WACHTELL, LIPTON, ROSEN & KATZ

July 29, 1983

To Our Clients:

Disclosure of Merger Negotiations

The Second Circuit Court of Appeals has reaffirmed that a company is not required to disclose merger negotiations even though the negotiations have been approved by the board of directors.

The Court said:

> Disclosure is a matter of corporate discretion where legally material facts are not involved, and, absent a finding of materiality, disclosure at one time does not imply a legal obligation to disclose at a different time. It does not serve the underlying purposes of the securities acts to compel disclosure of merger negotiations in the not unusual circumstances before us. . . . Such negotiations are inherently fluid and the eventual outcome is shrouded in uncertainty. Disclosure may in fact be more misleading than secrecy so far as investment decisions are concerned. We are not confronted here with a failure to disclose hard facts which definitely affect a company's financial prospects. Rather, we deal with complex bargaining between two (and often more) parties which may fail as well as succeed, or may succeed on terms which vary greatly from those under consideration at the suggested time of disclosure. We have no doubt that had Pan Am disclosed the existence of negotiations on August 15 and had those negotiations failed, we would have been asked to decide a section 10b-5 action challenging that disclosure.

Reiss v. Pan American World Airways, CCH Fed. Sec. L. Rep. ¶ 99,266 (2d Cir. June 29, 1983).

M. Lipton