The prohibited trade practices and/or corrective actions, as codified under 16 CFR Part 13, appearing at 45 FR 38352, remains unchanged.

(Sec. 6, 38 Stat. 721; (15 U.S.C. 46). Interpret or apply sec. 5, 38 Stat. 719, as amended; sec. 2, 49 Stat. 1526; (15 U.S.C. 45, 13))

The Order Granting In Part, and Denying In Part, Respondents' Petitions for reconsideration, is as follows:

Order Granting in Part, and Denying in Part, Respondents' Petitions for Reconsideration

An opinion and final order in this matter having been issued on April 30, 1980; respondents having been served by mail with the said opinion and order on May 20, 1980 and May 21, 1980; respondents having petitioned for reconsideration of said opinion and order on June 12, 1980; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petitions for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is, modified as follows:

In paragraph 1 of Section II of the Order, line 2, insert the word "while" in front of the word "acting"; and

In paragraph 2 of Section II of the Order, line 3, after the word "respondent[s]," insert a comma and the phrase "while acting as a buyer or acting for in behalf of or subject to the direct or indirect control of a buyer,".

By the Commission.

James A Tobin,

Acting Secretary.

[FR Doc. 80-28125 Filed 9-11-80; 8:45 am]

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release Nos. 33-6239; 34-17120; and IC-11336]

Tender Offers

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Commission announces the adoption of a new anti-fraud rule establishing a "disclose or abstain from trading rule" for any person who is in possession of material information that relates to a tender offer by another person which information he knows or has reason to know is nonpublic and was acquired, directly or indirectly, from that person or the issuer of the securities subject to the tender offer. The rule also contains exceptions pertaining to multi-service financial institutions and brokerage transactions. In addition, as a means reasonably designed to prevent fraudulent, deceptive, or manipulative acts or practices, the rule establishes an "anti-tipping" rule with respect to material, nonpublic information relating to a tender offer. The provision implements existing statutory requirements and will be applicable to any tender offer. This action is necessary and appropriate in the public interest and for the protection of investors because of the current abuses in tender offer practice and the detrimental effects which such trading has on shareholders and securities markets in the context of tender offers.

EFFECTIVE DATE: October 14, 1980.

FOR FURTHER INFORMATION CONTACT: Prior to the effective date of the rule contact John J. Huber or W. Scott Cooper (202-272-2589), Office of Disclosure Policy; thereafter, contact Joseph G. Connolly, Jr., (202-272-3097), Office of Tender Offers, Division of Corporation Finance, Securities and Exchange Commission, 500 North Capitol Street, Washington, D.C. 20549.

SUPPLEMENTARY INFORMATION: The Securities and Exchange Commission today announced the adoption of Rule 14e-3 under Regulation 14E [1] pursuant to Sections 14(e) and 23(a) of the Securities Exchange Act of 1934 (the "Exchange Act") [15 U.S.C. 78a et seq. (1976 and Supp. I 1977)]. The rule pertains to trading by persons in securities which may be the subject of a tender offer as well as tipping of material, nonpublic information relating to a contemplated tender offer. It should be noted that the rule applies only in the context of tender offers. Persons subject to the provisions of Rule 14e-3 may also be subject to other provisions of the federal securities laws. Moreover, good business judgment and industry standards may require persons subject to the provisions of Rule 14e-3, particularly broker-dealers, to perform acts and to implement policies and procedures beyond the minimum standards necessary to avoid liability under Rule 14e-3.

Rule 14e-3(a) establishes a "disclose or abstain from trading" rule under the Williams Act. A person who is in possession of material information that relates to a tender offer by another person which information he knows or has reason to know is nonpublic and which he also knows or has reason to know was acquired directly or indirectly from a person who has taken a substantial step or steps to commence or has commenced a tender offer (hereinafter also referred to as the "offering person"), the issuer whose securities are subject to the tender offer or any officer, director, partner or employee or any other person acting on behalf of the offering person or the issuer would be subject to the restrictions of the new rule. Any person subject to the rule would be prohibited from purchasing or selling or causing the purchase or sale of the securities to be sought or being sought in the tender offer unless, within a reasonable period of time prior to the purchase or sale, the information and its source are publicly disclosed.

Rule 14e-3(b) provides that certain transactions by multi-service financial institutions under certain circumstances which would otherwise be proscribed will not violate Rule 14e-3(a). This exception is available for purchases or sales by multi-service institutions where the institution can show that the individuals making the investment decision did not know the information and that the institution has established policies and procedures, reasonable under the circumstances, to ensure that individual decision maker(s) would not violate Rule 14e-3(a).

Rule 14e-3(c) provides that certain transactions which would otherwise be proscribed will not violate Rule 14e-3(a). These exceptions include: (1) the execution by a broker or another agent on behalf of the offering person; and (2) sales by any persons to the offering person.

Rule 14e-3(d) is designed to prevent leaks of material, nonpublic information relating to a tender offer. Rule 14e-3(d) provides that, as a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of Section 14(e), it shall be unlawful for certain specified persons to communicate such information to persons under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of Rule 14e-3. An exception to the rule provides that a communication made in good faith to certain other persons involved in the planning, financing, preparation or execution of the tender offer, to the issuer and certain affiliated persons or to any person pursuant to applicable statute will not violate Rule 14e-3(d).

[1] Regulation 14E [17 CFR 240.14e-1 through 17 CFR 240.14e-3] is applicable to any tender offer other than one involving exempted securities and includes provisions relating to the length of the tender offer and extensions thereof, the payment of consideration offered, and the disclosure of the subject company's position with respect to the tender offer.

Rule 14e–3(a) does not proscribe purchases or sales of securities to be sought or sought in a tender offer by the person who has taken a substantial step or steps to commence or has commenced the tender offer.[2] The offering person will be subject to liability, however, under Rule 14e–3(d) if he tips, *i.e.*, communicates material, nonpublic information relating to a tender offer to someone under circumstances in which it is reasonably foreseeable that he may violate Rule 14e–3. Persons other than the offering person will also be subject to liability for tipping under Rule 14e–3(d).

Rule 14e–3 is the result of a Commission proceeding which began in February 1979 with the publication of a proposed rule which would have proscribed any purchase of subject company securities by any person, other than a bidder, who was in possession of nonpublic information received directly or indirectly from a bidder that the bidder would make a tender offer for the subject company securities, unless prior to the purchase the person publicly announced the information received and its source (the "February proposal").[3] Based on the comments received on the February proposal, proposed Rule 14e–3 was published for comment as part of a package of tender offer proposals in November 1979 (the "November proposals").[4] Rule 14e–3, as adopted, is based primarily on the November proposal, the seventeen letters of comment received [5] and the Commission's experience.

This release contains a discussion of the background for Rule 14e–3 and a synopsis. While the synopsis is intended to assist in a better understanding of Rule 14e–3, attention is directed to the provisions of the rule itself for a more complete understanding.

I. Background

Several commentators on proposed Rule 14e–3 expressed the view that the Commission should not adopt any rule regulating trading on material, nonpublic information relating to a tender offer until after the Supreme Court had rendered its decision in *Chiarella* v. *United States*.[6] These commentators suggested the *Chiarella* decision might either make the proposed rule superfluous or raise questions concerning the Commission's authority to adopt such a rule. The Supreme Court decided *Chiarella* on March 18, 1980. In the Commission's view, that decision has had neither of the suggested effects.

The *Chiarella* case arose from a series of securities transactions by an employee of a financial printer. On the basis of confidential information obtained in the course of his employment, Mr. Chiarella deduced the identities of various companies that were to be the subject of tender offers that had not yet been publicly announced. Without disclosing the fact of the impending tender offers, Mr. Chiarella purchased target securities and then sold them at a profit immediately after the tender offers were made public.

In the U.S. District Court for the Southern District of New York,[7] Mr. Chiarella was convicted of a criminal violation of Section 10(b) and Rule 10b–5 [17 CFR 240.10b–5]. The U.S. Court of Appeals for the Second Circuit affirmed the conviction and held that he was a "market insider" because of his regular access to market information, and, therefore, was barred from trading on the basis of material, nonpublic information obtained in that capacity.[8] The Second Circuit also found that his actions were fraudulent because he misappropriated the information used in trading.

The Supreme Court reversed the Second Circuit's decision and held "that a duty to disclose under Section 10(b) does not arise from the mere possession of nonpublic market information."[9] The Court, however, did not reach the question of whether Mr. Chiarella violated Section 10(b) and Rule 10b–5 by trading while in possession of material, nonpublic information that he had misappropriated [10] or that he had used or obtained by unlawful means.[11] The Court concluded that this basis for liability had not been properly charged to the jury.

Notwithstanding its conclusion, the Court in its opinion clearly indicated that insiders and their tippees continue to be liable under Rule 10b–5 when they trade on material, nonpublic inside information.[12] The Court not only cited the Second Circuit's decision in *SEC* v. *Texas Gulf Sulphur Co.*[13] but also cited with approval the Commission's administrative decision in *Cady, Roberts & Co.*,[14] in which it articulated the duty of insiders to disclose material, nonpublic inside information or to abstain from trading.[15] In that proceeding, the Commission emphasized that such a duty arose both from the existence of a relationship affording access to inside information intended to be available only for a corporate

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[2] The Commission had published for comment a proposed rule which would have prohibited the purchase of subject company securities by a bidder which had determined to make a tender offer therefor but had not yet publicly announced its intention to do so unless prior to any such purchase the bidder made a public announcement of certain information. *See* proposed Rule 14e–2(c), Release No. 34–15548 (February 5, 1979) (44 FR 9956). As noted in Release No. 34–16384 (November 29, 1979) (44 FR 70326, 70338), the Commission continues to be concerned by such purchases by bidders and is still considering the wisdom of adopting such a rule. In any event, the adoption of Rule 14e–3 should not be construed as relating in any way to the Commission's authority to regulate the conduct of a bidder under Section 10(b) or Section 14(e) of the Exchange Act or as an indication that the Commission may not act to bar such purchases in the future.

[3] Release No. 34–15548 (February 5, 1979) (44 FR 9956). As more fully discussed in Release No. 34–16385 (44 FR 70349), the Commission did not adopt proposed Rule 14e–2 due in part to the concern that the scope of proposed Rule 14e–2(a) was not sufficiently broad to reach certain aspects of the misuse of material, nonpublic information relating to a tender offer.

[4] Release No. 34–16385 (November 29, 1979) (44 FR 70349). The November proposals also included: a definition of the term "tender offer"; provisions requiring equal treatment of all security holders in the context of a tender offer; a prohibition of certain purchases not made by means of a tender offer; and general and specific inquiries. While Rule 14e–3 has been adopted separately from the other November proposals, it should be particularly noted that the remaining proposals have not been withdrawn. The Commission presently anticipates that further rulemaking action will be undertaken with respect to these proposals.

[5] Of the 39 letters submitted in response to the Commission's request for comment on the November proposals, 17 comment letters specifically addressed proposed Rule 14e–3 and related inquiries. These 17 commentators may be categorized as follows: law firms and associations (7); securities industry (4); corporations (3); trade organizations and associations (2); and individuals (1). Copies of the 39 letters, as well as the summary of comments prepared by the Commission staff with respect to proposed Rule 14e–3, are available for public inspection and copying at the Commission's Public Reference Room (File No. S7–812).

[6] —— U.S. ——, 100 S. Ct. 1108 (1980). The comment period for proposed Rule 14e–3 expired on February 15, 1980, before the *Chiarella* decision was handed down.

[7] *U.S.* v. *Chiarella*, 450 F. Supp. 95 (S.D.N.Y. 1978).

[8] *Chiarella* v. *U.S.*, 588 F.2d 1358, 1365 (2d Cir. 1978).

[9] —— U.S. at ——, 100 S. Ct. at 1118. Thus, the Court only examined whether Chiarella was under a duty to make certain disclosures prior to trading where he had remained silent. The Court's analysis in *Chiarella* does not alter existing standards of liability under Section 10(b) and Rule 10b–5 in cases where the defendant has made affirmative statements in connection with the purchase or sale of a security.

[10] *See* —— U.S. at ——, 100 S. Ct. at 1119 n. 21.

[11] *See* —— U.S. at ——, 100 S. Ct. at 1120–3. (Burger, C. J., dissenting).

[12] The Court in *Chiarella* did not distinguish between corporate and market information where there exists a duty to disclose such information or abstain from trading. Nor does the Commission believe that any such distinction is appropriate, since both corporate and market information may be material to an investment decision. Moreover, Section 10(b) and Rule 10b–5 by their terms do not distinguish between corporate and market information.

[13] 401 F.2d 833 (2d Cir.1968), *cert. denied*, sub nom. *Coates* v. *Securities and Exchange Commission*, 394 U.S. 976 (1969). *See* —— U.S. at ——, 100 S. Ct. at 1115.

[14] 40 S.E.C. 907 (1961).

[15] *See* —— U.S. at ——, 100 S. Ct. at 1113–15.

purpose, and the unfairness of allowing a corporate insider to take advantage of such information by trading without disclosure.[16] In addition, the Court noted without comment that persons have been held liable who receive or learn material, nonpublic information from an insider ("tippees") and who subsequently trade without disclosing such information.[17]

The Court also affirmed its holding in *Affiliated Ute Citizens* v. *United States* [18] that a fiduciary may not trade with its beneficiary while in possession of material information of which the beneficiary is not aware. Thus, persons who possess such information and in whom a purchaser or seller has reasonably reposed trust and confidence with respect to securities transactions are subject to a duty to disclose that information or to abstain from trading with such purchaser or seller.[19]

As noted, the *Chiarella* Court did not resolve whether trading while in possession of material, nonpublic market information misappropriated or obtained or used by unlawful means violates Rule 10b–5. The Commission continues to believe that such conduct undermines the integrity of, and investor confidence in, the securities markets, and that persons who unlawfully obtain or misappropriate material, nonpublic information violate Rule 10b–5 when they trade on such information.[20] Moreover, the decision did not suggest any limitation on the Commission's authority under Section 14(e) to adopt a rule regulating trading while in possession of material, nonpublic information relating to a tender offer.[21]

In view of the potential harm to investors and the securities markets which results from trading on material, nonpublic information,[22] the Commission will continue diligently to discharge its enforcement responsibilities in this area with particular emphasis on corporate insiders and securities professionals involved in tender offers. The Commission and the self-regulatory organizations will continue to monitor insider trading and to investigate allegations of unlawful trading on material, nonpublic information.

The abuses which result from trading in securities by persons in possession of material, nonpublic information are particularly troublesome in the context of tender offers. Such trading was a matter of concern to Congress when it enacted the Williams Act and is of ongoing concern to the Commission in administering the Exchange Act.[23] As more fully discussed in Release No. 34–15548 setting forth the February proposals [24] and in Release No. 34–16385 setting forth the November proposals,[25] the testimony in the Senate and House Hearings on the legislation which became the Williams Act highlighted the market disruption and abusive practices associated with leaks by a bidder relating to a tender offer.[26] During the hearings on the Williams Act amendments in 1970, the issue of trading on material, nonpublic information relating to a tender offer was brought to the attention of Congress in the discussion of the manner in which the Commission would implement its rulemaking authority under Section 14(e).[27]

In 1971, the Commission indicated in its Institutional Investor Study Report that it would consider the possibility of developing appropriate rules to deal with the misuse by institutional investors in the market of undisclosed information concerning corporate takeovers.[28]

The Commission has previously expressed and continues to have serious concerns about trading by persons in possession of material, nonpublic information relating to a tender offer.[29] This practice results in unfair disparities in market information and market disruption.[30] Security holders who purchase from or sell to such persons are effectively denied the benefits of disclosure and the substantive protections of the Williams Act. If furnished with the information, these security holders would be able to make an informed investment decision, which could involve deferring the purchase or sale of the securities until the material information had been disseminated or until the tender offer had been commenced or terminated. Moreover,

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[16] *See* 40 S.E.C. at 912 and n. 15.

[17] *See* —— U.S. at ——, 100 S. Ct. at 1115. *See, e.g., Shapiro* v. *Merrill Lynch, Pierce, Fenner & Smith*, 495 F.2d 228, 237–38 (2d Cir. 1974).

[18] 406 U.S. 128 (1972).

[19] For example, the Investment Advisers Act of 1940 imposes, in effect, a fiduciary obligation on an investment adviser to its client. *See* §§ 205 & 206 [15 U.S.C. 80b–5 & 80b–6]. Under traditional principles of agency law, a broker owes a fiduciary duty to its customer which is defined by the scope of the agency relationship. *See, e.g.*, N. Wolfson, R. Phillips & T. Russo, *Regulation of Brokers, Dealers and Securities Markets* ¶ 2.03 (1977). In addition, in appropriate circumstances, a dealer has been held to owe a fiduciary obligation to its customer. *See Charles Hughes & Co., Inc.* v. *Securities and Exchange Comm'n*, 139 F.2d 434 (2d Cir. 1943), *cert. denied*, 321 U.S. 786 (1944); *Arleen W. Hughes*, 27 S.E.C. 629 (1948); *Chasins* v. *Smith Barney & Co.*, 438 F.2d 1167 (2d Cir. 1970). *See also* Securities Exchange Act Release No. 13662 (June 23, 1977), 42 FR 33510, 33519–33521, in which the Commission discussed the standards of conduct applicable to certain market professionals in connection with publishing Rule 19c–2 for comment.

[20] In view of the limited holding in *Chiarella*, the Commission continues to believe that such trading may violate Rule 10b–5. Accordingly, no inference should be drawn respecting the applicability of Section 10(b) and Rule 10b–5 to such trading from the adoption of Rule 14e–3 under the Exchange Act.

[21] —— U.S. at ——, 100 S. Ct. at 1117–18.

[22] *See* discussion at notes 29–32, *infra*.

[23] The Commission has instituted numerous civil injunctive actions alleging violations of Section 10(b) of the Exchange Act and Rule 10b–5 thereunder by persons trading in subject company securities while in possession of material, nonpublic information prior to the public announcement of a tender offer. *See, e.g., S.E.C.* v. *Hall*, No. 80–0504, filed Feb. 22, 1980 (D.D.C.), Lit. Rel. No. 9013 (special counsel to issuers making tender offers for their own stock purchased stock before the tender offers were announced); *S.E.C.* v. *Lopata*, No. 80–0274, filed Jan. 29, 1980 (D.D.C.), Lit. Rel. No. 8985 (chairman of the board of directors of subject company tipped brother who purchased subject company stock before the tender offer was announced); *S.E.C.* v. *Fike*, No. 79 Civ. 4434, filed Aug. 23, 1979 (S.D.N.Y.), Lit. Rel. No. 8851 (secretary for director of subject company purchased subject company stock before the tender offer was announced); *S.E.C.* v. *Wright*, No. 79–1981 filed July 30, 1979 (D.D.C.), Lit. Rel. No. 8829 (director of subject company purchased subject company stock before an announcement that management supported tender offer by third party was made); *S.E.C.* v. *Hechler*, No. 79–1729, filed July 5, 1979 (D.D.C.), Lit. Rel. No. 8811 (consultant to bidder and his brother-in-law purchased subject company securities before the tender offers were announced); *S.E.C.* v. *Lockwood*, No. 79 Civ. 0245, filed Jan. 16, 1979 (S.D.N.Y.), Lit. Rel. No. 8646 (vice-president of bidder purchased subject company stock before the tender offer was announced); *S.E.C.* v. *Stone*, No. 78 Civ. 4259, filed Sept. 11, 1978 (S.D.N.Y.), Lit. Rel. No. 8527 (employee of bidder who was inadvertent tippee—"eavesdropper"—purchased subject company stock before the tender offer was announced).

[24] 44 FR 9956, 9976–9979.

[25] 44 FR 70349, 70352–70355.

[26] *See, e.g.*, Hearings on S. 510 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 69 *passim* (1967).

[27] During his testimony at the Senate hearings, then Chairman Budge was asked by Senator Williams to give the committee some examples of fraudulent, deceptive or manipulative practices used in tender offers which would be prevented by the rulemaking authority to be granted to the Commission under the proposed amendment to Section 14(e) of the Exchange Act. Hearings on S. 3431 and S. 336 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency, 91st Cong., 2d Sess. 11 (1970). In response to this specific request, a memorandum from the Commission's Division of Corporation Finance was submitted for the record. Among the "problem areas" enumerated by this memorandum which the staff proposed to deal with by rulemaking authority under Section 14(e), as amended, was the situation in which [t]he person who has become aware that a tender offer is to be made, or has reason to believe that such bid will be made, may fail to disclose material facts with respect thereto to persons who sell him securities for which the tender bid is to be made. *Id.* at 12.

[28] Institutional Investor Study Report of the Securities and Exchange Commission, H.R. Doc. No. 92–64, 92d Cong., 1st Sess. XXXIII (Comm. Print 1971).

[29] Release Nos. 34–15548 and 34–16385.

[30] Such purchases may result in rapid and unexplained price and volume movements in the subject company's and the bidder's securities.

the Williams Act was designed to avert a "stampede effect" in the context of tender offers [31] and the trading on material, nonpublic information and the dissemination of leaks and rumors in connection with such trading tends to promote this detrimental effect.

In view of the continue trading and potential for trading by persons while in possession of material, nonpublic information relating to tender offers and the detrimental impact which such trading has on tender offer practice, shareholder protection and the securities markets, the Commission has determined that Rule 14e–3 is necessary and appropriate in the public interest and for the protection of investors.[32] As adopted, Rule 14e–3 pertains to both the person who receives the information, the tippee, and the person who transmits the information, the tipper.

II. Synopsis of Rule

A. Rule 14e–3(a)

Like the November proposal, Rule 14e–3(a) imposes a duty of disclosure under Section 14(e) on any person who trades in securities which will be sought or are being sought in a tender offer while that person is in possession of material information which he knows or has reason to know is nonpublic and has been acquired directly or indirectly from the offering person, from the issuer or from an officer, director, partner or employee or any other person acting on behalf of the offering person or the issuer. Since no duty to disclose would arise if a person subject to the rule does not purchase or sell or cause the purchase or sale of such securities while in possession of such information, the rule establishes a specific duty to "disclose or abstain from trading" under Section 14(e). The "disclose or abstain from trading" framework of Rule 14e–3(a) is similar to the approach taken in *Texas Gulf* and *Cady, Roberts* which the *Chiarella* Court cited with approval. In the Commission's view this framework is the least restrictive method of regulating this abusive practice.

In order to avoid the prohibition on trading, there must be public disclosure within a reasonable time prior to any such purchase or sale. This public disclosure may be made by the person who has acquired information subject to the prohibition or by another person. As with the earlier proposals, the Commission does not believe that electing to make the public disclosure required by Rule 14e–3(a) prior to trading would be a defense for a breach of duty owed by such person under a contractual or fiduciary relationship with the offering person or the issuer. When such contractual or fiduciary relationships exist, abstention from trading may be the only alternative available to persons in possession of material, nonpublic information which will be both lawful and not in breach of the relationships.

1. *Operation of Rule 14e–3(a).* The "disclose or abstain from trading" duty of Rule 14e–3(a) will arise if the following elements are present:

(a) If any person has taken a substantial step or steps to commence [33] or has commenced a tender offer and another person [34] is in possession of material information relating to such tender offer; [35]

(b) which information the other person knows or has reason to know [36] is nonpublic;

(c) which information the other person knows or has reason to know has been acquired directly or indirectly from the offering person, from the issuer of the securities sought or to be sought in such tender offer or from an officer, director, partner or employee or any other person acting on behalf of the offering person or the issuer; [37] and

(d) the other person purchases or sells or causes the purchase or sale [38] of any security to be sought or sought in such tender offer, or any other security convertible into or exchangeable for such security or any option or right to obtain or to dispose of such securities.[39]

As adopted, the information which will trigger the operation of the Rule (1) must be material, (2) must relate to a tender offer, (3) must be nonpublic and (4) must have been acquired directly or indirectly from the offering person, from the issuer or from another specified person. For the last two requisites, there is a "knows or has reason to know" standard by the person who has possession of the information. For the first two requisites, *i.e.*, materiality and relation to a tender offer, there is no

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[31] *Rondeau* v. *Mosinee Paper Co.*, 422 U.S. 49, 58 n. 8 (1975).

[32] In addition, the Commission will continue to consider additional regulatory initiatives in the area of trading on material, nonpublic information.

[33] Unlike the November proposal, which was triggered by the determination by the bidder to make a tender offer, Rule 14e–3(a) is triggered by any person taking a substantial step or steps to commence a tender offer. Thus, the prohibition of Rule 14e–3(a) will apply to the period from the accomplishment by the offering person of a substantial step or steps to commence a tender offer to the termination of the tender offer. This provision addresses the commentators' concern with the difficulty of identifying when a person has actually determined to make a tender offer by replacing that standard with the one in the rule as adopted. The Commission believes that, although this standard is not totally objective, it provides a reasonable basis to identify when the prohibition of Rule 14e–3(a) would apply.

The Commission believes that a substantial step or steps to commence a tender offer include, but are not limited to, voting on a resolution by the offering person's board of directors relating to the tender offer; the formulation of a plan or proposal to make a tender offer by the offering person or the person(s) acting on behalf of the offering person; or activities which substantially facilitate the tender offer such as: arranging financing for a tender offer; preparing or directing or authorizing the preparation of tender offer materials; or authorizing negotiations, negotiating or entering into agreements with any person to act as a dealer manager, soliciting dealer, forwarding agent or depository in connection with the tender offer.

[34] This person is someone other than the offering person, or in the case of an issuer tender offer, the issuer.

[35] Like the November proposal, Rule 14e–3(a) pertains to any material, nonpublic information relating to a tender offer. Therefore, this element would include information prior to the commencement of a tender offer, such as the intention to make a tender offer, as well as such information during a tender offer such as the withdrawal of a tender offer or an increase in the consideration being offered to security holders.

[36] In light of the comments received, the "knows or has reason to believe" standard embodied in the November proposal was replaced with a "knows or has reason to know" standard. This revision should not be construed to indicate that the person who trades or causes a transaction does not necessarily have a duty of inquiry with respect to the information and its source.

[37] Unlike the November proposal which focused on information directly or indirectly received from the bidder, Rule 14e–3(a) differs in two respects. First, it provides that the other person knows or has reason to know that he has directly or indirectly acquired the information. Thus, information received as well as information obtained by conversation, misappropriation and other means is included in the term "acquired." Second, the information may be acquired from the offering person, from the subject company or from an officer, director, employee or partner or any other person acting on behalf of the offering person or the issuer. This revision responds to concerns of the commentators that the proposed Rule did not address adequately material, nonpublic information emanating from the subject company. This revision also makes clear that the response to a tender offer by the subject company, including its recommendation to accept or reject the tender offer, is within the purview of Rule 14e–3(a). One result of the revision is that, in circumstances where the subject company or its insiders are the source by which the information is acquired, the duty established by Rule 14e–3(a) may overlap with a similar duty under Rule 10b–5. Thus, the subject company's response to the tender offer would be information from the subject company and would be covered by Sections 14(e) and 10(b) and Rule 10b–5. Since the information must come directly or indirectly from the offering person, from the subject company or from an officer, director, partner or employee or any other person acting on behalf of the offering person or the issuer, Rule 14e–3(a) would not apply if the information comes from an initial source other than such persons.

[38] The meaning of the term "causes" in the context of this Rule includes a recommendation by one person to another person which results in a purchase or sale by the other person.

[39] The November proposal prohibited trading in any security or any option to purchase any security of the subject company. In response to the commentators, the types of securities subject to the trading prohibition has been narrowed. As a result, trading is proscribed only in securities whose market value has a relationship to the security sought or to be sought in the tender offer.

"knows or has reason to know" standard.

In addition, Rule 14e–3(a) applies prior to the commencement of a tender offer as well as after an offer has commenced. Trading while in possession of material, nonpublic information prior to the commencement of a tender offer results in the same abuses and causes the same detrimental effects as trading during a tender offer. Since the scope of Section 14(e) applies to acts or practices "in connection with any tender offer," it was, in the Commission's judgment, intended that conduct prior to the date of commencent as well as during a tender offer be covered.

The operation of Rule 14e–3(a) may be illustrated by examples. It should be emphasized that these examples are not exclusive and do not constitute the only situations in which the duty under Rule 14e–3(a) would arise:[40]

(1) If an offering person tells another person that the offering person will make a tender offer which information is nonpublic, the other person has acquired material, nonpublic information directly from the offering person and has a duty under Rule 14e–3(a).

(2) If an offering person delegates the authority to determine whether such offering person should take a substantial step or steps to commence or should commence a tender offer to an officer, employee, director or partner and such person decides to implement the tender offer, such person will be deemed to have acquired information relating to the tender offer from the offering person and therefore will have a duty under Rule 14e–3(a) to disclose or abstain from trading.

(3) If the offering person sends a nonpublic letter to a subject company notifying the subject company of a proposed tender offer at a specified price and upon specified terms and the management of the subject company learns the contents of the letter, the management of the subject company has acquired material, nonpublic information directly from the offering person. An individual member of such management will violate Rule 14e–3(a) if he purchases or sells or causes the purchase or sale of the securities to be sought in the tender offer.

(4) If, under the facts in the preceding example, the management of the subject company also tells other persons not affiliated with management of the letter, then those other persons have acquired material, nonpublic information indirectly from the offering person and are under a duty to disclose or abstain from trading under Rule 14e–3(a).

(5) If a person receives material information from the subject company relating to its response to another person's tender offer for the subject company's securities, such person will be under a duty to disclose or abstain from trading provided that such person knows or has reason to know the information is nonpublic.

(6) If a person steals, converts or otherwise misappropriates material, nonpublic information relating to a tender offer from an offering person, such person will have acquired the information directly from the offering person and has a duty under Rule 14e–3(a).

(7) If an offering person tells another person of his intention to make a tender offer, and such other person subsequently tells a third person that a tender offer will be made and this third person knows or has reason to know that this non-public information came indirectly from the offering person, then this third person has a duty under Rule 14e–3(a).

2. *Disclosure under Rule 14e–3(a).* A person who triggers the elements of Rule 14e–3(a) discussed above may either refrain from trading in the securities specified or comply with the disclosure requirement of Rule 14e–3(a). The disclosure requirement has two elements: (1) timing of disclosure; and (2) the information and its source. Within a reasonable time prior to such purchase or sale the person must publicly disclose, by press release or otherwise, the information received and its source. The Commission does not believe that this requirement imposes an undue burden of disclosure. Moreover, the Commission emphasizes that the disclosure must be made in a manner which will fully disseminate the information. Various methods are available. These include, but are not limited to, disclosing the information and its source to a national securities exchange on which the class of securities sought or to be sought in the tender offer is listed; to the National Association of Securities Dealers, Inc., if such security is authorized for trading in the NASDAQ interdealer quotation system; a daily newspaper with a national circulation; or a national news service.

In addition, if full and complete disclosure of the information is made by another person, then there is no requirement for duplicative disclosure by a person who would otherwise be required to disclose or abstain from trading. It should be emphasized, however, that the disclosure made by another person must occur within a reasonable time prior to any purchase or sale by the person and that the disclosure must be substantially similar in content to that disclosure which such person would have been required to make under the rule.

B. Rule 14e–3(b)

The abuse at which Rule 14e–3(a) is directed is the actual misuse of material, nonpublic information in connection with a sale or purchase. The Commission recognizes that the rule is capable of being applied to a person that is not a natural person even though the individuals making the investment decision on behalf of such person did not know the material, nonpublic information. This could occur, for example, where one department of a multi-service financial institution received material, nonpublic information relating to a tender offer while a separate and independent department of the same organization made the decision to purchase (or sell) securities of the subject company without any knowledge of such information. In the instance where the prohibition would be applicable to a person other than a natural person, and the individuals making the investment decision did not know the material, nonpublic information, there would be no actual misuse of the information, yet it could be said that the institution was in possession of the information and did purchase or sell in apparent violation of Rule 14e–3(a).

In recognition of this situation, the November proposal contained an exception from the prohibition on trading for a person, which is not a natural person, where the individuals making the investment decision on behalf of that person did not know and did not have access to such material, nonpublic information. The commentators supported the Commission's recognition that an exception was necessary and appropriate for such persons, typically multi-service financial institutions. Many, however, suggested certain changes in the formulation of the exception. In response to the comments received and based on further analysis by the Commission, the exception provided in Rule 14e–3(b) has been revised.[41]

[40] Also, these examples do not illustrate the operation of Rule 14e–3(d). *See* discussion at 34, *infra.*

[41] Rule 14e–3(b) differs from proposed Rule 14e–3(b) in two respects. First, the proposed rule required the institution to prove that the individual making the investment decision did not know and did not have access to the material, nonpublic

Footnotes continued on next page

As adopted, Rule 14e–3(b) provides an exception to the prohibition of Rule 14e–3(a) where an institution or other non-natural person engaged in the securities business can show that the individual decision makers did not know the information and that the institution has implemented one or a combination of reasonable procedures to ensure that such individuals would not violate Rule 14e–3(a).

1. *Elements of the exception.* In order to qualify for the exception in Rule 14e–3(b), a person who is not a natural person must carry the burden of proof for both elements of the exception. First, under Rule 14e–3(b)(1) such person must show that the individual decision maker(s)[42] within the person did not know the information at the time the investment decision was made. Whenever the actual decision maker(s) know [43] the information, the exception is not available whether or not the second element of the exception is satisfied. Second, Rule 14e–3(b)(2) requires that the person must show that it has implemented [44] one or a combination of policies and procedures, reasonable under the circumstances to ensure that individual(s) making investment decision(s) would not violate paragraph (a). These policies and procedures may include but are not limited to (i) those which restrict any purchase, sale and causing any purchase or sale of any security and (ii) those which prevent the individual decision maker(s) from knowing such information.

The neutral approach adopted in Rule 14e–3(b)(2) is intended to provide flexibility to each institution to tailor its policies and procedures to fit its own situation. The policies and procedures which are implemented to satisfy the exception must be reasonable under the facts and circumstances of the person and that person's type of business. Policies and procedures which may be reasonable for one institution may not be reasonable for another institution, even in the same industry. Moreover, the phrase "reasonable under the circumstances" relates to the timing of the policies and procedures—at which point in time they are implemented with respect to material, nonpublic information—as well as to their substance.

Rule 14e–3(b)(2) (i) and (ii) specify certain types of policies and precedures, which are not exclusive. The first type of policies and procedures is the restricted list procedure and the second type refers to policies and procedures often called a "Chinese Wall." There are other informal procedures that some institutions employ when they receive material, nonpublic information, such as "watch lists." The "reasonable under the circumstances" standard may require one or a combination of these policies and procedures to ensure that actual investment decision maker(s) do not violate paragraph (a).

As adopted, the availability of the exception does not depend on the type of multi-service financial institution involved, the departments within the multi-service financial institutions involved or the activities performed by such multi-service financial institutions. This position is consistent with the views of the majority of the commentators who addressed the issue of whether distinctions should be made for different institutions. However, the Commission believes that the type of institution or the particular department within an institution involved and the activities that are engaged in are factors which should be assessed when determining what constitutes reasonable policies and procedures within the circumstances of a particular institution.

2. *Present practices.* The Commission understands that policies and procedures to prevent the use of material, nonpublic information relating to a tender offer as well as other types of information are widely used by multi-service financial institutions. These present practices include the use of so-called "Chinese Walls" which are used to isolate the nonpublic flow of information from one department to the rest of the institution. Depending on the circumstances, it may be appropriate to advise customers of its use of the Chinese Wall, because the institution would not be using all information that it had received to the benefit of a particular customer. There is also a danger that the Chinese Wall may not be fully effective in all instances and that information may pass through the wall. In that regard, other informal procedures are often used in conjunction with and to supplement the Chinese Wall at times when the institution has material, nonpublic information but before the information is appropriate for public release or to cause placement of the security on a restricted list. This "watch list" procedure enables the institution to monitor trading activity to determine whether any leaks in the Chinese Wall have occurred.

Another type of procedure is the restricted list whereby an institution will prohibit recommendations relating to, solicitations of orders to purchase or sell, execution of unsolicited orders to purchase or sell a particular security or any combination of these prohibitions. Most firms are reluctant to place a security on a restricted list until the information is significant and ready to be publicly announced.[45] This reluctance is based upon the perception that a restricted list often operates as a "tip-sheet" for the investment community—immediately signaling that the institution is in possession of material, nonpublic information about the issuer of the stock placed on restriction.

Depending upon the nature of the activities of a particular institution, it may use a Chinese Wall or a restricted list or a combination of these and other procedures. The specific policies and procedures selected by an institution will be those which will be most effective in preventing the misuse of material, nonpublic information.

Footnotes continued from last page
information. The separate requirement of proving lack of access was criticized by the commentators, based on the belief that it would be difficult, especially in smaller institutions, to prove that the investment decision maker did not have access to the information and because evidence concerning a lack of access really bears on the question of whether the investment decision maker had actual knowledge. As adopted, Rule 14e–3(b) requires the institution to show that it has implemented reasonable policies and procedures to ensure that individual decision maker(s) would not violate paragraph (a). Second, proposed Rule 14e–3(b) provided that the existence of policies and procedures designed to prevent the misuse of the material, nonpublic information may, depending upon the facts and cricumstances, be taken into account in determining whether the individuals had access. Rule 14e–3(b) provides that Rule 14e–3(a) will not apply if the institution can show that the individual decision maker(s) did not know the information and that the institution had implemented reasonable policies and procedures so that investment decision maker(s) would not violate paragraph (a). This revision addresses the concerns of the commentators that the proposed rule did not indicate whether the existence of policies and procedures would provide a defense to liability under Rule 14e–3(a).

[42] One of the commentators expressed concern over a possible expansive interpretation of the phrase "individual(s) making the investment decision." Only the individual(s) actually involved in the investment decision are covered by the phrase and it does not include individual(s) that have a purely supervisory authority with respect to investment decisions. Thus, an insurance company's Finance Committee which may be charged with ultimate responsibility for supervising investment decisions by that institution but which does not make the actual investment decision would not be considered "individual(s) making the investment decision" under Rule 14e–3(b)(1).

[43] A person attempting to establish the non-availability of the exception may be able after the institution has met the initial burden to show circumstances under which it would not be reasonable to assume that the individual decision maker(s) did not know the information. This evidence may also bear on the effectiveness of the policies and procedures in the second element.

[44] As used in Rule 14e–3(b)(2), the term "implemented" includes the establishment and effective maintenance of the reasonable procedures.

[45] The Commission notes that that information may be material for purposes of Rule 14e–3(a) well in advance of time the security is placed on the restricted list.

The Commission expects that present practices would continue in light of Rule 14e–3(b) and may, in certain instances, be strengthened to ensure the availability of this exception to liability. The Commission will carefully monitor and review the impact that Rule 14e–3(b) has on the present practices.[46] In addition, the Commission believes that Rule 14e–3(b) will not unduly burden the operations of multiservice financial institutions and that the provision is consistent with those of other federal agencies.[47]

In addition to these practices, these institutions in the exercise of sound business judgment and in light of attendant legal responsibilities have instituted policies and procedures which may exceed those required by Rule 14e–3(b). The business judgment aspect involves the perception of the customers of that institution concerning the conduct and practices of the institution. To maintain a high level of customer confidence in the integrity of the institution and the industry in general, the institution may be compelled to institute policies or procedures in addition to those required by Rule 14e–3(b). The Commission anticipates that the adoption of Rule 14e–3(b) will not affect these business judgment decisions.

[46] One such practice that the Commission expects to continue is the practice that a broker dealer does not trade for its own account, such as arbitrage and other proprietary activities, when the broker dealer possesses material, nonpublic information relating to a tender offer. In the Commission's view, the burden of proof with respect to knowledge and the effectiveness of the policies and procedures would be more difficult to sustain if the purchases at issue involve such activities.

[47] By not designating the specific policies and procedures that should be adopted to ensure that the individual decision maker(s) would not violate Rule 14e–3(a), the Commission's approach is consistent with that of the Federal Reserve Board ("Fed") and the Comptroller of the Currency ("Comptroller"). In a policy statement concerning the use of inside information, the Fed stated its judgment that the use of material inside information by any state member bank in connection with any decision or recommendation to purchase or sell securities constitutes an unsafe and unsound banking practice. Those banks which exercise investment discretion for the account of others were then notified to adopt written policies and procedures suitable to its particular circumstances to ensure that such information is not misused [43 FR 12755]. The Comptroller has adopted regulations to require every national bank exercising fiduciary powers to adopt written policies and procedures to ensure that national bank trust departments shall not use material, inside information in connection with any decision or recommendation to purchase or sell any security (12 CFR 9.7(d)). In adopting these requirements, the Comptroller rejected the idea of setting forth the key aspects of these policies and procedures in favor of a flexible approach, whereby each bank would be able to choose those policies and procedures which best suit it [43 FR 6759].

C. Rule 14e–3(c)

Rule 14e–3(c) sets forth two exceptions in addition to that provided by Rule 14e–3(b). The exceptions pertain to purchases of the securities sought or to be sought in the tender offer by brokers or other agents on behalf of an offering person; and to sales of such securities by any person to an offering person.

It should be noted that the scope of the exceptions from liability provided by this paragraph is limited. Rule 14e–3(c) provides an exception for only those persons named in Rule 14e–3(c) and an exception from liability for violations of only Rule 14e–3(a). Rule 14e–3(c) does not have any effect on the duties imposed on an offering person under other provisions of the federal securities laws, such as Rule 10b–13 [17 CFR 240.10b–13]. Rule 10b–13 prohibits an offering person from directly or indirectly purchasing or arranging to purchase certain securities otherwise than pursuant to a tender offer from the time the tender offer is publicly announced or otherwise made known by the offering person until the expiration of the offer. Therefore, if Rule 10b–13 is applicable, the offering person would be unable to purchase the securities notwithstanding that Rules 14e–3(c)(1) or 14e–3(c)(2) will render the provisions of Rule 14e–3(a) inapplicable. In such instances, the transaction would not occur because the offering person would be unable to purchase or arrange for the purchase of the securities.

Rule 14e–3(c)(1) provides that the purchase or purchases of any security described in Rule 14e–3(a) by a broker or by another agent on behalf of an offering person are not violations of Rule 14e–3(a). This exception addresses the concern by some commentators that a broker or other agent making purchases on behalf of an offering person would violate the proposed rule if the offering person disclosed material, nonpublic information to such broker or agent. As adopted, Rule 14e–3(a) applies to any person and since the broker or the offering person's agent is a person within the meaning of paragraph (a), the exception is necessary for the offering person to consummate lawful purchases if the broker or agent acquires material, nonpublic information from the offering person. As noted earlier, this exception does not provide any relief for the offering person from other provisions of the federal securities laws.

Rule 14e–3(c)(2) provides that a sale or sales by any person of any security described in paragraph (a) to the offering person are not in violation of Rule 14e–3(a). This exception permits a person who has received material, nonpublic information from a particular offering person relating to a tender offer to sell securities to that offering person prior to the date of commencement of the tender offer as well as to tender securities to that offering person pursuant to the tender offer and to have those securities accepted for payment by the offering person pursuant to the tender offer. Since the potential for misuse of the information is negligible in these instances, liability is not imposed on the seller in this type of transaction.

The exception in Rule 14e–3(c)(2) is designed to permit the following transactions without a violation of Rule 14e–3(a). In the situation where the offering person acquires the securities of an insider prior to the commencement of a tender offer and the insider is informed of the offering person's nonpublic intention to make a tender offer, then paragraph (a) would prohibit the sale to the offering person by the insider without disclosure. However, the exception in Rule 14e–3(c)(2) would permit the sale by the insider to the offering person. This exception would also permit any person to tender securities to the offering person in the tender offer, where such person knows material, nonpublic information relating to the tender offer, such as an increase in consideration or an extension of the tender offer, without complying with the disclosure requirements of paragraph (a).

D. Rule 14e–3(d)

As discussed earlier, trading on the basis of material, nonpublic information leaked to the market creates disparities in market information and market disruption. This undermines the purposes of the Williams Act since security holders who sell to persons with such material, nonpublic information are effectively denied the benefits of disclosure and the substantive protections provided by the Williams Act.

To address this problem the Commission published for comment proposed Rule 14e–3(c) as part of the November proposals. This proposal focused on the bidder's role in preventing these practices and fostering the achievement of the purposes of the Williams Act. Under proposed Rule 14e–3(c), a person who had determined to make or was making a tender offer or any person acting on behalf of such person would be prohibited from communicating material, nonpublic information relating to such tender offer to any other person if such person knew or had reason to know that the other person was likely to violate proposed

Rule 14e–3(a) by purchasing or selling securities of the subject company. An exception was provided from proposed Rule 14e–3(c) for the communication of material, nonpublic information relating to a tender offer by the person who had determined to make or is making the tender offer to its officers, directors, employees or partners as well as persons included in the planning, financing, preparation or execution of the tender offer in order to implement the tender offer, unless the person who had determined to make or is making the tender offer had evidence that such persons are likely to violate proposed Rule 14e–3(a).

Rule 14e–3(d) is the rule designed to prevent the selective communication of material, nonpublic information relating to a tender offer as contemplated by the November proposals but contains a number of revisions to the proposal. Rule 14e–3(d) is adopted as a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices under Section 14(e) in the area of trading on material, nonpublic information relating to a tender offer. Rule 14e–3(d) provides that it shall be unlawful for certain specified persons to communicate material, nonpublic information relating to a tender offer under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of Rule 14e–3(a) or Rule 14e–3(d) except that the prohibition shall not apply to a communication made in good faith to certain specified persons: those involved in the planning, financing, preparation or execution of the tender offer; the issuer and certain persons involved in the planning, financing, preparation or execution of the issuer's activities with respect to such tender offer; and any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

1. *Operation of Rule 14e–3(d)(1).* Rule 14e–3(d)(1) proscribes the selective communication of certain information by persons described in Rule 14e–3(d)(2). The proscription consists of two elements. First, such person must possess material, nonpublic information relating to a tender offer. Such person may create the information, *e.g.,* the offering person or the subject company, or he may have acquired the information from the offering person or the subject company or from a person who is in a chain from the offering person or the subject company. Second, such person tips the information to another. The tipping occurs where it is reasonably foreseeable that the communication is likely to result in a violation of Rule 14e–3. The standard of reasonably foreseeable is premised on what a reasonable man would view as reasonably foreseeable. This formulation is reasonably related to the objective of preventing trading on the basis of material, nonpublic information because it operates to prohibit leaks which are the source of this information.

The rule is not intended to have an impact on casual and innocently motivated social discourse. The rule applies where the circumstances such as the identity, position, reputation or prior actions of the participants—or other relevant factors—make it reasonably foreseeable that a violation of Rule 14e–3 is likely to occur. Even beyond the reach of the rule, because of the disruptive effect of leaks of material, non-public information relating to tender offers, the Commission urges that persons in possession of such information exercise all due care in communications.

2. *Persons subject to the anti-tipping rule.* Rule 14e–3(d)(2) specifies the persons subject to the proscription of Rule 14e–3(d)(1). These persons may be grouped into two categories. The first category consists of those persons who occupy a certain status such as the offering person, the subject company, or an officer, director, partner or employee or any other person acting on behalf of the offering person or the issuer. The second category consists of tippees of the persons in the status category. As a result, Rule 14e–3(d)(2) would reach intermediate level tippees, regardless of whether they trade on the basis of the information. For example, a person who receives such information from the offering person such as a broker dealer not involved in the tender offer will violate Rule 14e–3 if he communicates such information to another person under circumstances where it is reasonably foreseeable that such other person will trade on the basis of the information or such other person will tip someone else.

3. *Exception to Rule 14e–3(d).* In order not to hinder tender offer practice and to allow both the offering person and the subject company to conduct their affairs without exposure to an unwarranted litigation hazard, the Commission believes that it is necessary to specify an exception to Rule 14e–3(d). On the basis of the exception, Rule 14e–3(d) will not apply to communications by the persons specified in Rule 14e–3(d)(2) to the persons enumerated in Rule 14e–3(d)(1) (i) through (iii), provided that they are made in good faith. The adoption of this exception responds to the concerns of several commentators that a safe harbor be added to assure that the offering person can communicate information to persons involved in the tender offer without violating the proposed rule.

The good faith standard is the critical concept to the availability of the exception and the person claiming the availability of the exception bears the burden of proof in establishing his good faith. If the person who communicates the information knows or has reason to know that the person enumerated in Rule 14e–3(d)(1) (i) through (iii) is going to violate Rule 14e–3, then the exception is not available. The communicator would be a tipper subject to the prohibition of Rule 14e–3(d) and the person who acquires and trades will violate Rule 14e–3(a).

III. Certain Findings

In publishing the November proposals, the Commission specifically invited comments with respect to: (1) whether the costs imposed on bidders, subject companies and/or others by the proposals would outweigh their benefits to investors and the public interest; and (2) whether any proposed rule, if adopted, would have an adverse effect on competition or would impose a burden on competition which is neither necessary nor appropriate in furthering the purposes of the Exchange Act.

The comment letters did not provide any significant basis for concluding that the implementation of the Commission's statutory mandate in the manner proposed would be outweighed by such possible additional costs. Accordingly, the Commission finds that the cost imposed on bidders, subject companies and others by the rule published herein are not unreasonable and are far outweighed by the benefits which will accrue to investors.

As required by Section 23(a)(2) of the Exchange Act, the Commission has specifically considered the impact which the rule published herein will have on competition. The Commission finds that compliance with the rule will not impose any significant burden on competition. In any event, the Commission has determined that any possible competitive burden will be outweighed by, and is necessary and appropriate to achieve, the benefits of the rule to investors.

IV. Text of the Adopted Rule

Accordingly, 17 CFR Part 240 is amended by adding § 240.14e–3 to read as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

§ 240.14e–3 Transactions in securities on the basis of material, nonpublic information in the context of tender offers.

(a) If any person has taken a substantial step or steps to commence, or has commenced, a tender offer (the "offering person"), it shall constitute a fraudulent, deceptive or manipulative act or practice within the meaning of section 14(e) of the Act for any other person who is in possession of material information relating to such tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from (1) the offering person, (2) the issuer of the securities sought or to be sought by such tender offer, or (3) any officer, director, partner or employee or any other person acting on behalf of the offering person or such issuer, to purchase or sell or cause to be purchased or sold any of such securities or any securities convertible into or exchangeable for any such securities or any option or right to obtain or to dispose of any of the foregoing securities, unless within a reasonable time prior to any purchase or sale such information and its source are publicly disclosed by press release or otherwise.

(b) A person other than a natural person shall not violate paragraph (a) of this section if such person shows that:

(1) The individual(s) making the investment decision on behalf of such person to purchase or sell any security described in paragraph (a) of this section or to cause any such security to be purchased or sold by or on behalf of others did not know the material, nonpublic information; and

(2) Such person had implemented one or a combination of policies and procedures, reasonable under the circumstances, taking into consideration the nature of the person's business, to ensure that individual(s) making investment decision(s) would not violate paragraph (a) of this section, which policies and procedures may include, but are not limited to, (i) those which restrict any purchase, sale and causing any purchase and sale of any such security or (ii) those which prevent such individual(s) from knowing such information.

(c) Notwithstanding anything in paragraph (a) of this section to contrary, the following transactions shall not be violations of paragraph (a) of this section:

(1) Purchase(s) of any security described in paragraph (a) of this section by a broker or by another agent on behalf of an offering person; or

(2) Sale(s) by any person of any security described in paragraph (a) of this section to the offering person.

(d)(1) As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts or practices within the meaning of section 14(e) of the Act, it shall be unlawful for any person described in paragraph (d)(2) of this section to communicate material, nonpublic information relating to a tender offer to any other person under circumstances in which it is reasonably foreseeable that such communication is likely to result in a violation of this section *except* that this paragraph shall not apply to a communication made in good faith,

(i) To the officers, directors, partners or employees of the offering person, to its advisors or to other persons, involved in the planning, financing, preparation or execution of such tender offer;

(ii) To the issuer whose securities are sought or to be sought by such tender offer, to its officers, directors, partners, employees or advisors or to other persons, involved in the planning, financing, preparation or execution of the activities of the issuer with respect to such tender offer; or

(iii) To any person pursuant to a requirement of any statute or rule or regulation promulgated thereunder.

(d)(2) The persons referred to in paragraph (d)(1) of this section are:

(i) The offering person or its officers, directors, partners, employees or advisors;

(ii) The issuer of the securities sought or to be sought by such tender offer or its officers, directors, partners, employees or advisors;

(iii) Anyone acting on behalf of the persons in paragraph (d)(2)(i) of this section or the issuer or persons in paragraph (d)(2)(ii) of this section; and

(iv) Any person in possession of material information relating to a tender offer which information he knows or has reason to know is nonpublic and which he knows or has reason to know has been acquired directly or indirectly from any of the above.

(Sec. 14(e), sec. 3, 82 Stat. 455; sec. 5, 84 Stat. 455; sec. 13(2), sec. 23, 48 Stat. 901; sec. 203(a), 49 Stat. 704; sec. 8, 49 Stat. 1379; sec. 10, 78 Stat. 580; sec. 18, 89 Stat. 155; 15 U.S.C. 78n(e) 78w(a))

Authority: The Commission hereby adopts Rule 14e–3 (§ 240.14e–3) as part of Regulation 14E (§§ 240.14e–1 through 14e–3) pursuant to Sections 14(e) and 23(a) of the Exchange Act.

By the Commission.

George A. Fitzsimmons,

Secretary.

September 4, 1980.

[FR Doc. 80–28215 Filed 9–11–80; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 284

[Docket No. RM79–34]

Transportation Certificates for Natural Gas for the Displacement of Fuel Oil

August 29, 1980.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Order granting stay.

SUMMARY: The Federal Energy Regulatory Commission (Commission) hereby adopts an Order Granting Stay. The effect of the Order is to stay the amendment to section 284.206 specified in ordering paragraph (6) of Order No. 30–D until after the Commission issues its order on rehearing of Order No. 30–D. Order No. 30–D extended the Commission's fuel oil displacement program for the nine month period from September 1, 1980 through May 31, 1981. (45 FR 56046, August 22, 1980.)

EFFECTIVE DATE: August 29, 1980.

FOR FURTHER INFORMATION CONTACT:

Robert Platt, Assistant Advisory Counsel, Office of the General Counsel, 825 North Capitol Street, N.E., Washington, D.C. 20426, 202–357–8457, or

Glenn Berger, Office of the General Counsel, 825 North Capitol Street, N.E., Washington, D.C. 20426, 202–357–9036.

Order Granting Stay

Issued August 29, 1980.

On August 21, 1980, Consolidated Edison Company of New York, Inc. (Con Ed), filed a petition pursuant to § 1.7(c) of the Commission's Rules of Practice and Procedure, seeking a stay of Order No. 30–D. Order No. 30–D extended the Commission's fuel oil displacement program for the nine month period from September 1, 1980, through May 31, 1981. Although the extension was for the most part subject to the same terms and conditions as the original Order No. 30, Ordering Paragraph (6) of Order No. 30–D amended § 284.206 to limit the effect of that provision to volumes delivered prior to September 1, 1980. § 284.206 currently provides: