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To Our Clients:

Takeovers; Open Market Accumulations; Bank Financing

A. The decision in Chromalloy American Corp. v. Sun Chemical Corp., No. 79-935 C (3) (E.D. Mo. Aug. 20, 1979) illustrates three important points with respect to open market accumulations.

1. Definition of tender offer. The court held that ordinary NYSE purchases plus one large institutional block purchase were not a tender offer within the Williams Act or the Delaware or Missouri Takeover Statutes. The Court said:

> Plaintiff has made no showing that there are serious questions going to the merits of these counts so as to make them fair ground for litigation. Defendants' lengthy history of purchases was conducted almost entirely on the open market. The one purchase made off the exchange involved a normal block purchase transaction. This block purchase involved no solicitation of shares, no premiums offered, no time limit, and no minimum purchase contingency. On the record as it now stands, there is no way defendants' purchases could be considered a tender offer within the meaning of any of these statutes.
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> Regardless of the ultimate meaning ascribed to "tender offer" under the Williams Act, see, for example, "The Developing Meaning of Tender Offer Under the Securities Exchange Act of 1934", 86 Harv. L. R. 1250 (1973), this Court is certain that the situation presented here could not fall within that definition. The evidence adduced in support of this preliminary injunction showed no pressure whatsoever placed on the shareholders. Plaintiff, therefore, has not shown sufficiently serious questions going to the merits of these counts to warrant a preliminary injunction. Kennecott Copper Corp. v. Curtiss-Wright Corp., 584 F.2d 1195 (2d Cir. 1978); Brascan Limited v. Edper Equities Ltd., [current] CCH Fed. Sec. L. Rep. ¶ 96,882 (S.D.N.Y. 1979).

2. Schedule 13D disclosure of control intentions. The Court held that an intention to buy 20% coupled with attempts to gain board representation, were sufficient indicia of an attempt to obtain control as to require an explicit statement that the purchases were for control purposes and that disclosure of the 20% objective and attempts to gain board representation were not by themselves sufficient to satisfy the disclosure requirements. The Court said:

> A strict interpretation of the term "control" would not be in keeping with the remedial nature of the Williams Act. The fact that Sun intends to purchase only 20% of Chromalloy, and seeks only one or two members on the seventeen member board, is therefore not determinative of this issue.
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> From the time Alexander first became interested in Chromalloy, he was continually interested in the splits on the Board. He exhibited a constant interest in how to exert influence over the board, once he became a member. He has campaigned for the selection of Leon Toups as Chief Executive Officer, a man he has indicated he could control. In addition, the course followed by Alexander and Sun is similar to dealings in the past by those parties through which they took over, or attempted to take over, other corporations. Such evidence is probative of Alexander's intent and should not be ignored.

Nevertheless, the Court concluded that "if defendants amend their Schedule 13D to properly reflect their intention, absent unforeseen contingencies, to attempt to ultimately obtain control of Chromalloy, injunctive relief would be inappropriate". Therefore, the Court granted only limited relief, enjoining Sun Chemical from acquiring further Chromalloy shares only until it amends its Schedule 13D to the satisfaction of the Court. In addition, the Court rejected the plaintiff's request that it order the defendants to divest all Chromalloy shares they acquired, inasmuch as "[t]o the extent that the price of Chromalloy stock was effected by the misleading statements in defendants' Schedule 13D, there is an adequate remedy at law for those who bought or sold."

3. Constitutionality of state takeover statutes. The Court held that there is sufficient doubt as to the constitutionality of the state takeover statutes to warrant denial of a preliminary injunction enforcing them.

B. Fuqua has settled the SEC injunction action against its aborted Hoover takeover attempt. The settlement requires Fuqua to establish an acquisitions committee whose members are not objectionable to the SEC. The committee is to review Fuqua's acquisition procedures and related disclosures for compliance with the federal securities laws. All acquisitions, including purchases of securities related thereto, must be submitted to the committee in advance of any purchases. SEC v. Fuqua Industries, Inc., CCH Fed. Sec. L. Rep. ¶ 96,954 (D.C.D.C. Aug. 21, 1979).

C. The decision by the Wisconsin Commissioner of Securities in Matter of Harnischfeger Corp. and PACCAR, Inc., Aug. 27, 1979, is another in the series that rejects the argument that a bank which does not disclose or misuse confidential information nevertheless has a fiduciary duty to refrain from advising or financing the takeover of a borrower. The Commissioner said:

> Nevertheless, in connection with the third subquestion, Harnischfeger argues that it is a per se violation of the antifraud provisions of the Wisconsin Uniform Securities Law for a bank in Citibank's position to assist a third party in the identification of a potential target company and the preparation of a plan for acquiring its securities if the target is a preexisting bank customer, regardless of whether any confidential information is utilized in the process. However, Harnischfeger fails to cite a single case for the proposition that such activity constitutes a per se violation of s. 551.41(1) or (3), Wis. Stats. That statute provides, in relevant part, that:
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> > "551.41 Sales and purchases. It is unlawful for any person, in connection with the offer, sale or purchase of any security in this state, directly or indirectly:

> "(1) To employ any device, scheme or artifice to defraud;
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> "(2) . . . ;
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> "(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person."

Implications that customary banking or corporate activity constitute per se fraud under the securities laws should not be drawn lightly. Assuming that no material nonpublic information given by Harnischfeger in confidence to Citibank has been either given to PACCAR by Citibank or used internally by Citibank in advising PACCAR, it is simply inconceivable that the rendering of investment advice by Citibank, in and of itself, could constitute either a device, scheme or artifice to defraud or an act, practice or course of business which operates or would operate as a fraud or deceit upon any person. Borrowers may not appreciate their lending banks providing assistance to third parties in connection with a hostile take-over, and may wish to protect themselves by contract or otherwise, but such activity by itself does not rise to the level of fraud under the securities law.

* * *

Nor does a commercial lender-borrower relationship create the type of fiduciary relationship which would require Citibank to advise Harnischfeger of its activities on behalf of PACCAR. As stated by the Circuit Court in the Washington Steel case, it is not possible "to draw a fiduciary rabbit from a commercial loan agreement hat . . . ." To similar effect, see American Medicorp, Inc. v. Continental Illinois National Bank, No. 77-3865 (N.D. Ill., filed December 30, 1977). If a fiduciary relationship and consequent per se breach of fiduciary duty

> could be established so easily, a company wishing to insulate itself from take-over activity could merely establish minor borrowing relationships with, and provide material nonpublic information in confidence to, the nation's major lending institutions.

The _Harnischfeger_ decision is also interesting for the point that even where a cash tender offer price is below the market price of the target's stock, the Commissioner will not pass on the fairness of the offer price, but will leave it to the market. "When an offer is for cash, the fairness of the offer should be determined by the market, especially in a case such as this where there is a broad and active cash market for the stock. In the instant case, it may be noted that the market price of Harnischfeger's stock has exceeded the offer price almost continuously since the inception of these proceedings. The factors underlying the market's valuation of Harnischfeger's stock cannot be determined, nor are they relevant for this proceeding. Assuming the Offer does go forward at some time in the future, the market will determine the fairness and adequacy of PACCAR's Offer."

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