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To Our Clients:

Takeovers

Formation of a "Group" to Conduct a Proxy Fight. Cook United, Inc. v. Stockholders Protective Committee, CCH Fed. Sec. L. Rep. ¶ 96,875 (S.D.N.Y. May 21, 1979) contains several significant holdings with respect to the formation of a group to conduct a proxy fight. First, the court held that an initial meeting of several shareholders (whose shareholdings aggregated more than 5%) at which the shareholders endorsed the idea of a proxy fight but not all agreed to participate (and in fact some whose holdings were necessary to bring the total to 5% later decided not to participate) did not constitute the attending shareholders a group for the purpose of Section 13(d); such a group comes into being only where the participants holding 5% do in fact agree to act in concert. Second, the court held that the formation of a 13-person committee violated Rule 14a-2(a) which prior to the filing and delivery of a proxy statement limits the number of solicitations on behalf of someone other than management to 10 persons, but denied relief on the ground that the violation was technical and was cured when the committee later filed and distributed its proxy statement. Third, the court held that a lawyer who advises a committee and performs ministerial functions for the committee is not a participant in the proxy solicitation. Fourth, the court raised the question whether, in light of recent Supreme Court decisions denying implied private actions under the federal securities laws, such a right exists in a corporation seeking to enjoin its stockholders from engaging in a proxy fight, citing Howard v. Furst, 238 F.2d 790, 792 (2d Cir. 1956), cert. denied, 353 U.S. 937 (1957).

Tender Offer Disclosure Standards. Seaboard World Airlines, Inc. v. Tiger International, Inc., CCH Fed. Sec. L. Rep. ¶ 96,877 (2d Cir. 1979) held that the materiality test adopted by the Supreme Court in TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976) under the proxy rules was applicable to Section 14(e): a misstatement or omission is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding

whether to accept the tender offer. The Second Circuit then went on to hold not material the raider's characterization of the target's opinion that it was worth $20 per share in a merger as "unrealistic" despite the fact that the raider believed the liquidation value of the target to be $20 per share. In reaching this conclusion the court said that where the business of a company was to be continued and not liquidated by an acquiror and there was a representative market price for the company's shares, such market price and not asset value or liquidation value should be used in weighing fairness or reasonableness of price. In addition the court indicated that where the disclosure issue is the value of the target, the raider should not be required to disclose its view of value if that view is not the product of inside information obtained from the target, and that the failure of a target to inform its shareholders of management's opinion as to value may be considered in determining materiality. There was a strong and cogent dissent.

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