Bloomberg Law Reports®

January 25, 2012

Corporate and M&A Law

Hostile Takeovers

Stock Issuances and Repurchases

Issuer Stock Repurchases during a Hostile Tender Offer


Contributed by Lois Herzeca and Eduardo Gallardo, Gibson, Dunn & Crutcher LLP

Companies faced with the launch of a hostile tender or exchange offer for their securities generally consider a range of possible defensive measures. They may consider implementing a stockholder rights plan or amendments to their constituent documents, initiating a campaign in the media and with their significant stockholders, or undertaking a comprehensive review of strategic alternatives. As part of this review process, companies might consider implementing a stock repurchase plan–if they have available funds and their stockholders would view it favorably.

Methods of Implementation

Undertaking a stock repurchase plan in the face of a hostile offer poses more complexities than would otherwise be the case, but nonetheless can be successfully completed. There are generally two methods that a company facing a hostile bid may utilize to implement a broad stock repurchase plan: (1) a self-tender offer at a fixed price or through a "Dutch auction," or (2) an open market buyback program.

A self-tender offer will be subject to the issuer tender offer requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and can be completed in as few as 20 business days. This method provides the company an effective mechanism to complete a significant buyback within a short period of time. However, the timing advantage provided by the self-tender offer process can be outweighed by certain strategic considerations. First, the necessity to establish a fixed price for the buyback, in the case of a traditional self-tender (or a price range, if the alternative "Dutch auction" method is used), necessitate that the company establish a price or price range for its stock at a time when doing so might disadvantage it in negotiating with a hostile bidder or third parties. Further, an oversubscription of the tender offer at a price close to the hostile bidder's offer could be used by the hostile party as evidence that its bid has broad stockholder support. Second, it might prove

to be particularly burdensome to the company to maintain its tender offer materials continuously current during the offer period, as negotiations with the hostile bidder and other potential interested parties might necessitate updating relevant disclosures and possibly extending the tender deadline to give stockholders the ability to review the supplemental materials. In light of the foregoing, despite its timing advantages, the self-tender offer route rarely has been used in recent years as a response to any major hostile takeover.[1]

The second method of implementing a broad share buyback program is through open market repurchases. The liquidity of the company's stock and likely self-imposed daily volume limitations (further discussed below) will dictate the time that would be needed to complete an open market repurchase program. In all likelihood, such a program will take longer to complete, as compared to a self-tender offer. But, unlike a self-tender offer, it can be carried out at prevailing market prices for the company's stock. Also, as described below, the use of a 10b5-1 trading plan to effect such repurchases will give the company the ability to continue effecting stock repurchases notwithstanding the possibility that it might acquire material nonpublic information during the pendency of the program.

Rule 10b5-1 and Use of a 10b5-1 Trading Plan to Effect Stock Repurchases

Companies repurchasing their own securities—including by means of an open market repurchase—must be mindful of the federal prohibitions on insider trading. Section 10(b) of the Exchange Act, and Rules 10b-5 and 10b5-1 thereunder, as well as judicial opinions construing these provisions, prohibit the purchase or sale of a security on the basis of material nonpublic information about that security or the issuer in breach of a duty of trust or confidence owed to the issuer or its shareholders.

Therefore, a company generally may not repurchase its own stock while in possession of material nonpublic information about, among other matters, its business, plans or finances. However, Rule 10b5-1 provides an affirmative defense if the company demonstrates that, before becoming aware of the material inside information, it (1) entered into a binding contract to purchase or sell the security, (2) instructed another person to purchase or sell the security for its account, or (3) adopted a written plan (a "10b5-1 trading plan") for trading securities. The rule further states that such an affirmative defense is applicable "only when the contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of [Rule 10b5-1]." The adoption of 10b5-1 trading plans has become common practice for issuers and insiders as a way to more safely navigate the restrictions of Section 10(b).

An issuer 10b5-1 trading plan typically takes the form of a purchase agreement between the company and a broker, who will purchase shares on behalf of the company for a pre-determined fee for each share purchased. These agreements generally provide for a one-week grace period before purchases can begin and specify parameters for the prices and volumes at which shares will be purchased by the broker on the open market or in privately negotiated transactions. In addition, the agreement provides a termination date for the repurchase program, which is typically tied to an aggregate dollar amount of shares purchased and/or a specific date, as well as various termination events (i.e., the date of public announcement of a merger, a self-tender or bankruptcy). Importantly, these agreements typically provide that, during the term of the agreement, the company will not, directly or indirectly, communicate any information relating to the company or its securities to any employee of the broker who is involved in executing the repurchases. Once a 10b-5 trading plan is in effect, the company can amend or terminate the plan but cannot otherwise control or affect purchases under the plan.

The SEC rules, federal court opinions, and SEC guidance, do not address the propriety of implementing an issuer 10b5-1 trading plan while a hostile tender offer is pending. However, so long as the company is not in possession of material nonpublic information at the time the trading plan is implemented, the target of a hostile tender offer seeking to effect open market buybacks should be able to avail itself of the safe harbor provisions extended by a properly enacted 10b5-1 trading plan.[2]

A company is not prohibited from terminating its 10b5-1 trading plan should the company engage a third party in negotiations. The decision to terminate a 10b5-1 trading plan does not involve the purchase of a security but rather the decision *not* to purchase a security. Therefore, Rule 10b-5 is not applicable, and an affirmative defense under Rule 10b5-1 would not be necessary.[3] However, the termination of the 10b5-1 trading plan could call into question whether the plan was initially implemented in "good faith" or was instead implemented "as part of a plan or scheme to evade" the insider trading rules of Rule 10b5-1. A finding that the 10b5-1 trading plan was not implemented in good faith would eliminate the availability of the 10b5-1 affirmative defense for prior transactions under the 10b5-1 trading plan.[4]

State Law Considerations

In addition to the federal securities laws, state law also governs insider trading. For example, the Delaware courts have stated that compliance with the affirmative defenses provided in Rule 10b5-1 is not a defense or safe harbor from a breach of fiduciary duty claim related to insider trading under state law.[5] It is unlikely, however, that a 10b5-1 trading plan enacted while a company was not in possession of material nonpublic information would violate Delaware law.

The Delaware Chancery Court held in the *Brophy* case that a corporate insider who trades on material nonpublic information violates the fiduciary duty that the insider owes to the company.[6] As summarized in subsequent cases, the elements of a *Brophy* claim are "1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information."[7] The relevant Delaware cases involve individuals

who effected transactions based upon material nonpublic information, and there is no Delaware caselaw regarding insider trading in the context of corporate stock repurchases. However, as the principle of the prohibition against insider trading rests upon fiduciary obligations, the duty of loyalty owed by a corporation to its stockholders will likely apply. Furthermore, the corporation can theoretically be sued under such a claim because the harm is not measured by the harm to the corporation, but by "public policy" that prohibits one "occupying a position of trust and confidence toward his employer to abuse that relation to his own profit, regardless of whether his employer suffers a loss."[8]

Delaware law has not specifically developed any equivalent to a 10b5-1 affirmative defense; however, *Brophy* and its progeny are interpreted to be consistent with federal securities law and to also require scienter, which would arguably be negated by a 10b5-1 trading plan. The second element of a *Brophy* claim consists of a requirement that the corporate fiduciary use the material nonpublic information improperly by making trades motivated, in whole or in part, by the substance of that information.[9] The court further stated in that case that the elements of a *Brophy* claim "more or less track the key requirements to recover against an insider under federal law."[10] Therefore, it has been noted that the intent to trade based upon the material nonpublic information must exist for an insider to be liable for insider trading. As the court noted in *Guttman*, "it must be shown that each sale by each individual defendant was entered into and completed on the basis of, and because of adverse material nonpublic information."[11] Trades made in accordance with a 10b5-1 trading plan enacted before a company became aware of material nonpublic information would therefore be unlikely to satisfy this necessary element of a potential insider trading claim under Delaware common law.

Avoidance of Deceptive or Manipulative Practices

– Rule 10b-18 Safe Harbor

Although a 10b5-1 trading plan is an affirmative defense to a claim of insider trading under Rule 10b-5 and may avoid insider trading claims under Delaware law, it does not provide a safe harbor for claims that the issuer is engaging in deceptive or manipulative practices. Accordingly, most 10b5-1 trading plans contain provisions requiring the broker executing the trades to comply with the terms of the Rule 10b-18 safe harbor (described below) in order to ensure compliance with the federal prohibitions on market manipulation.

Rule 10b-18 provides an issuer with a "safe harbor" from liability for deceptive and manipulative market practices under Section 9(a)(2), as well as Rule 10b-5, by restricting the manner, timing, price and volume of share repurchases. However, by its terms, the safe harbor of Rule 10b-18 would not be expressly available to share repurchases effected by an issuer during the pendency of a third party hostile tender or exchange offer.[12] Nevertheless, an issuer implementing a 10b5-1 trading plan, or any other open market repurchase program, during the pendency of a third-party hostile bid would be well-served by observing the guidelines of Rule 10b-18, regardless of whether the safe harbor provided therein expressly applies to the repurchases. Such compliance should provide a strong presumption that the purchases were not deceptive or manipulative in intent or practice.

Among other qualifications, in order to fall under the Rule 10b-18 safe harbor, the purchase price of the shares being repurchased may not exceed the "highest independent bid or the last independent transaction price, whichever is higher."[13] Therefore, by implication, a share repurchase plan that specifies an above-market purchase price at the time of the plan's enactment may be viewed as manipulative or fraudulent under Section 9(a)(2) and/or Rule 10b-5.[14] Rule 10b-18 also provides certain limitations on the volume of purchases that may be made pursuant to the rule. Specifically, the total volume of purchases effected on any single day must not exceed 25 percent of the average daily trading volume during the four calendar weeks prior to the repurchase) (ADTV) for the security being repurchased; however, once per week, the issuer may make a block purchase instead of purchasing under the 25 percent of ADTV for that day if (x) no other purchases under the rule are effected that day, and (y) the block purchase is not included when calculating the ADTV.[15] SEC telephone interpretations have noted, however, that (i) share repurchases which are technically compliant with the provisions of Rule 10b-18 may still violate the anti-fraud and anti-manipulation provisions of the Exchange Act, and (ii) if an issuer instructs a broker to comply with the provisions of Rule 10b-18, the safe harbor will not be available to the issuer unless the transactions are executed in accordance with the terms of the rule.

Since a company subject to a hostile tender or exchange offer likely will not be able to avail itself of the Rule 10b-18 safe harbor, it will need to carefully monitor its compliance with the market manipulation prohibitions imposed by Section 9(a)(2) and Section 10(b).

– Avoiding Market Manipulation outside the 10b-18 Safe Harbor

There is no specific, bright-line definition of "market manipulation." The U.S. Supreme Court has stated that the word "manipulative" is "virtually a term of art when used in connection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities."[16] In a later case, the U.S. Supreme Court wrote that the term "manipulation" generally refers to practices "that are intended to mislead investors by artificially affecting market activity."[17] According to one district court, "practices in the marketplace which have the effect of either creating the false impression that certain market activity is occurring when in fact such activity is unrelated to actual supply and demand or tampering with the price itself are manipulative."[18] The SEC has similarly broad view

of the definition of market manipulation. In a proceeding, the SEC has stated that "manipulation is the intentional interference with the free forces of supply and demand."[19]

Section 9(a)(2), Section 10(b) and Rule 10b-5 each prohibit manipulative or deceptive practices with respect to the price of securities. Section 9(a)(2) specifically prohibits "any series of transactions in any security . . . creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."[20] Thus, to establish that a practice is manipulative under Section 9(a)(2), in addition to a showing of scienter, manipulative purpose must be shown.[21] The elements of a claim under Section 9(a)(2) are: (1) a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security, or raising or depressing the price of such security; (2) carried out with scienter; and (3) for the purpose of inducing the purchase or sale of such security by others.[22] Proof that the manipulator caused a change in price is necessary in order to establish "raising or depressing the price of such security."[23] However, causation has also been interpreted broadly and can be shown by establishing price leadership by the manipulator, dominion and control of the market for the security, reduction in the floating supply of the security, or the collapse of the security's market absent the manipulator's activity.[24]

Section 10(b) of the Exchange Act prohibits "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." While the language of Section 10(b) and Rule 10b-5 is broad, the Supreme Court has stated that what these provisions ultimately prohibit is "fraud."[25] To establish a manipulation claim under Section 10(b), the following elements must be proved: (1) fraudulent conduct; (2) in connection with the purchase or sale of securities; (3) through the means or instruments of transportation or communication in interstate commerce or the mails; and (4) with the requisite scienter.[26] Unlike claims brought under Section 9(a), manipulation claims under Section 10(b) do not require a showing of a purpose to manipulate.[27]

While there is no authority, outside of the Rule 10b-18 safe harbor, indicating what parameters are required to be in a 10b5-1 trading plan in order to avoid a violation of Section 9(a) or Section 10(b), the following cases may be instructive in evaluating whether a contemplated 10b5-1 trading plan, including one in which a share purchase price was set above market prices, would be considered market manipulation.

In *Crane Co. v. Westinghouse Air Brake Co.*, the court found that a third party opposing a tender offer who had purchased large amounts of the subject company's stock in order to drive the market price up and defeat the tender offer, had engaged in a manipulative practice.[28] Crane Company had approached Westinghouse about a potential merger between the companies and subsequently launched a tender offer for Westinghouse stock. A rival merger partner for Westinghouse began purchasing large quantities of Westinghouse stock, driving up the price and secretly selling the securities at a loss such that Crane's tender offer failed. The court found that the rival's "extraordinary buying," coupled with its covert sales of the securities, had distorted the market price of the shares and deceived other investors, thus making it liable under Section 9(a)(2).[29]

In *SEC v. Resch-Cassin & Co.*, an underwriter had encouraged other traders to purchase the stock of a company at increasingly higher prices. The court found that the underwriter and traders' activities had dominated and controlled the market for the stock, and thus could be said to have "caused" the stock price rise.[30] Of note, the court specifically mentioned the underwriter's practice of purchasing stock at a price higher than the previous day's close, despite the absence of competitive buying, as a factor in determining that the security's market was being manipulated.[31]

In *Alabama Farm Bureau Mutual Casualty Co., Inc. v. American Fidelity Life Insurance Co.*,[32] a shareholder challenged an issuer's repurchase plan under Section 10(b) of the Exchange Act, alleging that the repurchase plan was intended to artificially inflate the market price of the securities as part of a scheme by the issuer's directors to maintain control of the company. The district court had found that the company had adequately disclosed the existence, size and effect of the repurchase program and held that corporate directors and officers need not disclose their subjective motivation in adopting a stock repurchase program under Rule 10b-5.[33] Furthermore, the Fifth Circuit in *Alabama Farm Bureau* affirmed the district court's finding that sufficient disclosure of the repurchase program negated the possibility that the Rule 10b-5 element of deception could be established in that case.[34] The Fifth Circuit specifically cited the issuer's public filings as evidence as to why the details of the stock repurchase plan were not manipulative or deceptive. Specifically, the court noted ". . . the fact that press releases were issued and their contents; the identity and contents of proxy statements; and certain other evidentiary facts established by documents are, indeed, undisputed. Considering this uncontroverted evidence, the district court correctly concluded that the plaintiff's allegations were either not sufficient to establish the requisite element of deception, even if proved, or were conclusively refuted."[35] The Fifth Circuit also noted that "any person having rudimentary knowledge of securities trading would realize that a course of purchasing stock would tend either to increase the price of the stock or to avert a decline in price that might otherwise occur," and thus, repurchase plans were not "manipulative" under Rule 10b-5 in and of themselves.

Some Practical Considerations

A company entering into a 10b5-1 trading plan while facing a hostile exchange or tender offer should consider the following practical guidelines:

- The company should publicly announce the establishment of the 10b5-1 trading plan and the material terms thereof before any share repurchase is effected under the plan.

- At least two business days before entering into the 10b5-1 trading plan, the company should disclose any material nonpublic information it may have, so that it is not in possession of material non-public information at the time the plan is established.
- The 10b5-1 trading plan itself should be entered into with a reputable brokerage firm and should be structured to satisfy the guidelines of the safe harbor provisions of Rule 10b-18, including pricing and volume limitations.
- Rule 13e-1 of the Exchange Act provides that a company that is the subject of a tender offer cannot repurchase its securities unless it first files with the SEC an information statement describing the securities, how they will be purchased and for what purpose, and the source and amount of financing for the repurchases. Therefore, such a statement must be filed with the SEC, and the related fees paid, before any shares are repurchased under the program.
- In response to the commencement of a tender or exchange offer, a company must file a Schedule 14D-9 with the SEC which, among other things, sets forth the Board's recommendation to stockholders with respect to the tender or exchange offer. Item 6 of Schedule 14D-9 requires the company to furnish the information required by Item 1008(b) of Regulation M-A, which consists of a description of any transaction in the subject securities effected by the company, its officers, directors and certain other related parties during the 60 days prior to the filing of the Schedule 14D-9. In light of the company's obligation to continuously update its Schedule 14D-9 with any material changes to the information contained therein, the company should periodically update its Schedule 14D-9 to reflect trades effected pursuant to the share buyback program. A weekly amendment should suffice in most circumstances.

A carefully structured stock repurchase program which utilizes a 10b5-1 trading plan can be an important part of a strategic defense to a hostile bidder.

Lois F. Herzeca is a partner resident in the New York office of Gibson, Dunn & Crutcher. Ms. Herzeca advises public and private companies and investment banks on significant legal and business matters, including mergers and acquisitions, capital market transactions, commercial agreements, and joint ventures. Although she counsels companies in a wide range of industries, she specializes in insurance transactional matters and the fashion, retail and apparel industries.

Eduardo Gallardo is a partner in the New York office of Gibson, Dunn & Crutcher. He focuses his practice on mergers and acquisitions. Mr. Gallardo has extensive experience representing public and private acquirers and targets in connection with mergers, acquisitions and takeovers, both negotiated and contested. He has also represented public and private companies in connection with proxy contests, leveraged buyouts, spin-offs, divestitures, restructurings, recapitalizations, joint ventures and other complex corporate transactions. Mr. Gallardo also advises corporations, their boards of directors, and special board committees in connection with corporate governance and compliance matters, takeover preparedness, and other corporate matters.

[1] One rare instance where the target of a hostile tender offer opted to implement a buyback by means of a self-tender offer was the 2010 self-tender completed by Casey's General Stores in response to a hostile offer by Alimenation Couche-Tard Inc.

[2] There is also a prohibition on insider trading in Rule 14e-3 under the Exchange Act when a person is in possession of material nonpublic information regarding a tender offer. However, Rule 14e-3(b) contains a defense to a claim of insider trading that is comparable to Rule 10b5-1(c)(2), which provides a defense if the purchases are effected on behalf of an entity by an individual who was not aware of the nonpublic information, and the entity has implemented policies to ensure the individual does not trade on, or become aware of, the material nonpublic information. (Rule 14e-3 does not contain a defense comparable to Rule 10b5-1(c)(1), which provides a defense if the issuer, prior to becoming aware of the material nonpublic information, enters into binding contract to purchase or sell the security, instructed another person to purchase or sell the security, or adopted a written plan for trading securities.)

[3] *See* SEC Compliance and Disclosure Interpretations: Exchange Act Rules (Feb. 11, 2011), *available at* http://www.sec.gov/divisions/corpfin/guidance/exchangeactrules-interps.htm (stating that terminating a plan while aware of material nonpublic information does not invoke liability under Section 10(b) or Rule 10b-5 (citing *SEC v. Zandford*, 535 U.S. 813 (2002)).

[4] *See* Calculation of Average Weekly Trading Volume Under Rule 144 and Termination of a Rule 10b5-1 Trading Plan, SEC Release No. 33-8005A) (Sept. 21, 2001); Division of Corporation Finance: Manual of Publicly Available Telephone Interpretations, Fourth Supplement (May 30, 2001).

[5] Recent Delaware court decisions have stated that a plaintiff can maintain an action in Delaware court for breach of fiduciary duty based on insider trading, notwithstanding compliance with Rule 10b5-1 and the fact that there was no harm to the corporation. *See Kahn v. Kohlberg Kravis Roberts & Co., L.P.*, No. 436, 2010, 2011 BL 164471 (Del. June 20, 2011). However, no recent cases have held the directors, officers or a corporation liable for breach of fiduciary duty based on insider trading.

[6] *Brophy v. Cities Serv. Co.*, 70 A.2d 5 (Del. Ch. 1949).

[7] *In re Oracle Corp. Derivative Litig.*, 867 A.2d 904, 934 (Del. Ch. 2004).

[8] *Brophy*, 70 A.2d at 8; *see also Oberly v. Kirby*, 592 A.2d 445, 463 (Del. 1991) ("[T]he absence of specific damage to a beneficiary is not the sole test for determining disloyalty by one occupying a fiduciary position. It is an act of disloyalty for a fiduciary to profit personally from the use of information secured in a confidential relationship, even if such profit or advantage is not gained at the expense of the fiduciary. The result is nonetheless one of unjust enrichment which will not be countenanced by a Court of Equity."); *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939) (stating that it is "wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation").

[9] *Oracle*, 867 A.2d at 934.

[10] *Id.*; *see also Pfeiffer v. Toll*, 989 A.2d 683, 698, 2010 BL 65971 (Del. Ch. 2010) (stating that the Brophy doctrine is "consistent with–and supportive of–the federal securities regime").

[11] *Guttman v. Huang*, 823 A.2d 492, 505 (Del. Ch. 2003) (citing *Stepak v. Ross*, 1985 BL 18 (Del. Ch. Sept. 5, 1985).

[12] 17 C.F.R. § 240.10b-18(a)(13).

[13] 17 C.F.R. § 240.10b-18(b)(3).

[14] Additionally, an offer to repurchase securities at above market prices is one of the indications of a tender offer under the eight-factor test developed in *Wellman v. Dickinson*. These factors are:

(1) *active and widespread solicitation of public shareholders for the shares of an issuer*; (2) solicitation made for a substantial percentage of the issuer's stock; (3) *offer to purchase made at a premium over the prevailing market price*; (4) *terms of the offer are firm rather than negotiable*; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) *offer open only a limited period of time*; (7) offeree subjected to pressure to sell his stock. . . . [(8)] *public announcements of a purchasing program concerning the target company*

precede or accompany rapid accumulation of large amounts of the target company's securities.Wellman v. Dickinson, 475 F. Supp. 783, 823-24 (S.D.N.Y. 1979) (emphasis added).

[15] 17 C.F.R. § 240.10b-18(b)(d).

[16] *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 (1976).

[17] *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 476 (1977).

[18] *Hundahl v. United Benefit Life Ins. Co.*, 465 F. Supp. 1349, 1360 (N.D. Tex. 1979).

[19] *In the Matter of Pagel, Inc., et al.*, SEC Release No. 34-22280 (1985).

[20] 15 U.S.C. § 78i(a)(2) (2010).

[21] *See Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1164 (5th Cir. 1982), *vacated and remanded on other grounds,* 460 U.S. 1007 (1983).

[22] *Id.*

[23] *Jolley v. Welch*, 904 F.2d 988, 993 (5th Cir. 1990).

[24] *SEC v. Resch-Cassin & Co.*, 362 F. Supp. 964, 976 (S.D.N.Y. 1973).

[25] *Chiarella v. United States*, 445 U.S. 222, 235 (1980); *see also Santa Fe Indus. Inc.*, 430 U.S. at 473-77 (stating that a claim under Rule 10b-5 is actionable "only if the conduct alleged can be fairly viewed as 'manipulative or deceptive' within the meaning of the statute . . . .").

[26] *SEC v. Graystone Nash, Inc.*, 820 F. Supp. 863, 870-71 (D.N.J. 1993), *rev'd on other grounds*, 25 F.3d 187 (3d Cir. 1994).

[27] *United States v. Charnay*, 537 F.2d 341, 350-52 (9th Cir. 1976) (ruling that, for a 10(b) claim, it is sufficient for the person to engage in a course of business which operates as a fraud or deceit as to the nature of the market for the security).

[28] *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787 (2d Cir. 1969).

[29] *Id.* at 793.

[30] *Resch-Cassin*, 362 F. Supp. at 978.

[31] *Id.* at 977.

[32] *Alabama Farm Bureau Mutual Casualty Co., Inc. v. American Fidelity Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979).

[33] *Alabama Farm Bureau*, 606 F.2d at 609.

[34] *Id.* at 610.

[35] *Id.*