or both.

9. Tender Offers; State Statutes. South Dakota has adopted a Wisconsin type take-over regulation statute effective July 1, 1975.

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