To Our Clients

Williams Act; Schedule 13G;
Institutional Investors as a "Group"

In a letter to Paul F. Jock, Available Aug. 21, 1978, the Securities and Exchange Commission refused a no action position on the question whether five commercial banks which had acquired warrants exercisable for up to 31% of a company's common stock and which were lenders under a term loan agreement that contained customary loan covenants were a "group" and as such required to file a joint Schedule 13G under Section 13(d) (3). The SEC letter reads in part:

"Rule 13d-5(b)(l) provides that when 'two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership.' However, under Rule 13d-5(b)(2) there is deemed to be no acquisition of securities beneficially owned by other members of a group 'solely by virtue of their concerted actions relating to the purchase of equity securities directly from an issuer in a transaction not involving a public offering', provided that all the conditions of the Rule are met.

"On the basis of the facts presented, we are unable to conclude that the Banks are not a group under Section 13(d)(3) of the Act. In this regard, it appears that the Rule 13d-5(b)(2) may not be available inasmuch as all of its requirements do not appear to have been satisfied. Thus, paragraph (iv) of the Rule requires that the only actions among or between any members of the group with respect to the issuer or its securities subsequent to the closing date of the non-public offering are those which are necessary to conclude ministerial matters directly related to the completion of the offer or sale of the securities. From the facts presented in your letter, however, it appears that the Banks' relationship with each other extends beyond the mere purchase of warrants. The loan agreement and its subsequent amendments requires joint action by the Banks with respect to certain types of transactions which may be proposed by the Issuer. Such joint action by the Banks may encompass matters which have a fundamental impact on MCI's corporate operations, such as its ability to invest, incur additional debt, modify pension plans and many other matters that go well beyond the ministerial matters contemplated by Rule (2) and which are probative of the existence of a group.

"Moreover, the continuing and common interest which the Banks have as creditors in ensuring that their loans are repaid provides a significant incentive for a concerted disposition of the warrants, which represent the right to purchase in excess of 31% of MCI common stock now outstanding, to a new control group which could promise a greater likelihood of repayment of the loans. This potential for a rapid shift in control is, of course, precisely the type of disclosure at which Section 13(d) is aimed. This unity of interest suggests that the joint status which the Banks enjoy as lenders and security holders is not capable of separation for the purpose of finding that a group does not exist."

Thus it would appear that the SEC Staff views stock or convertible securities or warrants issued pursuant to or in connection with a typical bank loan agreement or insurance company private placement loan agreement as being subject to Williams Act reporting requirements even though any joint action under the loan agreement relates only to the debt and not to the stock.

M. Lipton