Press (Gov. Exs. 60, 61, 62; Tr. 394-399). Petitioner telephoned his broker and instructed him to purchase stock in each of the target companies for his margin account (Gov. Exs. 6, 7, 10, 61; Tr. 75, 117-119). As a result of those orders, petitioner received confirmations of purchase by mail.[5] Petitioner told his broker that he was buying the stocks to make a quick profit (Tr. 102). He did not disclose to his broker or any seller, however, that he had based his investment decisions on confidential information obtained covertly from customers of Pandick Press (Tr. 74, 96, 103, 114, 353-354).

Within days or hours after petitioner purchased the stock, the offering companies publicly announced their take-over plans (Gov. Exs. 50, 51, 52, 53, 44, 45, 46, 47A, 48). The price of the stock of the target companies rose sharply. Petitioner sold out immediately thereafter, realizing over $30,000 in profits (Gov. Exs. 7, 10, 61).[6]

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[5] Each count of the indictment charged that petitioner used the facilities of interstate commerce in furtherance of his scheme by causing confirmation slips to be sent through the mails by his broker. The indictment focused on petitioner's purchase of stocks issued by five different companies: Counts 1-2 (USM Corp.); Counts 3-10 (Riviana Foods, Inc.); Counts 11-12 (Foodtown Stores, Inc.); Count 13 (Booth Newspapers, Inc.); Counts 14-17 (Sprague Electric Co.).

[6] All of the companies whose stocks petitioner purchased were subject to tender offers, except for Riviana Foods, which was involved in a negotiated merger. Petitioner's purchases and sales involved as many as 3200 shares on one occasion, 2300 shares on another occasion, and 1100 shares on another (Pet. App. A4 n.3).

Petitioner's purchases of the target stocks represented, in some cases, a substantial portion of the total daily trading in those stocks. For example, his purchase of Riviana Foods, Inc., on February 6, 1976, amounted to approximately one-half of the total volume of the company's stock traded that day (Tr. 421). Similarly, his purchase of Foodtown Stores, Inc., on October 11, 1976, amounted to one-half of the total trading volume (*ibid.*). None of the persons who sold their stock to petitioner knew that the companies were about to become the targets of tender offers or mergers (Tr. 353). The information concerning the forthcoming acquisitions was material information that would have affected the investment decision of those sellers (*ibid.*).[7] Investors who had sold their stock to petitioner testified that they would not have done so if they had been told that the issuer companies were about to become merger partners or targets of tender offers (Tr. 360, 372, 375, 384).[8]

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[7] Petitioner stipulated as follows (Tr. 353):

> If called as witnesses to testify at trial, the sellers of the shares of common stock listed in the indictment from whom Chiarella purchased the stock and any intermediary brokers would testify that they did not know that the company's stock they were selling was about to be the subject of a tender offer or merger.

Because acquiring firms typically offer a premium to stockholders to obtain their shares, the imminence of a tender offer or merger is a material fact, as petitioner stipulated (*ibid.*):

> It is further stipulated that information concerning upcoming tender offers or mergers is material.

[8] One of the sellers, an employee of one of the target companies (Sprague Electric Co.), testified that he noticed that the price of the company's stock was rising prior to the

Petitioner was the only defense witness. He admitted that he had ascertained the names of the target companies by using the confidential documents submitted by Pandick's customers and had purchased the securities described in the indictment on that basis (Tr. 474-477).[9] Although petitioner denied that he intended to defraud anyone (Tr. 483-484) and asserted that his actions were no different from those of tender offerors who purchase limited quantities of stock on the open market without disclosure (Tr. 491-492), petitioner acknowledged that he knew that "it was wrong to use confidential information for personal gain" (Tr. 497; see also Tr. 495-496, 498, 500-502, 509, 512) and that such use could lead to discharge (Tr. 479-480, 495). When confronted on cross examination with the large warning signs at Pandick Press describing applicable criminal penalties, petitioner testified that he had never read

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announcement of the tender offer and shortly after his sale. He inquired within his company about the reason for the price rise, but the vice president of the company replied that he did not know (Tr. 362-363). Another seller, who was a professional security analyst, sold shares of USM Corporation to petitioner shortly before announcement of the tender offer. He testified that, despite his professional training, he was unable to perceive that a tender offer was imminent on the basis of available public information (Tr. 369-372).

[9] Petitioner stipulated that the mails were used in conjunction with these transactions (March 1978 stipulation, ¶¶ 1, 2). He further stipulated that he "did not tell anyone or communicate any information he may have had regarding the subject of a tender offer or merger in connection with the purchases of stock listed in the indictment" (*id.* at ¶ 4(a)).

the signs even though he had passed them more than 640 times (Tr. 502-508).[10]

Petitioner testified that he realized that he had been fired by Pandick Press "because I was using insider's information" (Tr. 514).[11] When asked whether he knew that it was against the law to trade on the basis of insider information, he said, "I didn't know it was a criminal law. * * * It was a violation, as far as I knew" (Tr. 515). When pressed on that point, petitioner admitted that he realized that use of insider information "was against the SEC" (Tr. 516).[12]

2. The district court instructed the jury that before it could return a verdict of guilty it must find beyond a reasonable doubt that petitioner employed a device, scheme, or artifice to defraud, or engaged in an act, practice or course of business that operated or would operate as a fraud or a deceit, as charged in the indictment; that petitioner did so knowingly and

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[10] At petitioner's sentencing hearing, the district court characterized that testimony as "perjury beyond a reasonable doubt" (Pet. App. A17 n.18).

[11] When petitioner was discharged for trading on the basis of confidential information, he did not protest but simply said: "I understand" (Tr. 234-235).

[12] Petitioner also admitted having read about insider trading cases in the newspaper (Tr. 518):

Q. You also knew that it was wrong against SEC rules to use inside information, is that right?

A. What I read in the papers, cases that I have.

Q. So the answer is yes?

A. Yes.

willfully; that the fraudulent conduct occurred in connection with a purchase or sale of securities; and that the mails were used in furtherance of the fraudulent scheme (Tr. 681-683). The court further instructed the jury that, to sustain a charge of fraudulent trading on the basis of material non-public information, the jury would have to find beyond a reasonable doubt both that the information was non-public and that it was not disclosed in connection with the stock transaction (Tr. 685-686).

The court defined "willful and knowing" conduct for the jury, stressing that such conduct is voluntary, intentional and deliberate and not a result of "innocent mistakes, negligence or inadvertence" (Tr. 688). The court added that the government must prove (*ibid.*):

> a realization on the defendant's part that he was doing a wrongful act, * * * and that the knowingly wrongful act involved a significant risk of effecting the violation that occurred.

The court also told the jury that evidence admitted during trial showing that certain tender offerors sometimes buy securities on the open market before filing disclosure statements may be considered in determining whether petitioner acted with the understanding that his conduct was wrongful (Tr. 689). It pointed out in this connection (Tr. 692):

> The central issue I suggest to you is what was Mr. Chiarella's state of mind when he was engaged in any one of them, using the clues and decoding the information, as he testified, know-

> ing that this violated company policy? Did he have any realization that he was doing a wrongful act or did he not? Did he believe that because he had an awareness a corporation could properly purchase stock in a target company without revealing its intent to make a tender offer, that he could under the circumstances figure out the target companies' names and purchase their stock for his own personal gain without its being a wrongful act on his part?

The jury subsequently returned its verdict of guilty on all 17 counts of the indictment (Pet. App. A6).

3. The court of appeals affirmed the judgment of conviction, one judge dissenting (Pet. App. A1-A34). The court held that petitioner's secret conversion of information provided in confidence by the acquiring companies, and his use of that information to purchase securities, operated as a fraud on the acquiring companies (*id.* at A13 & n.14). The court underscored the importance to acquiring companies of preserving the secrecy of their acquisition plans and avoiding trading or leaks that could cause "an anticipatory rise in the market price of the target company's stock" (*id.* at A3, A12-A13). The court also held that petitioner's use of confidential information converted from the acquiring companies operated as a fraud on the persons who sold him securities (*id.* at A6-A9).

The court of appeals concluded that, in these circumstances, petitioner was under a duty either to abstain from trading or to await public disclosure of the information before purchasing securities from uninformed investors (Pet. App. A6-A9). While the

court did not hold "that no one may trade on non-public market information without incurring a duty to disclose" (*id.* at A10), it concluded that such a duty applied to petitioner, who had "converted to his personal use confidential information entrusted to him in the course of his employment" (*id.* at A13). The court added that "[i]t is difficult to imagine conduct less useful, or more destructive of public confidence in the integrity of our securities markets, than Chiarella's" (*id.* at A15).

The court of appeals rejected petitioner's contention that he did not receive fair notice that his conduct violated Section 10(b) and Rule 10b-5. It noted that although "the precise fact pattern at issue here" had not been addressed in prior decisions (Pet. App. A15), imposition of liability was a logical and predictable application of prior authorities, and that the SEC's earlier charges of antifraud violations by other printers engaged in identical practices provided substantial warning. The court pointed out that petitioner received additional notice of potential criminal liability by the posters that were placed throughout the premises of Pandick Press, observing that "[f]ew malefactors receive such explicit warning of the consequences of their conduct" (*id.* at A17).

The court also ruled that the charge to the jury concerning petitioner's state of mind complied with this Court's holding in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (Pet. App. A17-A20). It observed that *Hochfelder* had established that the scienter requirement of Section 10(b) and Rule 10b-5 precluded imposition of liability in a private action for

damages on the basis of negligent misstatements or omissions. That holding, the court reasoned, does not bar a criminal conviction where the government proves a willful and knowing scheme to defraud, undertaken with the realization that the behavior in question is wrongful.

Judge Meskill dissented, concluding that application of the "disclose or abstain" doctrine to persons in petitioner's position was a departure from prior law. In his view, petitioner did not "owe[] a duty of disclosure to the sellers of target stock" (Pet. App. A29), and any breach of duty owed to the acquiring companies whose information petitioner admittedly converted constituted a mere breach of fiduciary duty, not fraud (*ibid.*). Judge Meskill concluded that a criminal prosecution in the circumstances of the present case violated principles of due process, since "fair notice" of potential liability did not emanate "from the language of the statute itself, from prior judicial interpretation, or from established custom and usage" (*id.* at A32).

SUMMARY OF ARGUMENT

I.

Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b), proscribes any deceptive device or contrivance used in connection with a Securities purchase or sale if prohibited by the rules of the Securities and Exchange Commission. SEC Rule 10b-5, 17 C.F.R. 240.10b-5, broadly prohibits the use in connection with a securities transaction of any device, scheme, or artifice to defraud, or any practice that

operates or would operate as a fraud on any person. Congress intended Section 10(b) to serve as a "catch-all." The statute reaches all new "cunning devices" used to commit fraud, especially those devices that "fulfill no useful function." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 203-206 (1976). As this Court has frequently noted, Congress enacted the anti-fraud provisions of the federal securities laws "'to achieve a high standard of business ethics . . . *in every facet of the securities industry.*'" *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 6 (emphasis in original).

1. Petitioner violated Section 10(b) and Rule 10b-5 by converting confidential information belonging to the customers of his printing firm and using that information for personal enrichment in the stock market. His secret misappropriation operated as a fraud on the businesses that entrusted him with that information. The court of appeals properly characterized petitioner's conduct as "conversion"; in the words of the district court, it was equivalent to "embezzlement" (Pet. App. A13, B2).

Misuse of confidential information concerning impending tender offers and acquisitions can disturb market prices and prematurely reveal acquisition plans, contrary to the interests of the acquiring companies. Thus, petitioner's misappropriation placed his interests in direct conflict with those of the acquiring companies to whom he owed a duty of confidence. As their agent, petitioner had an obligation to disclose his actions. Under common law principles, fail-

ure of an agent to disclose self-dealing or conflicts of interest affecting the subject matter of the agency is a form of deceit. It also violates Section 10(b) and Rule 10b-5 where, as in this case, the agent's fraud occurs in connection with a securities purchase or sale. Here, as in *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 10-13 (1971), concealed misappropriation by a fiduciary, achieved through the vehicle of a securities transaction, constitutes a violation of the statute and the rule.

2. Petitioner's use of converted information for personal financial gain also operated as a fraud on the uninformed investors who sold him securities. At common law, a purchaser was not privileged to take advantage of a seller by use of material information inaccessible to the seller if that information was obtained through unlawful methods. The rule of *caveat emptor*, which was designed to reward astuteness and penalize heedlessness, did not apply to exploitation of uninformed sellers through converted information that the seller, no matter how diligent, could not have lawfully obtained.

Moreover, under the federal securities laws the "philosophy of full disclosure" long ago superseded that of "*caveat emptor.*" See *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972). Consistent with this statutory philosophy, the decisions of the lower courts have uniformly held that persons who misappropriate confidential commercial information and who use that information for personal enrichment in the stock market infringe the statute and the

rule. See, *e.g.*, *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969).

The fact that petitioner's fraud involved the misappropriation of important information directly related to the market price of the securities that he purchased, rather than information about the earning power of the companies that issued those securities, underscores, rather than minimizes, the illegality of his actions. Foreknowledge of an acquisition or tender offer—events entailing a sudden and substantial increase in market values—is certain knowledge that the stock of the target company is worth significantly more than its owners believe. Obtaining that information by contrivance in order to exploit uninformed investors is an act of dishonesty and deception that the securities laws properly should and do condemn.

This Court's decision in *Affiliated Ute Citizens* v. *United States*, *supra*, establishes that the failure of purchasers to disclose to sellers important facts relating to the market price of securities can violate Section 10(b) and Rule 10b-5. The defendants in *Ute* bought securities based on information concerning their market price that the defendants obtained by virtue of their privileged position in the market place. Financial printers also occupy such a privileged position. Petitioner was entrusted with highly material and confidential information that would cause substantial unfairness and unjust preferences if selectively revealed or misused. It was his job to help prepare disclosure documents for dissemination to all investors on an equal basis. He perverted that

function by using the information to enrich himself. His conduct is wholly at odds with "[t]he high standards of business morality" exacted by the federal securities laws. *SEC* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 201 (1963).

Petitioner's conduct bears no resemblance to that of tender offerors or other business firms that purchase securities (within statutory and regulatory limits) while in possession of information about market conditions generated by their own bona fide commercial activity. The securities laws have never been interpreted in such a manner as to preclude legitimate economic activity. Petitioner's conversion and misuse of material confidential information, by contrast, was harmful to the bona fide business activity of acquiring companies and to the investing public. His activities present a clear example of deceptive conduct that can "fulfill no useful function." *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U.S. at 204-205, 206.

II.

Petitioner received fair notice that his conduct could result in the imposition of criminal sanctions. The literal language of Section 10(b) and Rule 10b-5 placed him on notice that all deceptive devices and contrivances practiced in connection with a securities transaction violate the law. Prior to his actions, the lower courts repeatedly had denounced insider trading (*SEC* v. *Texas Gulf Sulphur Co.*, *supra*) and this Court had held that frauds involving the misuse of

market information relating to the value of securities were forbidden (*Affiliated Ute Citizens* v. *United States, supra*). Lower court decisions had also established that use of information concerning impending corporate acquisitions to purchase target company stock violated the statute and the rule (*SEC* v. *Shapiro*, 494 F.2d 1301, 1303-1307 (2d Cir. 1974)). Similarly, the SEC had commenced well-publicized enforcement proceedings against printers who had misused confidential data concerning forthcoming tender offers (*SEC* v. *Sorg Printing Co.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,767 (S.D. N.Y. 1974)). Moreover, prior to petitioner's actions, the Department of Justice had instituted criminal prosecutions in many cases where willful violations of Section 10(b) and Rule 10b-5 were found to exist.

As the court of appeals pointed out, this case presents no abstract question concerning the sufficiency of notice provided by statute books and judicial opinions. Petitioner received explicit warning from large posters placed throughout his printing firm that use of confidential information for securities trading would subject him to fines and imprisonment. Few malefactors ever receive such specific and personal warning about the consequences of their actions.

Furthermore, the district court instructed the jury that it could not find petitioner guilty unless the government proved beyond a reasonable doubt that he acted willfully and knowingly with the understanding that his conduct was wrongful. Thus, there is no ques-

tion here of convicting a defendant who believed that his actions were proper. This Court repeatedly has held that, where a defendant acts with *mens rea*, constitutional standards of fair notice are satisfied even if the prohibitory language of the statute is general or, indeed, even if the precise boundaries of the statute are subject to debate. Where a defendant consciously acts in a manner that he knows to be wrongful, and where his conduct is fairly encompassed by the literal terms of the criminal statute, the Due Process Clause does not stand in the way of his conviction. See, *e.g.*, *Nash* v. *United States*, 229 U.S. 373, 377 (1913); cf. *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 438-441 (1978) (defendants may be convicted of "rule of reason" violations under the antitrust laws where *mens rea* is proven).

III.

The district court's charge to the jury emphasized that it could not find petitioner guilty unless it concluded that he acted willfully and knowingly, with consciousness that his conduct was wrongful. The court specifically instructed the jury that it could not convict petitioner if his actions were merely negligent. That instruction comports in all respects with *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976). *Hochfelder* held that Section 10(b) and Rule 10b-5 require proof of scienter as opposed to simple negligence. The scienter standard is satisfied by proof of knowing and willful misconduct. At common law, knowing and willful conduct was equivalent to scienter. The lower

courts uniformly have held that such proof satisfies the scienter standard adopted in *Hochfelder*.

The district court properly rejected petitioner's proposed instruction that the jury must find an "evil ambition to injure someone." That instruction not only misstates the law but also has no logical application in a case of this kind. Persons trading on the basis of material non-public information on impersonal securities exchanges are unaware of the identities of other traders. They rarely entertain an evil ambition to injure a victim. Their only intent is to make a profit and avoid detection. If criminal or civil sanctions are to be available in cases involving trading on material non-public information, the statute and the rule cannot be construed to require an evil ambition to injure some victim. Proof of knowing and willful misconduct, undertaken with a realization of its wrongfulness, is a sufficient showing of *mens rea* in a criminal prosecution of this kind. *United States* v. *United States Gypsum Co.*, *supra*, 438 U.S. at 443-446.

IV.

The district court's receipt of an admission made by petitioner to the New York Department of Labor did not constitute reversible error. Under New York law, the Department of Labor may disclose statements given in connection with unemployment insurance benefits in a number of different situations, and the Department discloses such statements to the FBI. Indeed, the New York Commissioner of Labor approved use of petitioner's admission in the present

prosecution. Thus, receipt of this evidence did not infringe any state policy.

The federal policy in favor of admissibility is expressed in Fed. R. Evid. 402 and 501, which authorize the receipt of all relevant evidence in criminal trials unless barred by the Constitution, a federal statute, or the federal common law. No principle of federal constitutional, statutory, or common law requires exclusion here. In the circumstances of this case the district court properly declined to erect a new federal privilege. See *United States* v. *Nixon*, 418 U.S. 683, 708-713 (1974). Moreover, receipt of petitioner's admission, even if erroneous, was clearly harmless. The government proved the substance of the admission through independent and uncontradicted evidence. Receipt of this cumulative evidence could not have affected the outcome of the trial.

ARGUMENT

I. PETITIONER'S SECRET CONVERSION OF MATERIAL CONFIDENTIAL INFORMATION FROM THE CORPORATIONS THAT RETAINED HIS PRINTING FIRM, AND HIS USE OF THAT INFORMATION TO PURCHASE SECURITIES FROM UNINFORMED INVESTORS, VIOLATED SECTION 10(b) OF THE SECURITIES EXCHANGE ACT OF 1934 AND SEC RULE 10b-5

Petitioner admits that he converted confidential information from the corporations that entrusted his printing firm with their documents (Br. 6-7) and that he used that information to purchase stock from unsuspecting investors (*ibid.*). He has stipulated that

the information he converted was of material importance and that he made no disclosure to anyone before purchasing the securities (and then quickly reselling them at a large profit to himself) (see pages 9-10, *supra*). Petitioner contends, however, that his conduct cannot be deemed to be fraudulent under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), or Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5, because he was not "an 'insider,' the 'tippee' of an 'insider', or one with a special relationship with other traders and investors" (Br. 13).

The court of appeals correctly rejected petitioner's contention, in recognition of the well established principal that Section 10(b) and Rule 10b-5 apply to "any" fraudulent scheme (*Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 151 (1972)) and are not limited to frauds involving "inside" corporate information or trading between persons having an arbitrarily defined "special relationship." As this Court recently noted in *United States* v. *Naftalin*, No. 78-561 (May 21, 1979), slip op. 6, the antifraud provisions of the federal securities laws were intended "'to achieve a high standard of business ethics . . . *in every facet of the securities industry*'" (emphasis in original). As we demonstrate below, petitioner committed fraud against both the acquiring corporations whose information he converted and the investors who sold him securities in ignorance of forthcoming market events of critical importance. Since petitioner's fraud occurred "in connection with" his

purchase of securities, it constituted a violation of the statute and the rule.[13]

A. Section 10(b) And Rule 10b-5 Apply To Any Deceptive Practice Used In Connection With A Purchase Or Sale Of Securities, Not Just The Species Of Fraud Involving Insider Information Or A Special Relationship Between Buyer And Seller

In considering petitioner's assertions regarding the limited scope of Section 10(b) and Rule 10b-5, the primary guide must be the language of the statute and the rule. See *Touche Ross & Co.* v. *Redington*, No. 78-309 (June 18, 1979), slip op. 7 ("as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself"); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976). The literal language of the statute and its implementing rule prohibits *all* frauds, not just certain categories of fraud. Section 10(b) provides that it is unlawful for "any person," "directly or indirectly," to "use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of

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[13] This is a criminal prosecution brought by the United States to enforce the federal securities laws. It does not present the complications often involved in private actions, including questions of standing to sue and the scope of private redress. See *United States* v. *Naftalin, supra*, slip op. 5 n.6.

investors." Pursuant to this broad mandate, Rule 10b-5 prohibits the use of "any device, scheme or artifice to defraud," and also forbids any person "[t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person" in connection with a securities purchase or sale.

The statute and rule could hardly have employed broader terms. There is no limitation on the category of persons who may violate the statute or rule. Nor is there a limitation on the category of fraud or on the identity of the victim. The antifraud provisions apply to "any person" and extend to "any" fraudulent device or contrivance, whether practiced directly or indirectly. See *Affiliated Ute Citizens* v. *United States*, *supra*, 406 U.S. at 151 (footnote omitted):

> These proscriptions, by statute and rule, are broad and, by repeated use of the word "any," are obviously meant to be inclusive. The Court has said that the 1934 Act and its companion legislative enactments embrace a "fundamental purpose . . . to substitute a philosophy of full disclosure for the philosophy of *caveat emptor* and thus to achieve a high standard of business ethics in the securities industry."

Accord, *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 9-13 & n.7 (1971) (quoting *A. T. Brod & Co.* v. *Perlow*, 375 F.2d 393, 397 (2d Cir. 1967)); *United States* v. *Naftalin*, *supra*, slip op. 3-8. Thus, the literal text of the statute and the rule provide no support for the argument that

they should be limited to frauds practiced by "insiders" or "tippees," or to frauds involving a "special relationship" between buyer and seller.

Where a defendant's scheme to defraud involves "deception," "manipulation" or "non-disclosure," as opposed to simple breach of fiduciary duty (*Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 476 (1977)), is accompanied by "scienter" rather than negligence (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 214 (1976)), and involves the purchase or sale of securities and the facilities of interstate commerce, the broad prohibitions of Section 10(b) and Rule 10b-5 apply at face value. As this Court emphasized in *Hochfelder*, Section 10(b) was conceived as a "catch-all" to "deal with new manipulative or cunning devices." 425 U.S. at 203. Quoting from the remarks of Thomas Corcoran, a spokesman for the drafters of the legislation, the Court concisely summarized the statute's prohibition: " 'Thou shalt not devise any other cunning devices.' " *Id.* at 202. See also S. Rep. No. 792, 73d Cong., 2d Sess. 18 (1934) (Section 10(b) supplements narrower antifraud prohibitions by extending to "any other manipulative or deceptive practices"). Congress intended the antifraud prohibition to fall with special force on " 'manipulative and deceptive practices which . . . fulfill no useful function' " and on " 'illicit practices,' where the defendant has not acted in good faith." *Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U.S. at 206. As Professor Loss has summarized, Section 10(b) was intended to serve as an "omnibus provision" to curtail all fraudulent schemes used in connection with securities trans-

actions. VI L. Loss, *Securities Regulation* 3528 (1969 ed.). Accord, 1 A. Bromberg, *Securities Law Fraud: SEC Rule 10b-5*, § 2.2(332) (1977). In light of the broad "catchall" purposes of Section 10(b) and Rule 10b-5, there is no basis for petitioner's argument that the unusual nature of the fraud that he practiced provides immunity from liability.

B. Petitioner Defrauded The Corporations That Entrusted Him With Confidential Information When He Secretly Converted That Information And Used It For Personal Profit In The Stock Market

Petitioner's secret conversion of confidential information operated as a fraud on the corporations that entrusted him with that information. Because he practiced his scheme to defraud through securities purchases and sales, he violated Section 10(b) and Rule 10b-5.

The indictment in this case charged that petitioner's actions operated as a fraud on the sellers of the securities. It also charged that his conduct amounted to a device, scheme, or artifice to defraud, without limitation on the category of victims (Indictment, ¶ 1). Accordingly, in its pretrial order denying petitioner's motion to dismiss the indictment, the district court explained that, if proven, the scheme charged in the indictment would operate as a fraud on the corporations whose information petitioner converted (Pet. App. B2-B3):

> Crediting the indictment, there is no question that Chiarella wrongfully took corporate information—unquestionably material and non-public

> —entrusted to him by offering corporations, and used it solely for personal profit, which information was "intended to be available only for a corporate purpose and not for the benefit of anyone." * * * The analogy of embezzlement by a bank employee immediately springs to mind, and, of course, embezzlement implies fraudulent conduct. *E.g., Grin* v. *Shine*, 187 U.S. 181, 189-90 * * * (1902). Chiarella can, therefore, hardly claim that the acts alleged did not operate as a fraud. * * * Chiarella's purchases further operated as a fraud upon the acquiring corporations whose plans and information he took while he was setting them in type, because his purchases might possibly have raised the price of the target companies' stock, increasing the cost of legitimate market purchases by such acquiring corporations, and thus constituted "a manipulative or deceptive device or contrivance" within the prohibition of § 10(b) and Rule 10b-5.

In light of the uncontradicted evidence of undisclosed misappropriation of confidential information presented at trial, the prosecutor argued to the jury that petitioner's conduct constituted a fraud against the acquiring companies (Tr. 605).[14]

The court of appeals agreed with the district court that petitioner's conduct operated as a fraud on the tender offerors as well as the sellers of securities (Pet. App. A13 n.14):

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[14] The district court's charge to the jury emphasized that Section 10(b) and Rule 10b-5 could be violated by a fraud practiced on "any person" in connection with a purchase or sale of securities (Tr. 681, 683, 686-687). This phrase, like Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), contains no limitation on the category of persons who may