particularly in a period of increased tender offer activity. The price of a security at any given time depends on two things: the earning power and assets of the issuing corporation and the market demand for the security. The market may capitalize corporate earnings and assets at different levels, depending upon investor demand. Demand for securities reaches its apex during a tender offer, when the offeror agrees to pay a "premium" above the current market price. That premium can be quite substantial. A recent survey of tender offers occurring in 1975 and 1976 showed that the premium over the previous closing price for target company shares ranged from 22% to 66%. See Troubh, *supra*, 54 Harv. Bus. Rev. at 82.[36] Foreknowledge of a tender offer is *certain* knowledge that the shares owned by the seller are worth substantially more than he believes. Obtaining such knowledge by theft or other dishonest means in order to exploit a seller who is in ignorance of an impending tender offer is an act of deception and dishonesty properly forbidden by Section 10(b) and Rule 10b-5.

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[36] See also Statistical Spotlight, *Forbes*, Feb. 9, 1979 at 69 (analysis of 40 largest takeovers in 1978 showed premiums of 40% or more to be common, with premiums of over 100% in some cases). As noted in Borden & Weiner, *An Investment Decision Analysis of Cash Tender Offer Disclosure*, 23 N.Y. L.Sch. L. Rev. 553, 575-576 (1978), from the point of view of the offeree, "price is * * * the name of the game." Where there is a reasonable premium, "investors almost always sell."

b. *The statutory context shows that Section 10(b) applies to all frauds, including market information frauds*

The structure of the Securities Exchange Act of 1934 supports the view that Section 10(b) should extend to all fraudulent schemes, including those involving market information. Section 10(b) stands between Sections 9 and 11 of the Act; the three provisions may be viewed *in pari materia*. See VI Loss, *supra*, at 3528. See also *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 466 (1969) ("the interdependence of the various sections of the securities laws is certainly a relevant factor in any interpretation of the language Congress has chosen * * *").

Section 11(b) of the Act, 15 U.S.C. 78k(b), places strict limitations on securities exchange specialists who possess non-public market information. Those limitations prevent tipping of market information and discretionary trading for customers on the basis of such information:

> It shall be unlawful for a specialist or an official of the exchange to disclose information in regard to orders placed with such specialist which is not available to all members of the exchange, to any person other than an official of the exchange, a representative of the Commission, or a specialist who may be acting for such specialist * * *. It shall also be unlawful for a specialist permitted to act as a broker and dealer to effect on the exchange as broker any transaction except upon a market or limited price order.

The specialist's market-making role necessitates his own purchases and sales of securities to promote continuous and orderly price movements. But Congress prohibited misuse of the market information entrusted to him: "The specialist is forbidden to reveal the orders on his books to favored persons. This information must be available to all members or else kept entirely confidential. The specialist is likewise prohibited from exercising purely discretionary orders as distinct from market or limited price orders." S. Rep. No. 792, 73d Cong., 2d Sess. 18 (1934); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 22 (1934). See also S. Rep. No. 1455, 73d Cong., 2d Sess. 25-30 (1934). During debates on Section 11(b), Congress focused on the unfairness inherent in permitting certain traders to utilize non-public market information for personal gain:

> [I]s there not a danger that a few men on the inside, the officers of the exchange, may secure from the specialist in advance any and all information they desire, precisely as they have heretofore?
>
> Will they not still be able to obtain information that will apprise them in advance of all the other members of the exchange knowledge of the accumulated overnight orders to buy or sell various stocks, the amount and the prices at which the sellers will sell, and the prices at which buyers are willing to buy? * * * Armed with this confidential information, they would be able easily to decide what course to pursue as between buying or selling. Or, in other words, * * * they

> would have the opportunity of looking into all the other players' hands, and then of making their bets at this gambling table in safety not only to the disadvantage of outside investors but even to the [dis]advantage of their fellow members of the gambling fraternity as well. It is practically the same as if they were playing with marked cards.

78 Cong. Rec. 8031-8032 (1934) (remarks of Rep. Sabath). These concerns led to the adoption of the restrictions on specialist activities contained in Section 11(b).

Like Section 11(b), Section 9(a)(1) of the Act, 15 U.S.C. 78i(a)(1), seeks to prevent market information frauds. That provision prohibits, *inter alia*, manipulative securities transactions that have

> * * * the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security * * *.

Market manipulation, in the view of Congress, effectively defrauds public investors by misleading them about current market facts. See S. Rep. No. 1455, 73d Cong., 2d Sess. 32 (1934) ("In all cases fictitious activity is intentionally created, and the purchaser is deceived by an appearance of genuine demand for the security"); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10 (1934).

Viewing Section 10(b) in this statutory context thus fortifies the conclusion that it applies to all

fraudulent schemes, including those involving market information. Congress recognized the danger to investors from market information frauds and attempted to minimize that danger in Sections 9 and 11 of the Act. Section 10(b), the catchall provision inserted between Sections 9 and 11 to deal with any new cunning devices, should be construed in accordance with that recognition. In the view of Congress, misuse of market information is a deceptive device or contrivance—in the words of Representative Sabath, it is the same as "playing with marked cards."

c. *This Court and the lower federal courts have applied Section 10(b) and Rule 10b-5 to market information frauds*

This Court's decision in *Affiliated Ute Citizens* v. *United States*, 406 U.S. 128, 144-154 (1972), confirms that Section 10(b) and Rule 10b-5 can apply to trading by persons, not insiders or tippees of insiders, possessing material non-public market information. The defendants in *Ute* purchased shares in their individual capacities directly from the plaintiffs and arranged for the sale of shares to third parties, effectively serving as market makers in the securities in question. They failed to disclose to the sellers at the time of purchase that the current market value of the stock on the resale market was far higher than the sellers believed. The Court held that this failure to disclose market information constituted a violation of the statute and the rule, noting that "[t]he sellers had the right to know that the defendants were in a position to gain financially from their sales and that

their shares were selling for a higher price in that market." 406 U.S. at 153.[37]

Petitioner's situation is the same as that of the defendants in *Ute*. He purchased securities while in possession of unquestionably material market information that was unknown, and could not have been known, to the sellers. Although the defendants in *Ute* had a special relationship with the sellers by virtue of their market-making role, petitioner's position imposed on him similar if not more exacting responsibilities. His professional duties placed him near the center of major market-shaping events. It was his job to maintain the confidentiality of critically important information that would create substantial preferences and unfairness in the marketplace if leaked or selectively revealed. It was also his job to help prepare documents that he knew were to be publicly disclosed to all investors on an equal basis. As the court of appeals observed, a "financial print-[er] * * * [is] a central, though generally unheralded, cog in the vital machinery for disseminating infor-

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[37] The Court rejected the defendants' contention that they could not be guilty of fraud because they merely stood "mute": "We do not read Rule 10b-5 so restrictively. To be sure, the second subparagraph of the rule specifies the making of an untrue statement of a material fact and the omission to state a material fact. The first and third subparagraphs are not so restricted. These defendants' activities * * * disclose, within the very language of one or the other of these subparagraphs, a 'course of business' or a 'device, scheme or artifice' that operated as a fraud upon the Indian sellers." 406 U.S. at 152-153. Accord, *SEC* v. *Capital Gains Research Bureau, Inc., supra*, 375 U.S. at 197-198.

mation to investors" (Pet. App. A7). Petitioner perverted that function by misappropriating the information entrusted to him and exploiting uninformed investors. Since, as *Ute* emphasizes, the securities laws were intended to preserve "a high standard of business ethics" in all aspects of the securities industry (406 U.S. at 151), petitioner may not contend that his role in the securities market was any less "special" or required less "trust" than that of the defendants in *Ute*.[38]

The lower courts have also held that fraudulent practices involving market information violate Section 10(b) and Rule 10b-5. The facts in *SEC* v. *Shapiro*, 494 F.2d 1301, 1303-1307 (2d Cir. 1974), for example, bear a striking resemblance to those presented here. The defendants in *Shapiro* were consultants who assisted an acquiring company in its efforts to merge with a target company. Aware of the impending merger, the consultants purchased shares in the target company for themselves, selling them at a large profit after public announcement of the merger

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[38] Petitioner also argues (Br. 33) that *Ute* is inapplicable here because it recognized that "transfer agents" would not ordinarily be required to make disclosure to investors. But transfer agents normally do not purchase securities; they merely record transfers of securities on the books of issuer corporations. Unlike a transfer agent, petitioner purchased large quantities of securities for himself at a substantial personal profit (see Pet. App. A4 n.3). And, in contrast to an ordinary transfer agent, petitioner was entrusted with highly confidential information, which he misused in violation of the rules of his employer and in breach of his duty to his employer's customers.

plan. The court of appeals concluded that this misuse of material non-public information for personal enrichment violated the statute and the rule.[39] In sum, the application of Section 10(b) and Rule 10b-5 to market information frauds has substantial judicial precedent; it is the materiality of the nonpublic information, not its source, that is relevant under the statute and the rule.

d. *The Securities and Exchange Commission has applied Section 10(b) and Rule 10b-5 to various kinds of market information frauds*

For over 30 years, the Securities and Exchange Commission has brought enforcement proceedings in cases involving market information frauds. See, *e.g.*, *In re Herbert L. Honohan*, 13 S.E.C. 754 (1943) (misappropriation of information about sealed bids to learn market facts inaccessible to other persons); *In re Blyth & Co.*, [1967-1969 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,647 (1969) (use of material non-public information about interest rates affecting market conditions wrongfully ob-

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[39] See also *Zweig* v. *Hearst Corporation*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 96,851, at 95,460-95,462 (9th Cir. 1979) (market information fraud by financial columnist); *Courtland* v. *Walston & Co.*, 340 F. Supp. 1076, 1082-1084 (S.D. N.Y. 1972) (market information fraud by broker). See generally Jacobs, *The Impact of Rule 10b-5*, *supra*, § 66.02[b], at 3-289 to 3-292. These decisions support the proposition announced by the Second Circuit over 30 years ago: "The essential objective of securities legislation is to protect those who do not know market conditions from the over-reachings of those who do." *Charles Hughes & Co.* v. *SEC*, 139 F.2d 434, 437 (2d Cir. 1943), cert. denied, 321 U.S. 786 (1944).

tained from a Treasury Department employee). See also *SEC* v. *Hancock*, SEC Litigation Release No. 505 (Mar. 18, 1949), condemning a scheme to misappropriate information for personal trading advantages. In *Hancock*, an employee of an investment company relayed information about planned securities purchases by the company to a broker, who purchased the shares cheaply and subsequently resold them to the company at a profit. This scheme to defraud, involving market information, was the basis for a subsequent criminal indictment. See *United States* v. *Hancock*, SEC Litigation Release No. 530 (Aug. 8, 1949).

The Commission has also brought a number of enforcement proceedings under Section 10(b) and Rule 10b-5 when confidential market information concerning forthcoming corporate acquisitions is misappropriated and used in the public securities markets. See, *e.g.*, the consent decrees in *SEC* v. *Sorg Printing Co.*, [1974-1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,767 (S.D.N.Y. 1974); *SEC* v. *Primar Typographers, Inc.*, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,734 (S.D.N.Y. 1976); *SEC* v. *Ayoub*, [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,567 (S.D.N.Y. 1976); *SEC* v. *Manderano*, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 96,357 (D.N.J. 1978). Enforcement actions have also been commenced against executives of acquiring companies who purchased shares of target company stock prior to public revelation of a tender offer. See, *e.g.*, *SEC* v. *Rosenberg*, [1974-1975

Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,766 (S.D.N.Y. 1974); *SEC* v. *Healy*, SEC Litigation Release No. 6589 (S.D.N.Y. 1974); *SEC* v. *Stone*, SEC Litigation Release No. 8527 (S.D.N.Y. 1978). See also *FTC* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 391 (1959) (administrative interpretation entitled to deference "even though it was applied in cases settled by consent").

Thus, application of Section 10(b) and Rule 10b-5 to market information frauds finds substantial support in the enforcement actions of the administrative agency vested with primary responsibility for interpreting the Securities Exchange Act of 1934.

e. *Petitioner's proposed limitation of the statute and the rule would lead to absurd results*

The limiting interpretation of Section 10(b) and Rule 10b-5 that petitioner urges would result in illogical legal standards. The essence of petitioner's claim is that persons such as himself who have no relationship with the issuing corporation and who obtain non-public information solely from the acquiring corporation may freely use that information in the stock market. This is so, petitioner argues, because they do not obtain their information from traditional inside sources and have no express fiduciary relationship with the issuing corporation or other traders in the market (Br. 19, 20, 22).

If petitioner's contention were adopted, it would mean that an officer or director of a tender offeror could purchase large quantities of target company stock for his own account after emerging from a

meeting at which plans to make a tender offer had been approved. However, if, instead of a tender offer, the acquisition was a negotiated corporate merger, and the same acquiring company officer or director learned of the acquisition from attending a confidential meeting also attended by the target company's officers, his information would be "inside." His source would be the "issuer corporation" and, under petitioner's analysis, the employee would be forbidden to purchase shares in the target company.[40] Despite the fact that confidential corporate information is misappropriated in both cases for the purpose of exploiting uninformed investors, petitioner's proposed rule of law would impose liability in one instance but not the other.

The same anomaly would arise in the case of printers. Under petitioner's proposed rule, printers who convert non-public information from tender offerors may freely purchase securities in the target company at the expense of uninformed investors. But if a printer obtains his information by reviewing confidential merger documents submitted by the target company rather than the acquiring company, then, under petitioner's theory, he is forbidden to trade.

These examples expose the arbitrariness of petitioner's proposed legal standard. Indeed, the only

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[40] As petitioners' argument recognizes, when confidential market information concerning a forthcoming acquisition stems from the issuer corporation, Section 10(b) and Rule 10b-5 clearly prohibit tipping and use of that information for personal trading. See, *e.g.*, *SEC* v. *Geon Industries, Inc.*, 531 F.2d 39 (2d Cir. 1976).

discernible logic of petitioner's standard is that it excludes *him* from liability. Under the established principles of fraud that we have discussed above, each of the traders in the preceding examples has violated Section 10(b) and Rule 10b-5. Each has misappropriated confidential corporate information in violation of his duty as an agent and each has used that information to exploit uninformed investors in the purchase or sale of securities. As the court of appeals recognized (Pet. App. A13-A15), conversion of confidential information for the purpose of obtaining an advantage over other investors undermines public confidence in the national securities markets and conflicts with the congressional purpose to eliminate all frauds in securities transactions. This is true regardless of the formal relationship between the buyer and seller or the source of the non-public information that is used for personal enrichment at the expense of other traders.

4. *Petitioner's conversion of market information for the purpose of exploiting uninformed investors bears no resemblance to the actions of business firms engaged in bona fide economic activity*

Petitioner contends (Br. 25-29) that his conduct is "identical" to that of tender offerors who, prior to publicly announcing their acquisition plans, may purchase up to 5% of the stock of target companies on the open market.[41] He also argues that if he is subject

[41] Under the Williams Act amendments to the Securities Exchange Act, 15 U.S.C. 78m(d), 78n(d), an acquiring firm, including a tender offeror, must disclose various facts about itself and its acquisition plans after it acquires 5% of any

to liability, then bona fide activities of businesses such as "specialists," "block positioners," and "arbitrageurs" likewise "would be subject to Rule 10b-5 liability" (Br. 34). The court below correctly concluded (Pet. App. A10-A15) that there is no substance to these comparisons and no reason to extrapolate rules of liability appropriate in this case to other situations presenting different questions of fact and public policy.

The facts in this case do not show simple possession of non-public market information generated by bona fide economic activity. As the court of appeals noted, the undisputed evidence at trial proved that petitioner "converted" information from the customers of Pandick Press for personal enrichment in the stock market (Pet. App. A13); the district court described his conduct as a form of "embezzlement" (*id.* at B2). The common law of fraud, as we have discussed on pages 39-42, *supra*, drew a clear distinction between use of information obtained by misappropriation and bona fide economic activity. See Keeton, *supra*, 15 Tex. L. Rev. at 25-26, 35; Bower & Turner, *supra*, at 107; Kronman, *supra*, at 9, 13-18, 33-34. By the same token the antifraud provisions of the federal securities laws are aimed at " 'manipulative and deceptive practices which . . . fulfill no useful function' " (*Ernst & Ernst* v. *Hochfelder*, *supra*, 425 U.S.

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class of stock of the issuer. As originally enacted, these provisions required disclosure when 10% of the target company's stock had been acquired; the figure was lowered to 5% in 1970.

at 206), not at bona fide business activity.[42] In these circumstances, there is no basis for the assertion that petitioner's conduct should be immunized under legal principles that have been applied to legitimate forms of commercial activity or that affirmance of the decision below would cast doubt on the propriety of those activities.

Petitioner's contention that his conversion of confidential information for personal trading is "identical" with the actions of tender offerors totally ignores the nature of the commercial operations in which tender offerors engage and the regulatory framework that surrounds them. Tender offerors participate in bona fide economic activity within a pervasive scheme of regulation that accommodates their legitimate interests with those of the investing public.

To protect the interests of both investors and tender offerors, the Williams Act does not require the filing of disclosure documents until a tender offer is "first published, or sent or given to security holders." 15 U.S.C. 78n(d)(1). Prior to the commencement of the tender offer, disclosure is not required unless the acquiring company obtains 5% of any class of the

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[42] Congress intended the securities laws to protect the investing public with the least interference to honest business. See, *e.g.*, remarks of Rep. Wolverton, 78 Cong. Rec. 7863 (1934) ("The uppermost thought that has dominated our individual and collective decisions has been a desire to correct existing evils, or conditions that have proved harmful, without destroying, curtailing, or handicapping legitimate business."). Accord, remarks of Rep. Chapman, *id.* at 7925; remarks of Rep. Rayburn, *id.* at 8013.

target company's securities. See 15 U.S.C. 78m(d)(1). Thus, premature disclosure, which could frustrate market-testing by a potential tender offeror, is not compelled. This reflects a careful congressional balancing. As Senator Williams stated prior to enactment of the Williams Act: "I have taken extreme care with this legislation to balance the scales equally to protect the legitimate interests of the corporation, management, and shareholders without unduly impeding cash takeover bids." 113 Cong. Rec. 854 (1967). See also S. Rep. No. 550, 90th Cong., 1st Sess. 3 (1967); *Rondeau* v. *Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975).[43]

This congressional balancing of interests has no application to petitioner's case, as the courts below correctly held.[44] Congress has expressed no policy

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[43] Senator Williams also pointed out: "Substantial open market or privately negotiated purchases of shares may precede or accompany a tender offer or may otherwise relate to shifts in control of which investors should be aware. While some people might say that this information should be filed before the securities are acquired, disclosure after the transaction avoids upsetting the free and open auction market where buyer and seller normally do not disclose the extent of their interest * * *." 113 Cong. Rec. 856 (1967). As this indicates, there is normally no requirement that a person advise the market of the amount of stock he is planning to buy or sell. But where investment decisions are based on information concerning forthcoming tender offers that is converted or embezzled, entirely different considerations are presented.

[44] The SEC has recently proposed a rule (SEC Rule 14e-2(c)) under the Williams Act that would bar trading by the tender offeror in the target company's securities once it "has

judgment in favor of his dishonest scheme. Petitioner engaged in no bona fide economic activity that justifies trading prior to public disclosure. Unlike a tender offeror, which ordinarily undertakes an acquisition program based on independent analysis and economic planning and which assumes the risks of the investment process, petitioner converted information not publicly available and used that information to bet on a sure thing. Unlike tender offerors, who must disclose their plans and actions at the time prescribed by Congress under the Williams Act, petitioner did not make any disclosure to anyone. And unlike the activities of tender offerors which can promote investor welfare (see *Rondeau* v. *Mosinee Paper Corp.*, *supra*, 422 U.S. at 58 n.8), petitioner's actions served

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determined to make a tender offer," unless public disclosure of its intentions is made. The proposed rule would afford additional protection to public investors. This proposal is based on the premise that the tender offeror should be permitted to "test the market" only so long as it is still undecided about whether to make an offer. Proposed Rule 14e-2(a) would also specify that persons other than the tender offeror (including persons such as "warehousers") may not trade on the basis of confidential information concerning the offer. See 44 Fed. Reg. 9956, 9976-9978 (1979). Proposal of these specific rules does not imply that the conduct they cover was previously immune from regulation under other, more general, statutory provisions or rules or that fraud occurring in the course of that conduct would not violate Section 10(b) and Rule 10b-5 if practiced in connection with a securities purchase or sale. See generally *SEC* v. *National Securities, Inc.*, *supra*, 393 U.S. at 468; *United States* v. *Naftalin*, *supra*, slip op. 9; see also *Electronic Specialty Co.* v. *International Controls Corp.*, 409 F.2d 937, 940-941 (2d Cir. 1969).

only to injure other investors and the tender offerors whose confidence he betrayed.

General Time Corp. v. *Talley Industries, Inc.*, 403 F.2d 159, 164-165 (2d Cir. 1968), relied on by petitioner, offers no support to his position. *General Time* held that an acquiring company need not disclose its acquisition plans prior to making certain open market purchases. The court observed that, at least in the initial stages of the acquisition, requiring the purchaser to make a public announcement of his plans could easily result in anticipatory price increases and thus "abort" the acquisition. Nothing in *General Time* suggests that persons who trade on the basis of information converted from acquiring companies have a privilege to enrich themselves. The court's concern for the effectiveness of the tender offer and the need to preserve pre-announcement secrecy confirm that its reasoning would not condone a scheme of the kind involved here, which had the clear potential to frustrate bona fide tender offers (see Pet. App. A13; see also pages 34-35, *supra*).[45]

The case of the specialist is similar to that of the tender offeror. As noted on pages 53-55, *supra*, Congress recognized that specialists who make a market in securities while in possession of information about prevailing public demand for those securities con-

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[45] See A. Jacobs, *supra*, § 66.02[b], at 3-284 (footnote omitted), noting that the rule in *General Time* has no application to persons in petitioner's position: "[T]his [rule] cannot justify purchases by persons who know the tenderor's plans. Trading by persons having this informational inequity is contrary to the Rule's policies."

tribute to the stability of prices on the national securities exchanges. The Act expressly authorizes the registration of specialists to serve as market makers. See Section 11(b) of the Act, 15 U.S.C. 78k(b). As discussed above (see page 54, *supra*), Section 11(b) balances the legitimate interests of the specialist and the investing public. Specialists are prohibited from selectively tipping other traders or placing discretionary orders for preferred customers on the basis of non-public market information contained in their books. Due to their essential role in the market, however, they are not altogether forbidden to trade while in possession of market information.[46]

The fact that businesses may ordinarily engage in specialist activities, open market purchases, arbitrage or block trading (within statutory and regulatory restrictions) without disclosing information generated by *their own* activities does not immunize petitioner's conduct. Unlike these businesses and

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[46] Other participants in the securities markets, such as block traders, arbitrageurs, bank trust departments, mutual funds, and insurance companies, also may possess information about impending changes in market conditions due to their ability to buy and sell large quantities of stock. Congress recognized that large transactions by such institutions may have some impact on market price, but it acknowledged that such transactions are a necessary part of the operation of the national securities markets. See H.R. Rep. No. 1383, 73d Cong., 2d Sess. 20 (1934); S. Rep. No. 792, 73d Cong., 2d Sess. 17 (1934). See also Section 11(a)(1)(A)-(D) of the Act, 15 U.S.C. 78k(a)(1)(A)-(D).

ordinary investors participating in the nation's securities market, petitioner converted confidential market information of another person intended for a special commercial purpose.[47] As explained in the brief *amicus curiae* of the Securities Industry Association (page 30),[48] there is no reason why imposition of

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[47] Petitioner's conversion of confidential information to secure an advantage over uninformed traders in the public securities markets is totally unlike the bona fide research activities of investors, brokers and stock market analysts who achieve superior insights through investigation of publicly available information. See note 29, *supra*.

[48] We agree with the contention of the brief *amicus curiae* that certain language in the opinion of the court of appeals, taken out of context, incorrectly suggests that mere possession or regular receipt of confidential market information precludes market professionals (such as market makers, specialists, arbitrageurs, and block traders) from carrying on their normal business activities. Each of these businesses purchases and sells securities as a necessary part of its operations and possesses from time to time confidential information about market conditions that is generated by its own bona fide commercial activity. We do not understand the opinion of the court of appeals, viewed in its entirety, to question the propriety of these business operations. Significantly, the court was careful to point out: "We are not to be understood as holding that no one may trade on nonpublic market information without incurring a duty to disclose" (Pet. App. A10). In this connection, the court referred to the case of tender offerors, which may possess market information generated by their own legitimate activities. Thus, while we agree with the court of appeals that Section 10(b) and Rule 10b-5 apply to theft or misappropriation of confidential information for personal use in the stock market by both traditional corporate insiders and market insiders such as petitioner, we also agree with *amicus* that Section 10(b) and Rule 10b-5 would not ordinarily prohibit market professionals from

liability on agents who fraudently misappropriate confidential information for personal enrichment should establish a precedent applicable in areas of legitimate business activity.[49]

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carrying on their securities business while in possession of confidential information stemming from their own legitimate business operations. That is not to say, however, that the activities of such professionals may never violate the statute and the rule. If, for example, a block trader, arbitrageur, or portfolio manager received a tip from a printer and realized that he was obtaining converted information about an impending tender offer, subsequent trading on the basis of that information would violate Section 10(b) and Rule 10b-5.

We do not agree with the assertion of *amicus* that the SEC is required to proceed by rule-making in developing standards to govern the use of market information by securities industry professionals. To be sure, detailed rules may prove to be workable in some areas. But as Professor Loss has pointed out, an appropriate standard of conduct applicable in different contexts does not readily "lend itself to definition." ALI, *Federal Securities Code* § 1603, at 538-539 (Proposed Official Draft 1978). Professor Loss notes that new and "egregious" forms of fraud involving market information are properly dealt with under general antifraud provisions, adding that "this area must be left to further judicial development." *Ibid.* Particularized rules for different commercial contexts are, of course, desirable when feasible, but the decision whether to proceed by rule-making or adjudication remains a question committed to administrative discretion. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 201-203 (1947); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 290-295 (1974). In any event, that question is not presented in this case.

[49] The brief *amicus curiae* correctly notes (Br. 30) that "liability under Rule 10b-5 may be predicated upon the deliberate, and purely personal, utilization of market information, where the information was received solely by virtue of a confidential business relationship, and where there is a clear

In summary, this case involves only the narrow question whether Section 10(b) and Rule 10b-5 prohibit the unlawful conversion and use of market information not available to the general public in an effort to exploit uninformed investors. Petitioner's trading on undisclosed information cannot be analogized to bona fide commercial activity. As the court of appeals concluded, the law properly distinguishes between petitioner's conduct and that of the tender offerors, specialists, and block traders to whom he would compare himself.

II. SECTION 10(b) AND RULE 10b-5 AND THEIR RELEVANT INTERPRETATIONS PROVIDED FAIR NOTICE THAT PETITIONER'S CONDUCT WAS UNLAWFUL

Petitioner contends (Br. 38-48), that he was denied "fair notice" that his conduct violated Section 10(b) and Rule 10b-5. He argues that the legal basis for his prosecution was so obscure that, even had he consulted an attorney, he would not have learned that his actions entailed a substantial risk of criminal liability (Br. 38, 41, 48).

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showing 'that an expectation of fair dealing . . . is justified.'" See also Fleischer, Mundheim & Murphy, *An Initial Inquiry Into The Responsibility To Disclose Market Information*, 121 U. Pa. L. Rev. 798, 822 (1973): "[I]t may be realistic to expect that a market professional who is given a preferred position in order to fulfill a particular market function will use any confidential information received as a consequence of his position solely to further his assigned role." Accord, Comment, *The Application of Rule 10b-5 to "Market Insiders": United States* v. *Chiarella*, 92 Harv. L. Rev. 1538, 1547 (1979).

1. Petitioner's argument ignores the fact that the statute and rule prohibit all fraudulent schemes. They provide the clearest possible warning that any deceptive device or contrivance, scheme or artifice to defraud, or course of business that operates or would operate as a fraud on any person is unlawful.[50] The scope of these provisions is unequivocal: every scheme to defraud is forbidden if practiced in connection with a purchase or sale of securities and through use of the prescribed jurisdictional means.

Prior to petitioner's actions, this Court had confirmed that Section 10(b) and Rule 10b-5 prohibit fraudulent misappropriations practiced in connection with securities transactions (*Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, *supra*); the lower courts had uniformly held that trading on the basis of inside corporate information was illegal (*SEC* v. *Texas Gulf Sulphur Co.*, *supra*); and this Court had held that failure to disclose market information could constitute a fraud under the statute (*Affiliated Ute Citizens* v. *United States*, *supra*). Before petitioner acted, the Second Circuit also held that persons aware of corporate acquisition plans

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[50] See *Speed* v. *Transamerica Corp.*, 99 F. Supp. 808, 832 (D. Del. 1951):

> In enacting the section, Congress sought to eliminate, within the sphere of federal jurisdiction, all deceptive devices or contrivances. * * * As stated by Judge Cardozo [in *People* v. *Mancuso*, 255 N.Y. 463] "one is at a loss to imagine how" this broad objective "could be more accurately stated, without a catalogue of particulars not susceptible of enumeration in advance of the event."