WACHTELL, LIPTON, ROSEN & KATZ

JHF

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To Our Clients:

Recent Developments

1. Tender Offers; Offeror Can Obtain Shareholders List Under New York Law. Matter of Crane Co. (Anaconda Co.), N.Y.L.J. Jan. 29, 1976, p. 1, col. 3 holds that communicating a tender offer to the shareholders of the target is a proper purpose within § 1315 of the New York Business Corporation Law which governs the basis on which a shareholder can inspect the shareholder list of a non-New York corporation.

2. Corporate Transactions with Controlling Persons. Three current cases illustrate the increasing judicial attention to conflict transactions and the expansion of federal securities law in this area:

(a) In Collins v. SEC, No. 75-1100, (8th Cir. Jan. 23, 1976), the SEC approval of the merger between Christiana Securities Co. and DuPont under § 17 of the Investment Company Act of 1940 was reversed on the ground that the fair and reasonable test of § 17(b) is not satisfied when the SEC as a matter of law holds that the value of an investment company is determined by its net asset value and ignores such other factors as earnings, dividends, taxes, etc. (See our memo of Jan. 12, 1976 re the companion case of Harriman v. DuPont in which the same transaction was sustained under Delaware law and Rule 10b-5.) While the holding in Collins is a very narrow one under §17(b), the court made several observations that are applicable generally to corporate conflict transactions:

(i) Weight will be given to negotiating committees of independent directors and independent financial advisors.

(ii) Management directors may not be considered independent and negotiating committees should have a majority of totally independent directors.

(iii) The opinion of a financial advisor will be accorded greater weight if it is an initial determination rather than a report on an already determined value or exchange ratio.

(iv) Since it is not possible to know in advance the basis on which a court will view a transaction, financial advisors' opinions should consider all the possible valuation factors and methods and state that the conclusion has been reached in consideration of all such factors.

(b) In Wright v. Heizer Corp., CCH ¶ 95,399 (N.D. Ill. Dec. 3, 1975) the court, without discussion, assumed that Rule 10b-5 mandates fairness in a corporate conflict transaction even though full disclosure has been made.

(c) In Tanzer v. Haynie, CCH ¶ 95,399 (S.D.N.Y. Jan. 7, 1976) the court recognized the Second Circuit position that Rule 10b-5 does not extend beyond disclosure to mandate fairness, but said that in corporate conflict transactions it would hold the parties to a very high standard of disclosure. Of special note is the court's statement that where a fair and equitable opinion is included in a proxy statement special attention will be given to any studies by the parties themselves which might contradict the fair and equitable opinion.

3. Tender Offers; Injunctions Limited to Situations Where Shareholders Are Harmed; Management Resisting a Takeover Has a Fiduciary Duty to the Minority Shareholders. The Supreme Court decision in Rondeau v. Mosinee Paper Corp. limits the availability of injunctive relief under the Williams Act to situations where the shareholders of the target are harmed and does not extend to harm to the offeror or the target. While the court did not pass on the question whether Rule 10b-5 and § 14(e) establish a fiduciary duty of management to the public shareholders in takeover defense situations, it found that such a duty existed under California law. Klaus v. HiShear Corp., CCH ¶ 95,404 (9th Cir. Dec. 15, 1975).