November 13, 1975

To Our Clients:

Recent Developments

1. Tender Offers; Disclosure of "Second Step" Merger. In Otis Elevator Co. v. United Technologies Corp., CCH ¶ 95,342 (S.D.N.Y. October 29, 1975) the offeror, United, had attempted to negotiate a merger with the target, Otis, but had been rebuffed. About 20 days after being rebuffed, United made a cash tender offer for a portion of the Otis shares. In connection with the negotiated merger proposal United had prepared a study reflecting a first step cash tender followed by a second step merger for United stock. This study was presented to the United board of directors when it authorized the cash tender offer at issue 40 days after the study had been prepared. The United board did not act on the study or approve a second step merger; it only approved the cash tender for a portion of the Otis shares. The existence of the study and the extensive consideration that had been given to it by the senior officers of United were not disclosed in the United offer. The United offer stated that "United has not formulated any plan or proposal to merge [Otis] with United." The court stated the test for disclosure of plans or proposals:

> "a plan or proposal will not be considered inchoate but rather, that the plan is material if there is strong evidence of its adoption by high corporate officers over a period of time."

The court then went on to hold that in view of the confusion caused by three prior unilateral amendments to its offer by United and some doubt as to whether such amendments started the seven-day withdrawal period anew, the present offer should be enjoined, but that United would be free to initiate a new offer.

2. Tender Offers; Target's Shareholder Letter Recommending against Tender; Material Facts. The characterization of a tender offer by a target as "quite inadequate" and as an attempt to seize control "at bargain basement prices" was materially misleading in failing to set forth that the target's stock had not traded above the tender offer price during the preceeding 18 months and that the target had negotiated with the offeror for an acquisition of the target at less than 10% more than the offer price within the preceeding six months. Emhart Corp. v. USM Corp., CCH ¶ 95,334 (D. Mass. October 21, 1975).

3. Accountants' Liability; Failure to Establish an Adequate Reserve for Losses can be a 10b-5 Violation. Oleck v. Fischer, CCH ¶ 95,332 (S.D.N.Y. October 15, 1975) applies the usual Second Circuit formulation of the scienter requirement to establish a Rule 10b-5 violation by an accountant -- actual knowledge, reckless disregard or knowledge that the figures created a false picture -- to a situation where the accountant failed to establish an adequate reserve for losses and holds that the inadequacy of such a reserve is a question of fact. The court rejected the argument "that an accountant's failure to establish an adequate reserve is nonactionable because it involves matters of professional judgment only."

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