terial, nonpublic information, the ALI made it plain that some cases of nondisclosure of material information do not involve "fraud" and hence do not come within the scope of Section 10(b). Under the proposed code such nondisclosure is "unlawful" in connection with a security transaction when an "insider" trades in the shares of his own corporation and "may be" "unlawful" when "any person" fails to disclose in breach of "a duty to act or speak." *See* ALI Proposed Official Draft of the Federal Securities Code (1978), §§1602, 1603, 262(b).[12]

Under the ALI codification or any judicial interpretation of the embrace of Section 10(b) and Rule 10b-5 prior to the Second Circuit's opinion in this case, Chiarella's nondisclosure was in breach of no duty to disclose. He was clearly not an "insider" or a "tippee" of an "insider" of the target corporations whose shares he purchased.

12. In relevant part, the ALI proposed code provides as follows:

"Sec. 1603. (a) It is unlawful for an insider to sell or buy a security of the issuer, if he knows a fact of special significance with respect to the issuer or the security that is not generally available. . . . (b) 'Insider' means (1) the issuer, (2) a director or officer of, or a person controlling, controlled by, or under common control with, the issuer, (3) a person whose relationship or former relationship to the issuer gives or gave him access to a fact of special significance about the issuer or the security that is not generally available, or (4) a person who learns such a fact from a person specified in Section 1603(b) . . . with knowledge that the person from whom he learns the fact is such a person. . . ."

"Sec. 1602. (a) It is unlawful for any person to engage in a fraudulent act . . . in connection with (1) a sale or purchase of a security . . . ."

"Sec. 262. (b) Inaction or silence when there is a duty to act or speak may be a fraudulent act."

Chiarella had no relationship whatever with those corporations. Chiarella acquired information about the "target" corporations, *i.e.*, that they were about to become the subject of tender offers, from the offerors who were themselves "outsiders," and, as we demonstrate below, free to use the information to purchase the stock about to become targeted without fear of 10b-5 liability.

The precise same analysis has been used by several courts which have squarely held that conduct identical to Chiarella's—an outsider's open market purchase of an issuer's stock based on and without disclosure of information regarding an impending tender offer for the issuer's stock where the information was not derived through any relationship with the issuer—does not amount to a Rule 10b-5 violation.

In *General Time Corp.* v. *Talley Industries, Inc.*, 403 F.2d 159 (2d Cir. 1968), *cert. denied,* 393 U.S. 1026 (1969), Talley Industries acquired shares of General Time Corp. on the open market without disclosing its plan for a merger "whose terms might be more favorable than the price paid for the stock being acquired" (*id.* at 164). The Second Circuit, two months after its decision in *Texas Gulf Sulphur,* held that there was no violation of Rule 10b-5 because in purchasing the General Time shares Talley was not utilizing information of and had no fiduciary relation with General Time. Judge Friendly wrote as follows (*id.*):

> "We know of no rule of law, applicable at the time, that a purchaser of stock, who was not an 'insider' and had no fiduciary relation to a prospective seller,

had any obligation to reveal circumstances that might raise a seller's demands and thus abort the sale . . . .'"[13]

Similarly, in *Mills* v. *Sarjem Corp.*, 133 F. Supp. 753 (D.N.J. 1955), the court found no Rule 10b-5 violation in the conduct of an outside syndicate which purchased all the stock of a bridge company for the purpose of reselling the gathered stock at a profit without divulging in a solicitation letter sent to stockholders its plans to resell. The court wrote (*id.* at 764-65):

> "The cases imposing a duty on the part of a purchaser of shares to disclose his knowledge of future prospects and plans all involve situations where the purchaser

13. Judge Friendly's allusion to a change in the applicable law refers to enactment of the Williams Act. The purpose of that legislation was to remedy a gap in the securities laws by subjecting tender offerors and, in certain circumstances, prospective tender offerors, to disclosure requirements. Under 15 U.S.C. §78m(d)(1) takeover bidders must file with the SEC a statement disclosing, *inter alia,* the "background and identity" of the offeror, the source and amount of funds to be used in the purchase, the extent of the offeror's holdings in the target corporations, and the offeror's plans regarding the target. Additionally, the Williams Act provides protection for shareholders who elect to tender their stock (15 U.S.C. §78n[d][5], [6]), and prohibits fraud in connection with any tender offer (15 U.S.C. §78n[e]).

It is only after 5% of the target company's stock is acquired by the offeror, however, that plans regarding the target need be disclosed (15 U.S.C. §78m[d][1]). The changes in law made by the Williams Act did not otherwise affect the legality of a prospective offeror purchasing shares of a target on the open market without disclosing the impending offer. *See Gulf & Western Industries, Inc.* v. *Great Atlantic & Pacific Tea Co.*, 356 F. Supp. 1066 (S.D.N.Y.), *aff'd on other grounds,* 476 F.2d 687 (2d Cir. 1973); *Copperweld Corp.* v. *Imetal,* 403 F. Supp. 579 (W.D. Pa. 1975). Whatever policy considerations congress reflected in permitting prospective offerors to trade target stock until it acquires 5% of the target stock and thereby becomes an "insider" of the target applies with equal force to Chiarella. None of his purchases came anywhere near the 5% limit, and thus he was not and could not have been charged with a violation of the Williams Act.

> holds a fiduciary position and where the knowledge has been obtained by virtue of an 'insider' position."

And *see, Pacific Insurance Co. of New York* v. *Blot,*[14] 267 F. Supp. 956, 957 n.2 (S.D.N.Y. 1967) ("The Court entertains grave doubt whether the alleged failure by the defendant, an 'outsider,' to disclose to selling shareholders the impending tender offer . . . constitutes a violation of Rule 10b-5."); *Mutual Shares Corp.* v. *Genesco, Inc.*, 384 F.2d 540, 545 (2d Cir. 1967); *Jacobsen Manufacturing Co.* v. *Sterling Precision Corp.*, 282 F. Supp. 598, 603 (E.D. Wis. 1968).

The scholars, too, teach that Rule 10b-5 is not violated by the common practice of a prospective offeror making open market purchases of shares of the target without dis-

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14. In *Blot* the SEC filed an *amicus* brief setting forth its view that the purchase of an issuer's stock based on and without disclosure of nonpublic information regarding an upcoming tender offer for the stock did not violate Section 10(b) and Rule 10b-5. The SEC wrote:

> ". . . we . . . believe that defendant had no affirmative duty to come forward and disclose that forthcoming tender offer when purchasing shares . . . .
>
> ". . . in order to create an affirmative duty to disclose material facts before purchasing securities . . . there must . . . be some relationship giving rise to a duty to disclose. . . .
>
> "We believe that there is no duty to make public . . . the fact that an individual is purchasing or seeking to purchase a corporation's stock. The mere fact that such information might be of interest to prospective investors, stockholders and the corporation is insufficient to place a duty on a purchaser, and does not approach a violation of Rule 10b-5.
>
> ". . . We are inclined to believe that . . . defendant's failure to disclose his contemplated tender offer at a higher price . . . [did not] constitute a violation."
>
> (Memorandum of the SEC submitted *amicus curiae* in *Pacific Ins. Co.* v. *Blot,* 67 Civ. 1386 [S.D.N.Y.], pp. 5-7).

closing an impending tender offer. Professor Bromberg states:

> "The prospective offeror often buys some of the target company's securities in the open market . . . before the offer is announced. *The antifraud rules are apparently not violated. . . . Although the offeror is using material nonpublic information, it is information created by itself rather than emanating from the target company. Thus it is probably not inside information about the latter company's securities. . . . In any event, if it is not obtained by 'access' to the target company, the possessor is not . . . an insider subject to trading prohibitions."* (A. Bromberg, Securities Law: Fraud §6.3 [1969]) (Emphasis supplied.)

And in a recent treatise on tender offers, the authors wrote:

> "When a prospective tender offeror engages in market purchases of the target company's stock, presumably it is not acting upon information acquired as an insider of the target . . . . *Therefore, information concerning the planned tender offer need not be disclosed by the offeror before it makes market purchases of the target's securities."* E. R. Aranow, H. A. Einhorn, and G. Berlstein, Developments in Tender Offers for Corporate Control, 20 (1977). (Emphasis supplied.)

See also Fleischer and Mundheim, *Corporate Acquisition by Tender Offer,* 115 Penn. L. Rev. 317, 338 (1967).

There is no meaningful distinction between Chiarella's conduct and a prospective tender offeror's open market purchase of an issuer's stock without disclosure of its own planned tender offer; analytically the conduct is the same. In each case target shares are sold by a shareholder who is

unaware that the shares are about to become the object of a takeover bid. That in one case the nondisclosing purchaser is the prospective tender offeror and in the other it is Chiarella—a "tippee" of the prospective offeror—is surely of no consequence to the selling shareholder. Since neither the prospective offeror nor Chiarella, its tippee, has any fiduciary or other relationship with the issuer or its shareholders giving rise to an affirmative duty to disclose information, neither has an "obligation to reveal circumstances that might raise a seller's demands and thus abort the sale." *General Time Corp. v. Talley Industries, Inc., supra,* 403 F.2d at 164.

In affirming Chiarella's conviction, the Second Circuit panel majority avoided the impact of the *General Time* line of authority by reasoning that ". . . the offerors and Chiarella occupy entirely different positions with respect to trading on news of an impending tender offer" (588 F.2d at 1366). To the panel majority the difference between a prospective tender offeror's proper conduct under Rule 10b-5 and Chiarella's Rule 10b-5 felonies is that purchases of target shares by the offeror is accompanied by "substantial economic risk" whereas Chiarella has "no economic risk whatsoever" (588 F.2d at 1366-67). There is simply no authority in the language, history or judicial interpretations of Section 10(b) and Rule 10b-5 for the proposition that the degree of risk assumed by a trader is at all relevant to distinguish between legitimate and felonious conduct under the Statute and Rule.

The Second Circuit panel majority also sought to distinguish the *General Time* line of authority by the fact that Chiarella's use of the information violated a fiduciary duty he owed his employer and its customers—the offerors,

whereas when the offerors purchase target shares they merely use information they themselves create (588 F.2d at 1367-68). This distinction too is legally impotent. This Court has very specifically held that Rule 10b-5 violations are not made out by "all breaches of fiduciary duty in connection with a securities transaction." *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 472 (1977).[15] Moreover, Chiarella was not charged with having breached any fiduciary duty he may have owed his employer or its customers.

The Second Circuit's tortured distinctions amply demonstrate that there is simply no way to read Section 10(b) and the judicial development of it to glean that Chiarella's trading is prohibited, but not that of the prospective tender offeror. The distinction fashioned and relied upon by the Second Circuit to affirm—that Chiarella is a "market insider" who has "regular access to market information"—is a classic bootstrap analysis. The "test" of "regular access to market information," found nowhere in prior law, could not have been known by Chiarella or anyone else until it was read in the Second Circuit opinion.

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15. In denying Chiarella's motion to dismiss the indictment for failure to state an offense, the district court distinguished the *General Time* line of authority from Chiarella's conduct by reasoning that " . . . corporate purchases [by prospective offerors of target shares] have a presumptively legitimate business purpose to promote economic growth and are appropriately made without disclosure" whereas Chiarella's use of the same information obtained from the offerors "was solely for personal profit . . ." (450 F. Supp. 95, 97). The Second Circuit specifically disavowed "relying on any concept of 'business purpose' in distinguishing Chiarella from [the offerors]" and, citing *Santa Fe Industries, Inc.* v. *Green, supra,* agreed with Chiarella that " 'business purpose' cannot be dispositive of liability under Rule 10b-5" (588 F.2d at 1368 n.15).

Of course any distinction between criminal and non-criminal conduct based on the status of a defendant defies the most rudimentary concepts embodied in due process and equal protection law.

The judicial development of the scope of Section 10(b) and Rule 10b-5 leaves no question that Chiarella's conduct is outside their scope. As Judge Meskill said in his dissent from the Second Circuit's majority opinion affirming Chiarella's conviction (588 F.2d at 1373):

> "Today's decision expands §10(b) drastically, it does so without clear indication in prior law that this is the next step on the path of judicial development of §10(b) and, alarmingly, it does so in the context of a criminal case.
>
> * * *
>
> "That today's application of §10(b) is a departure from prior law cannot be disputed (footnote omitted)."

D. The Second Circuit's New and Expansive Interpretation of Section 10(b) and Rule 10b-5

The Second Circuit panel majority rejected the well-recognized authorities reviewed above as "irrelevant" (588 F.2d at 1364), failed to heed this Court's many recent warnings in civil cases that Section 10(b) is not to be interpreted expansively (*International Brotherhood of Teamsters* v. *Daniel,* —— U.S. ——, 99 S. Ct. 790 [1979]; *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462 [1977]; *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185 [1976]) and, in the context of this criminal case, created a new concept of "market insider" (588 F.2d at 1364-65) and relied on that concept to affirm Chiarella's conviction. The new rule for nondisclosure liability under Section 10(b) and Rule 10b-5 announced by Chief Judge Kaufman for the majority is as follows (588 F.2d at 1365):

> "*Anyone*—corporate insider or not—who regularly receives material nonpublic information may not use

that information to trade in securities without incurring an affirmative duty to disclose. And if he cannot disclose [footnote omitted] he must abstain from buying or selling.''[16]

As its sole support for its novel holding of Rule 10b-5 nondisclosure liability through a ''test of 'regular access' to market information'' (588 F.2d at 1365-66), the Second Circuit panel majority relied on this Court's decision in *Affiliated Ute Citizens* v. *United States,* 406 U.S. 128 (1972). Reliance on that case is misplaced. In *Affiliated Ute* a bank and two of its employees acted as transfer agent for shares of the Ute Development Corporation (UDC), an entity created by the government to hold assets of a group of mixed-blood Ute Indians. There were two separate markets for the shares of UDC—a primary market consisting of Indians selling to whites (including the two bank employees) through the bank as transfer agent and a resale market consisting of whites selling to whites at substantially higher prices. The bank and its two employees became market makers who were active in encouraging a resale market for the UDC shareholders' stock. They devised a plan and induced holders of stock to dispose of their shares without disclosing the resale market of which they were aware and which, in fact, they had created. This Court ruled that the special relationship between the

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16. The language parallel between the "market insider" rule announced by the Second Circuit panel majority in this case and the "corporate insider" rule in *Texas Gulf Sulphur* strikingly demonstrates the new rule's departure from settled law. As quoted above, the Second Circuit (*en banc*) in *SEC* v. *Texas Gulf Sulphur* wrote:

> ". . . anyone in possession of material inside information must either disclose it to the investing public, or, if he is disabled from disclosing it . . . or chooses not to do so, must abstain from trading or recommending the securities concerned." (401 F.2d at 848).

bank and its employees as transfer agent and the selling UDC shareholders imposed an affirmative duty on the employees to disclose. The nondisclosure of the conditions of the resale market was held to be in contravention of Section 10(b) and Rule 10b-5.

But the concept underpinning the Second Circuit majority opinion—regular access to market information—was flatly rejected by this Court as a basis for finding an affirmative duty to disclose and Section 10(b) and Rule 10b-5 liability. Mere access by the bank and its employees to market information regarding the resale market by virtue of their role as transfer agent was rejected outright as giving rise to a disclosure duty. Mr. Justice Blackmun wrote as follows (*id.* at 152):

> "... if the two men and the employer bank had functioned merely as a transfer agent, there would have been no duty of disclosure here."

Rather, the duty to disclose found in *Affiliated Ute* arose from the relationship the bank and its employees had with the selling shareholders:

> "*The ... defendants, in a distinct sense, were market makers,* not only for their personal purchases ..., but for the other sales their activities produced. *This being so they possessed the affirmative duty under the Rule to disclose....*" (Emphasis supplied.) (*Id.* at 153.)

Thus, it was not regular access to market information but the defendants' role as market maker and agent for the selling shareholder that gave rise to a duty to disclose. Very much unlike the defendants in *Affiliated Ute* Chiarella

had no relationship at all with the selling shareholders of the target corporations—he did not undertake to act for them nor did he enter the type of special relationship with them which was determinative in *Affiliated Ute.*[17]

Moreover, the Second Circuit's replacement of the traditional "corporate insider" test with its new "market insider" test portends a licentious extension of Rule 10b-5 liability to regular and accepted trading activities by security industry employees. Thus, trading without disclosure by specialists, block positioners, floor traders, arbitrageurs and risk arbitrageurs—all of whom have "regular access to market information"—would be subject to Rule 10b-5 liability. Yet the market activities of these "market insiders" has been recognized by the SEC as "necessary" in order to "increase the depth, liquidity and orderliness of trading markets." Securities Exchange Act Release No. 9950 (Jan. 16, 1973), 38 Fed. Reg. 3902, 3918 (Feb. 8, 1973); *see also,* SEC Report of the Special Study of the Options Market, H.R. Comm. Print No. 96-IFC3, 96th Cong. 1st Sess. 1-4 (1978).

The SEC itself has taken the position that unlike use of nonpublic "inside" information, use of nonpublic "market" information should not be regulated under Rule 10b-5. Ten years after *Cady, Roberts,* in transmitting its *Institu-*

17. Thus, Chief Judge Kaufman was in error when, relying on *Affiliated Ute,* he wrote that "a duty to disclose arising out of regular access to market information is not a stranger to the world of 10b-5" (588 F.2d at 1366). It was the duty to disclose arising out of the "special relationship" the defendants in *Affiliated Ute* had with selling shareholders which is "not a stranger" to the world of the federal securities laws. *See SEC* v. *Capital Gains Research Bureau, Inc.,* 375 U.S. 180 (1963); *Zweig* v. *Hearst Corp.,* —— F.2d ——, CCH Fed. Sec. L. Rep. ¶96,851 (9th Cir. 1979).

tional Investor Study Report to Congress the SEC recommended *against* the use of Rule 10b-5 to regulate the common market practice of "warehousing"—a process by which a would-be tender offeror alerts "friendly" institutional investors of an impending tender offer in order to encourage the transfer of the target company's stock to investors who are likely to be receptive to the tender offer when announced. In its report the SEC expressly noted that "different underlying principles" from those involved in the misuse of "inside" information should govern the use of "market" information. 8 SEC Institutional Investor Study Report, H.R. Doc. No. 92-64, 92d Cong. 1st Sess. xxii, xxxii (1971). The Commission stated that the "different underlying principles" does:

> "not necessarily mean that such passing on of information concerning takeovers should be permitted, but it may well mean that if such activities are to be prohibited, this should be done by a rule specifically directed to that situation rather than by an expanded interpretation of Rule 10b-5 resting on a somewhat different theory than that underlying that rule as to the obligations and duties of those who receive material undisclosed [corporate] information." (*Id.*)

The SEC's position that the use of nonpublic "market" information should not be regulated by "an expanded interpretation of Rule 10b-5" was reiterated in 1973 (Securities Exchange Act Release No. 10316 [Aug. 1, 1973], 2 SEC Docket 229 [Aug. 14, 1973]) and again this year when the SEC proposed the adoption under Section 14(e) of the 1934 Securities Exchange Act (the Williams Act) of Rule 14e-2—a specific rule aimed at regulation of the trading activities of would-be tender offerors and their tippees once a decision to make a tender offer has been formulated.

Securities Exchange Act Release No. 6022 (Feb. 5, 1979), 44 Fed. Reg. 9956 (Feb. 15, 1979). Notably *not* proposed under Section 10(b) of the 1934 Act, the new proposed rule powerfully evidences what appears to be the SEC's own view that pre-tender trading without disclosure in target stock by "outsiders" *vis-a-vis* the target is not within the scope of Rule 10b-5.[18]

Perhaps recognizing, as did the SEC, that embracing the use of nonpublic market information within Rule 10b-5 departs from all prior law, the Second Circuit majority found some justification for its new and expansive rule in the policy consideration that remedial legislation such as the 1934 Securities Exchange Act should be broadly construed to effectuate its purpose, namely to provide to all securities traders "equal access to material information" (588 F.2d at 1365). The answer is three-pronged. First, "equal access to material information" does not mean and never has meant that there must be parity of information between traders. As Chief Judge Kaufman himself noted for the panel majority:

> "We are not to be understood as holding that no one may trade on nonpublic market information without incurring a duty to disclose." (588 F.2d at 1366).

That the "equal access" test is not a controlling principle is amply demonstrated by cases like *General Time Corp.* v. *Talley Industries Inc., supra.*

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18. This view by the SEC is obviously inconsistent with positions it has taken in a few enforcement actions against printers including Chiarella. *See, e.g., SEC* v. *Sorg Printing Co., Inc.,* CCH Fed. Sec. L. Rep. ¶95,034 (S.D.N.Y. 1975); *SEC* v. *Primar Typographers, Inc.,* CCH Fed. Sec. L. Rep. ¶95,734 (S.D.N.Y. 1976); *SEC* v. *Ayoub,* CCH Fed. Sec. L. Rep. ¶95,567 (S.D.N.Y. 1976); *SEC* v. *Chiarella,* No. 77 Civ. 2534 (S.D.N.Y. 1977). Each of these actions resulted in civil consent decrees with no litigation as to the viability of the Rule 10b-5 claim.

Second, and more importantly in the context of this *criminal* case, the policy of broad construction of remedial legislation runs directly afoul of the fundamental tenet of our criminal jurisprudence that criminal statutes must be strictly construed in favor of an accused. *See United States* v. *Dunn,* —— U.S. ——, 47 U.S.L.W. 4607, 4611 (June 4, 1979) and cases cited therein. Where, as here, conduct identical to Chiarella's has specifically been held to amount not even to a civil breach of Rule 10b-5 it is *a fortiori* that such conduct cannot be subject to criminal sanction. It would be cruel and senseless to impose, on pain of felony charges, a duty of disclosure on Chiarella when, in a civil context, his "tippers"—the prospective tender offerors—have no such duty.

Third, this Court very recently rejected the concept that the remedial purpose of the 1934 Securities Exchange Act can serve to broadly construe its sections. In holding that a private right of action was not to be implied in Section 17(a) of the 1934 Act, this Court wrote:

> ". . . generalized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit.' " *Touche Ross & Co.* v. *Redington,* —— U.S. ——, 47 U.S.L.W. 4732, 4737 (June 18, 1979).

See also SEC v. *Sloan,* 436 U.S. 103, 116 (1978).

There being no duty of disclosure on Chiarella, his silence does not amount to a "manipulative or deceptive device or contrivance" within the meaning and intendment of Section 10(b) and Rule 10b-5.

POINT II

The Second Circuit's application of an unpredictable, novel, and expansive construction of Section 10(b) and Rule 10b-5 to affirm the conviction, violated due process.

At the time Vincent Chiarella traded in stocks on the basis and without disclosure of material nonpublic information obtained without access to the issuer, conduct such as his had never before been interpreted as within the embrace of Section 10(b) or Rule 10b-5. Identical conduct had been ruled to be without their proscription. To base its decision sustaining the conviction, the Second Circuit expansively interpreted the Rule to create a new category of "market insider": any person with "regular access to market information" (588 F.2d at 1365-66).

Had Chiarella himself or any attorney he consulted, previous to his acts, sought to determine whether they were criminally violative of the Section and Rule, he would have found that they were not. At most, conceptualizing fine spun distinctions between the status of particular categories of traders, Chiarella or his attorney might have concluded that the issue had not been resolved and that there were insufficient and conflicting criteria in existence to reasonably foresee whether the conduct was meant to be covered.

Accordingly, the application of Rule 10b-5 to Chiarella's conduct violates the fair notice requirement of due process. *Dunn* v. *United States*, —— U.S. ——, 47 U.S.L.W. 4607, 4611 (June 4, 1979); *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).

The State of the Law at the Time of Chiarella's Acts

Chiarella's case is the first criminal prosecution for the purchase of stock on the basis of undisclosed material information. As the prosecution acknowledged, the case represents a novel application of Section 10(b). It is the first litigated case of any sort—*civil* or criminal—where a court has found liability based on the purchase of stock in a corporation about to be targeted for tender offer when the information was obtained from the offeror corporations. In sustaining the conviction, the Second Circuit deemed prior law "irrelevant" and fashioned its new "test" of liability—"regular access to market information"—suggesting that it would "provide a workable rule" as capable of "resolving close cases" in the future as was the "corporate insider" concept of *Texas Gulf Sulphur* (588 F.2d at 1365-66). That the Circuit created new law and did not merely restate or reformulate existing law is frankly conceded by Chief Judge Kaufman in his opinion when he wrote that the prosecution's theory of the Rule was based on "*. . . a view [of the law] we today hold was correct.*" 588 F.2d at 1370 n.18 (emphasis supplied).

Prior judicial treatment of the Rule demonstrates the unpredictable novelty of the Second Circuit's interpretation in the case at bar. Despite the "indefinite and uncertain disclosure obligation" (*International Brotherhood of Teamsters* v. *Daniel,* —— U.S. ——, 99 S. Ct. 790, 801 [1979]) of this rather elastic Rule it has consistently throughout its history only been applied to so-called insider cases where the material nonpublic information was derived from the issuer. The sanctions of Rule 10b-5 were never invoked without there having been access directly or indirectly to the issuer corporation and thus on the use of such informa-