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Affirmative Duty to Disclose Material Information Concerning Issuer's Financial Condition and Business Plans

Alan E Garfield
Dennis J Block
Nancy E Barton

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*By Dennis J. Block, Nancy E. Barton, and Alan E. Garfield**

"There cannot be honest markets without honest publicity."[1]

To provide the desired honesty in the securities markets, the central goal of the federal securities laws is to ensure that buyers and sellers of securities will be adequately informed of material information affecting the value of the securities traded.[2] The nondisclosure of material information distorts the market process: "Just as artificial manipulation tends to upset the true function of an open market, *so the hiding and secreting of important information obstructs the operation of the markets as indices of real value.*"[3] Nevertheless, the securities laws have not required issuers of securities to disclose material information concerning their businesses on a current basis.[4] Indeed, the courts have even emphasized that, in some circumstances, immediate and honest disclosure can do more harm to investors than good.[5]

The disclosure obligations of an issuer are particularly difficult to define when the issuer is experiencing financial difficulties of what it believes to be a temporary nature. Disclosure of a downward spiral of events, which may tend

*Mr. Block, Ms. Barton, and Mr. Garfield are members of the New York bar and practice law with Weil, Gotshal & Manges in New York City.

1. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934), *quoted in* SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 858 (2d Cir. 1968) (en banc), *cert. denied,* 394 U.S. 976 (1969).

2. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d at 858.

3. H.R. Rep. No. 1383, 73d Cong., 2d Sess. 11 (1934), *quoted in* SEC v. Texas Gulf Sulphur Co., 401 F.2d at 858 (emphasis added).

4. *See* Staffin v. Greenberg, 672 F.2d 1196, 1204 (3d Cir. 1982). *See also* Schlanger v. Four-Phase Sys., Inc., 582 F. Supp. 128, 133 (S.D.N.Y. 1984); Greenfield v. Heublein, Inc., 575 F. Supp. 1325, 1336 (E.D. Pa. 1983), *aff'd,* 742 F.2d 751 (3d Cir. 1984), *cert. denied,* 53 U.S.L.W. 3594 (U.S. Feb. 19, 1985) (No. 84-1025).

5. *See* Reiss v. Pan Am. World Airways, Inc., 711 F.2d 11, 14 (2d Cir. 1983); Staffin v. Greenberg, 672 F.2d at 1206; Electronic Specialty Co. v. International Controls Corp., 409 F.2d 937, 948–49 (2nd Cir. 1969).

to fuel itself, can be a self-fulfilling prophesy resulting in bankruptcy or other serious harm to shareholders. A nagging question in such circumstances is whether, absent disclosure of a possibly temporary downturn, the company might survive and its shareholders avoid significant loss.[6] Likewise, disclosure of ongoing business negotiations may serve to defeat them, causing a valuable opportunity such as a merger or acquisition to be forfeited.

Recent legal literature is full of discussions of whether an issuer is under a general obligation to disclose its financial difficulties or business plans on an ongoing basis.[7] Whether one answers this question yes or no, there are many nuances that may create pitfalls for the unwary. Ultimately, the issue turns less upon the necessity for disclosure than upon the timing of disclosure, where the issuer may have considerable discretion. This article reviews these important issues concerning the sources of the duty of disclosure and the time when disclosure must be made.

SOURCES OF THE DUTY TO DISCLOSE

The disclosure obligations of issuers under the federal securities laws are defined both expressly and implicitly. Certain express statutory reporting obligations require disclosure of specific information on a periodic basis. In addition, in some situations an issuer, although not commanded by a specific reporting requirement, must disclose additional information in order to avoid

6. See Denny v. Barber, 73 F.R.D. 6, 9 n.2 (S.D.N.Y. 1977), *aff'd,* 576 F.2d 465 (2d Cir. 1978), in which the court, in dismissing a complaint against directors for failing to forewarn the public of potentially unprofitable financial transactions, observed: "If defendants had described the vague contingencies limned in [the complaint] and reality had provided a happier turn of events, would not defendants have been liable for their gloomy publications?" *See also* Goldman v. Singer Co., 89 F.R.D. 436, 439 (S.D.N.Y. 1981):

> Had defendants indeed foreseen the [future] disasters and disclosed their fears in their [prior] annual report, it is quite possible that they would now be faced with a derivative action. An ingenious stockholder, supported by an imposing array of experts, might well be contending that the company had been fundamentally sound and would have weathered the economic storms of the past several years but for defendants' reckless prophecies of doom which had undermined the employee confidence so essential . . . to success.

7. Those commentators suggesting that no such duty exists include 6 L. Loss, Securities Regulation 3596–97 (Supp. 1969); Feuerstein, *The Corporation's Obligations of Disclosure Under the Federal Securities Laws When it is Not Trading in its Stock,* 15 N.Y.L.F. 385, 391–92 (1969); Fleischer, *"Federal Corporation Law": An Assessment,* 78 Harv. L. Rev. 1146, 1157–58 (1965); Rowe, *Disclosure of Negative News,* 17 Rev. Sec. Reg. (Standard & Poor's) 804 (1984); Sheffey, *Securities Law Responsibilities of Issuers to Respond to Rumors and Other Publicity: Reexamination of a Continuing Problem,* 57 Notre Dame Law. 755, 760–70 (1982); Wander & Schwartzman, *Timely Disclosure,* 17 Rev. Sec. Reg. (Standard & Poor's) 861 (1984). Those arguing that such a duty exists or can be implied include Bauman, *Rule 10b-5 and the Corporation's Affirmative Duty to Disclose,* 67 Geo. L.J. 935 (1979); Flom & Atkins, *The Expanding Scope of SEC Disclosure Laws,* 52 Harv. Bus. Rev., July–Aug. 1974, at 109, 112; Talesnick, *Corporate Silence and Rule 10b-5: Does a Publicly Held Corporation Have an Affirmative Obligation to Disclose?,* 49 Den. L.J. 369 (1973).

liability under the antifraud provisions. Issuers listed on the national exchanges also must comply with the disclosure requirements of those organizations.[8]

STATUTORY REPORTING REQUIREMENTS

Section 13(a) of the Securities Exchange Act of 1934 (1934 Act) says little but authorizes much:

> Every issuer of a security registered pursuant to [section 12 of the 1934 Act] shall file with the [Securities and Exchange] Commission, in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—
>
> (1) such information and documents . . . as the Commission shall require to keep reasonably current the information and documents required to be included in or filed with an application or registration statement filed pursuant to [section 12] . . . .
>
> (2) such annual reports . . . certified if required by the rules and regulations of the Commission by independent public accountants, and such quarterly reports . . . as the Commission may prescribe.[9]

Pursuant to this section, the Securities and Exchange Commission (SEC) has promulgated rules requiring issuers to file annual reports on form 10-K,[10] quarterly reports on form 10-Q,[11] and current reports on form 8-K.[12] The forms for periodic reports specifically designate in line items certain information that must be disclosed, and the rules further provide that the issuer must disclose "such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading."[13] Current reports must be filed upon the occurrence of certain specific events: changes in control; the acquisition or disposition of a significant amount of assets other than in the ordinary course of business; bankruptcy or receivership; changes in the issuer's certifying accountant; and, under certain circumstances, the resignation of an issuer's director.[14] Current

8. Disclosure obligations also exist pursuant to various provisions of the federal securities laws governing particular transactions. Sections 5, 7, and 10 of the Securities Act of 1933, 15 U.S.C. §§ 77e, 77g, and 77j, require extensive disclosures in connection with a public offering of securities; § 14(c) of the 1934 Act, 15 U.S.C. § 78n(c), requires disclosures in connection with the solicitation of proxies; and §§ 13(d), 13(e), 14(d), 14(e), and 14(f) of the 1934 Act, 15 U.S.C. §§ 78m(d), 78m(e), 78n(d), 78n(e), and 78n(f), require disclosures in connection with stock accumulation programs and tender offers.

9. 15 U.S.C. § 78m(a) (1982).

10. 17 C.F.R. § 240.13a-1 (1984).

11. *Id.* § 240.13a-13.

12. *Id.* § 240.13a-11.

13. *Id.* § 240.12b-20.

14. Form 8-K, items 1–4, 6.

reports also may be used for the optional disclosure of other events that the issuer deems important to shareholders.[15]

When an issuer is experiencing financial difficulties, its obligations under the periodic reporting requirements to disclose negative information may prove problematic. In its annual and quarterly reports on forms 10-K and 10-Q, an issuer is required to set forth its Management Discussion and Analysis (MDA), which must include information about "any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way."[16] When a company discloses a material deficiency in liquidity, it must indicate in the MDA "the course of action that the registrant has taken or proposes to take to remedy the deficiency."[17]

A company also must identify in its MDA (1) "any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case . . . the extent to which income was so affected";[18] (2) "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations";[19] and (3) "the registrant's material commitments for capital expenditures as of the end of the latest fiscal period . . . and the anticipated source of funds needed to fulfill such commitments . . . [and] any known material trends, favorable or unfavorable, in the registrant's capital resources."[20]

The SEC, through its enforcement officials, has expressed concern that adverse economic conditions might cause issuers to attempt to distort their disclosures to "create an appearance of financial stability and prosperity."[21] The SEC has therefore given top priority to policing for financial fraud, with its primary focus on MDA.[22] Several cases illustrate this crackdown.

15. Form 8-K, item 5. Reports under item 5 are optional and, accordingly, there is no mandatory time for filing. Nevertheless, registrants are encouraged to file such reports promptly. Instruction B(2) to form 8-K.

16. Item 303(a)(1) of regulation S-K and item 2 of form 10-Q. 17 C.F.R. § 229.303(a)(1) (1984).

17. 17 C.F.R. § 229.303(a)(1).

18. *Id.* § 229.303(a)(3)(i).

19. *Id.* § 229.303(a)(3)(ii).

20. *Id.* § 229.303(a)(2). The SEC has proposed certain changes in financial reporting for interim periods, including quarterly disclosure statements regarding business segments. The information required to be disclosed would include summary industry segment information in quarterly 10-Q reports and information regarding reportable segments in the management's discussion and analysis for interim and annual periods. SEC Securities Act Release No. 6514, [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,494 (Feb. 15, 1984). Members of several ABA committees have criticized the proposed segment reporting requirements. *See* 16 Sec. Reg. & L. Rep. (BNA) 929 (May 25, 1984).

21. Fedders & Perry, *Policing Financial Disclosure Fraud: The SEC's Top Priority,* J. Acct. 58 (July 1984).

22. *Id.*

In *SEC v. Ronson,*[23] for instance, the SEC charged Ronson with failing to disclose in the MDA sections of its 10-Q and 10-K reports that a substantial customer (accounting for fifteen percent of Ronson's revenues) had suspended purchases from Ronson and was altering its manufacturing process, which would probably result in a substantial reduction of orders. Ronson's financial data reflected the decline in sales and the importance of the customer, but the SEC alleged that the reports were misleading because they did not disclose Ronson's knowledge of its customer's alteration of the manufacturing process and the likely reduction in future purchases.[24]

Similarly, in *In re Fidelity Financial Corp. and Fidelity Savings & Loan Association,*[25] the SEC found that a press release issued by the company reporting a net loss for the fourth quarter and for the 1981 fiscal year "was materially misleading because it omitted disclosure of the severity of the situation."[26] The SEC stated that the press release simply "gave the impression of business as usual"[27] even though the company knew that it was continuing to lose net worth and that its outside auditor had indicated that it might disclaim any opinion on the 1981 financial statements.

These cases, as well as others,[28] also illustrate another point—that the SEC has been taking an especially hard look at accounting practices, which it sees as the principal means of "projecting seeming economic well-being in the face of

23. No. 83-3030 (D.N.J. Aug. 15, 1983), *discussed in* SEC Litig. Release No. 10,093, [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,464.

24. *See* Olson, *SEC Enforcers to Focus on Accounting Fraud in 1984,* Legal Times, Jan. 13, 1984, at 12.

25. SEC Exchange Act Release No. 18,927, [1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,239 (July 30, 1982).

26. *Id.* at 85,244.

27. *Id.*

28. *See also* 16 Sec. Reg. & L. Rep. (BNA) 1481 (Sept. 14, 1984) (reporting on SEC action against bank president for authorizing release of fraudulent financial statements that reported substantial income for 1982 when there were actually substantial losses); 16 Sec. Reg. & L. Rep. (BNA) 1327 (Aug. 10, 1984) (reporting on SEC action against president of oil and gas company for failing to disclose company's deteriorating financial situation in press releases and SEC filings); SEC v. Fraser, Litig. Release No. 10,512 (D.D.C. 1984) (misleading statements with regard to financial condition of company); SEC v. Butcher, Litig. Release No. 10,496 (E.D. Tenn. 1984) (misrepresentation of issuer's financial condition in connection with the offer and sale of securities); SEC v. McCormick & Co., Litig. Release No. 9846 (Dec. 21, 1982) (SEC filed complaint seeking injunctive relief relating to alleged scheme by company and officer to inflate company's reported earnings through improper accounting practices); National Tel. Co., SEC Exchange Act Release No. 14,380, [1977–1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,410 (Jan. 16, 1978) (press releases and letters to shareholders did not reflect that the company was running out of the cash needed to fund its growth); SEC v. Stirling Homex Corp., Litig. Release No. 6960, [1975–1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,218 (July 2, 1975) (falsification of company's financial statements); SEC v. Litton Indus., Inc., [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,891 (D.D.C. 1981) (question regarding accounting for costs in excess of contract values and company's disclosures relating thereto); *In re* Touche Ross & Co., SEC Exchange Act Release No. 20,364, 6 Fed. Sec. L. Rep. (CCH) ¶ 73,416 (1983) (same); Aetna Life & Casualty Co., SEC Acct. & Enf. Release No. 10 (July 7, 1983) (question whether tax benefits of loss carryforwards should be recognized in financial statements); other cases cited in Olson, *supra* note

business decline."[29] Declining and failing companies, in order to hide fiscal difficulties, have

> (a) prematurely recognized income, (b) improperly treated operating leases as sales, (c) inflated inventory by improper application of the LIFO inventory method, (d) included fictitious amounts in inventories, (e) failed to recognize losses through write-offs and allowances, (f) improperly capitalized or deferred costs and expenses, (g) included unusual gains in operating income, (h) overvalued marketable securities, (i) created "sham" year-end transactions to boost reported earnings, and (j) changed their accounting practices to increase earnings without disclosing the changes.[30]

The statutory reporting requirements thus impose certain explicit disclosure requirements in connection with an issuer's periodic financial disclosures and certain specified material events. To fill the interstices of this statutory scheme, however, the SEC and the courts also have looked to the antifraud provisions of the federal securities laws.

IMPLIED DISCLOSURE REQUIREMENTS UNDER THE ANTIFRAUD PROVISIONS

The general antifraud provisions of the federal securities laws are foremost among the sources of an implied duty of disclosure. Section 17(a) of the Securities Act of 1933 (1933 Act) prohibits fraud in connection with the offer or sale of a security, and section 10(b) of the 1934 Act and rule 10b-5 thereunder prohibit fraud in connection with the purchase or sale of a security.

The antifraud provisions have long been seen as imposing a duty to disclose before a company may trade in its own securities (the "disclose or abstain" rule),[31] or when disclosure was necessary to correct a company's previous misstatements.[32] In addition, a few cases have suggested that there is a general duty to disclose material information, even in the absence of trading or prior statements, when no proper corporate purpose would be served by nondisclosure. In *Financial Industrial Fund, Inc. v. McDonnell Douglas Corp.*,[33] for

24, at 16 nn.13–15, Fedders & Perry, *supra* note 21, and Middleton, *Two Companies Cited for 'Cooking the Books'*, Nat'l L.J., Sept. 3, 1984, at 7.

29. Fedders & Perry, *supra* note 21, at 59. *See also* Olson, *supra* note 24, at 12; *Accounting Issues Addressed by Fedders, Treadway at Rocky Mountain Conference,* 16 Sec. Reg. & L. Rep. (BNA) 1707 (Oct. 26, 1984); *SEC To Go After Firms That Stretch Accounting Principles, Treadway Warns,* 16 Sec. Reg. & L. Rep. (BNA) 446 (Mar. 2, 1984); *Commission Warns Companies About Misleading Statements,* 16 Sec. Reg. & L. Rep. (BNA) 111 (Jan. 20, 1984); *SEC Enforcement Chief Warns Companies, CPAs on Management Discussion Analysis,* 16 Sec. Reg. & L. Rep. (BNA) 95 (Jan. 13, 1984).

30. Fedders & Perry, *supra* note 21, at 59.

31. *See* SEC v. Texas Gulf Sulphur Co., 401 F.2d at 848. *See also* Kohler v. Kohler Co., 319 F.2d 634, 638 (7th Cir. 1963) (quoting Speed v. Transamerica Corp., 99 F. Supp. 808, 828–29 (D. Del. 1951)); Fisher v. Plessey Co., 559 F. Supp. 442 (S.D.N.Y. 1983).

32. SEC v. Texas Gulf Sulphur Co., 401 F.2d at 862.

33. 474 F.2d 514 (10th Cir.), *cert. denied,* 414 U.S. 874 (1973).

instance, the court remarked that "[i]t is . . . obvious that an undue delay not in good faith, in revealing facts, can be deceptive, misleading, or a device to defraud under Rule 10b-5."[34] In *Issen v. GSC Enterprises, Inc.*,[35] the court found that an issuer had a general duty to make full disclosures to its shareholders in its annual report. Relying on the Supreme Court's pronouncement in *Chiarella v. United States*[36] that liability for nondisclosures "is premised upon a duty to disclose arising from a relationship of trust and confidence between parties to a transaction,"[37] the *Issen* court held that a corporation must disclose all material facts to its shareholders because of its "special relationship" to them.[38]

Similarly, the SEC, which has never promulgated a rule expressly requiring ongoing disclosure of all material information, has nevertheless encouraged precisely such a course of action. In a 1970 release on this subject, the SEC cautioned that in addition to the periodic reporting requirements under the federal securities laws, a company also "has an obligation to make full and prompt announcements of material facts regarding the company's financial condition," and that "[n]ot only must material facts affecting the company's operations be reported; they must also be reported promptly."[39]

Most courts, however, have rejected a broad reading of these authorities and have declined to hold that the antifraud provisions impose a general duty of disclosure "on a corporation which is *not* trading in its own stock and which has

34. *Id.* at 519. *See also* Astor v. Texas Gulf Sulphur Co., 306 F. Supp. 1333, 1338 (S.D.N.Y. 1969). In *SEC v. Texas Gulf Sulphur Co.,* the court hinted at a similar idea:

> We do not suggest that material facts must be disclosed immediately; the timing of disclosure is a matter for the business judgment of the corporate officers entrusted with the management of the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC. Here, a valuable corporate purpose was served by delaying the publication of the [mining] discovery.

401 F.2d at 850 n.12.

35. 538 F. Supp. 745 (N.D. Ill. 1982).

36. 445 U.S. 222 (1980).

37. *Id.* at 230.

38. Issen v. GSC Enters., Inc., 538 F. Supp. at 751 n.9. The *Issen* case remains an aberration. As one commentator has noted:

> To the extent that this court intended to articulate a generally applicable affirmative disclosure obligation, it stands alone. A more reasonable construction, however, is that when making other disclosures, such as the annual report to shareholders, the omission of material facts which renders the disclosure misleading constitutes a violation of 10b-5. Viewed in this manner, the decision is consistent with earlier decisions and the provisions of 10b-5 and does not create a revolutionary affirmative disclosure obligation of all material facts even in the absence of trading or other disclosures by the issuer.

Sheffey, *supra* note 7, at 764 n.45.

39. SEC Securities Act Release No. 5092, [1970–1971 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 77,915, at 80,036 (Oct. 15, 1970). Other language in the release, however, suggests that this "obligation to disclose" arises only if the issuer seeks to trade in its own securities; this language would make the release simply a "restatement of the well-worn principle of 'disclose or abstain.' " Sheffey, *supra* note 7, at 766.

not made a public statement."[40] Commentators disagree whether any general duty of disclosure exists.[41]

Even in the absence of an implied affirmative duty to disclose, however, the SEC and the courts have articulated so many circumstances in which a duty to disclose does arise that the exceptions almost eat up the general rule.

Duty to Make Accurate Disclosures

The fundamental rule of the antifraud provisions is that an issuer can be liable for making false or misleading statements to the public. This is one of the lessons of *SEC v. Texas Gulf Sulphur Co.*: if an issuer makes a statement that is "reasonably calculated to influence the investing public," it must make diligent efforts to ensure that the statement is not "false or misleading."[42]

This rule applies to statements made in an issuer's periodic reports, as well as in any other public statements, including press releases, proxy solicitations, or annual reports. Indeed, the SEC has warned that issuers can be liable for statements made by company officials to noninvestor audiences if the statements can reasonably be expected to reach investors:

> The antifraud provisions of the federal securities laws apply to all company statements that can reasonably be expected to reach investors and the trading markets, *whoever the intended primary audience*. Thus, as with any communications to investors, such statements should not be materially misleading, as the result of either misstatement or omission. To the extent that the standard for accuracy and completeness embodied in the antifraud provisions is not met, the company and any person responsible for the statements may be held liable under the federal securities law.[43]

The SEC thus cautioned companies to be careful with statements made in rate filings or other publicly available filings, as well as in negotiations with creditors, labor unions, or other groups whose assistance may be sought by the company.

Duty to Make Complete Disclosures

Texas Gulf Sulphur requires not simply accurate disclosure but also complete disclosure; that is, the issuer's statement may not be "so incomplete as to mislead."[44] But this rule has not been construed to create an affirmative duty to disclose all material information every time an issuer makes any disclosure. As

40. Staffin v. Greenberg, 672 F.2d 1196, 1204 (3d Cir. 1982) (emphasis in original). *See also* Schlanger v. Four-Phase Sys., Inc., 582 F. Supp. 128, 133 (S.D.N.Y. 1984); Warner Communications v. Murdoch, 581 F. Supp. 1482, 1489 n.12 (D. Del. 1984).

41. *See* authorities cited *supra* note 7.

42. 401 F.2d at 862.

43. SEC Securities Act Release No. 6504, 2 Fed. Sec. L. Rep. (CCH) ¶ 23,120B, at 17,095-3 (Jan. 13, 1984) (emphasis added).

44. 401 F.2d at 862.

the Third Circuit explained in *Staffin v. Greenberg*: "[W]e do not believe that the intent of the [*Texas Gulf Sulphur*] court was to create a doctrine requiring a corporation to reveal every material corporate fact known to it every time it makes a public statement."[45] Rather, an issuer must only ensure that when it does have a duty to disclose specific information, the information it discloses is sufficiently complete so as not to mislead.

Duty to Update Prior Statements

Issuers also have a duty to correct or update prior statements that have subsequently become misleading if investors are still reasonably relying on the prior statements. In the leading case of *Ross v. A.H. Robins Co.*,[46] the plaintiff alleged that the defendant, a maker of a contraceptive device, represented that the device was safe and effective but then did not make corrective disclosure upon learning of a research report concerning certain problems with the device. The court stated: "It is now clear that there is a duty to correct or revise a prior statement which was accurate when made but which has become misleading due to subsequent events. This duty exists so long as the prior statements remain 'alive.' "[47]

As to the effect of time on the duty to make corrective disclosure, the court stated that "logic compels the conclusion that time may render statements immaterial and end any duty to correct or revise them."[48] However, since there is "no general rule" that can be uniformly applied, "a particular duty to correct a specific prior statement exists as long as traders in the market could reasonably rely on the statement."[49]

It has also been recognized, however, that overly-broad interpretation of a duty to correct would effectively replace the statutory scheme of quarterly and

45. 672 F.2d at 1204.

46. 465 F. Supp. 904 (S.D.N.Y.), *rev'd on other grounds,* 607 F.2d 545 (2d Cir. 1979), *cert. denied,* 446 U.S. 946 (1980).

47. 465 F. Supp. at 908. *See also* Greenfield v. Heublein, Inc., 742 F.2d 751, 758 (3d Cir. 1984) ("if a corporation voluntarily makes a public statement that is correct when issued, it has a duty to update that statement if it becomes materially misleading in light of subsequent events"), *cert. denied,* 53 U.S.L.W. 3594 (U.S. Feb. 19, 1985) (No. 84-1025); Sharp v. Coopers & Lybrand, 83 F.R.D. 343 (E.D. Pa. 1979) (accountant had duty to correct opinion letter after learning that it was inaccurate).

48. 465 F. Supp. at 908. *See also* Warner Communications, Inc. v. Murdoch, 581 F. Supp. 1482, 1489 n.13 (D. Del. 1984).

49. 465 F. Supp. at 908. Support for this holding is also found in the introduction to regulation S-K:

> With respect to previously issued projections, registrants are reminded of their responsibility to make full and prompt disclosure of material facts, both favorable and unfavorable, regarding their financial condition. This responsibility may extend to situations where management knows or has reason to know that its previously disclosed projects no longer have a reasonable basis.

17 C.F.R. § 229.10(b)(3)(iii) (1984).

annual financial reporting.[50] Thus, the judgment that must be made is whether the interim developments are so significant as to require disclosure between quarterly reports.

Duty to Disclose or Abstain

An issuer has a duty to disclose all material information before it may trade in its own securities.[51] This rule may pose problems for issuers with employee stock plans that are trading in the issuer's securities. If the stock plan is an affiliate of the issuer, rather than administered by an independent trustee, then the issuer's disclosure obligations may be attributed to the stock plan.[52]

Duty to Disclose When Others Trade

The SEC has stressed that prompt disclosure of material developments is especially important when a company suspects that persons with access to inside information may be trading in the company's stock: "[W]here there are indications that information may have become selectively available to certain persons who are trading in a corporation's securities, disclosure is especially significant in order to apprise the market place of the material information and substantially reduce the opportunity for such persons to profit from such trading."[53] Such disclosure is required, the SEC emphasized, because "[i]nvestors have legitimate expectations that public companies are making, and will continue to make, prompt disclosure of significant corporate developments."[54]

Issuers must be especially careful in discussions with analysts not to "tip" material inside information that the analysts could then use in trading in the issuer's securities. Such selective disclosures could make an issuer liable as a tipper for the inside trading. As the Second Circuit remarked in *Elkind v. Liggett & Myers, Inc.*,[55] the corporate officer who deals with analysts finds himself in a "precarious position" akin to "a fencing match conducted on a tightrope."[56]

50. *See* Rowe, *supra* note 7, at 806.

51. SEC v. Texas Gulf Sulphur Co., 401 F.2d at 848. *See also* Arber v. Essex Wire Corp., 490 F.2d 414, 418 (6th Cir.), *cert. denied,* 419 U.S. 830 (1974); Kohler v. Kohler Co., 319 F.2d 634, 638 (7th Cir. 1963); Fisher v. Plessey Co., 559 F. Supp. 442 (S.D.N.Y. 1983) (company required to disclose material information before making tender offer for subordinated debentures of subsidiaries that were convertible into the parent's common stock).

52. *See* Rowe, *supra* note 7, at 807.

53. *In re* Sharon Steel Corp., [1981–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,049, at 84,615 (Nov. 19, 1981). *Compare* Schlanger v. Four-Phase Sys., Inc., 582 F. Supp. 128 (S.D.N.Y. 1984) *with* Greenfield v. Heublein, 742 F.2d 751 (3d Cir. 1984), discussed *infra* in text accompanying notes 99–104.

54. *In re* Sharon Steel Corp., [1981–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) at 84,618.

55. 635 F.2d 156 (2d Cir. 1980).

56. *Id.* at 165 (quoting SEC v. Bausch & Lomb, Inc., 565 F.2d 8, 9 (2d Cir. 1977)). The court continued:

> A skilled analyst with knowledge of the company and the industry may piece seemingly inconsequential data together with public information into a mosaic which reveals material

The danger of liability for tipping may have been reduced by the Supreme Court's decision in *Dirks v. SEC.*[57] In that case, the Court held that an analyst (or any other tippee) who receives nonpublic information from a corporate insider is not under a duty to disclose or abstain unless the insider breached his fiduciary duty to the corporation or its shareholders in making the selective disclosure. Such a breach occurs, the Court said, only if the "insider personally will benefit, directly or indirectly, from his disclosure" to the tippee.[58] However, in *O'Connor & Associates* v. *Dean Witter Reynolds, Inc.,*[59] the court held that a corporate insider still has a fiduciary duty to the corporation not to " 'tip' material inside information to others who then trade on the basis of this information."[60] Thus, once material inside information is disclosed to outsiders, the issuer and its insiders should exercise caution to ensure either that the outsiders do not trade on the information or that general public disclosure is made.

Duty to Correct Rumors in the Marketplace

The general rule is that "[a] company has no duty to correct or verify rumors in the marketplace unless those rumors can be attributed to the company."[61] *Electronic Specialty Co. v. International Controls Corp.*[62] exemplifies this rule. In that case, the court held that a company planning a tender offer was not required to correct a report in the "Heard on the Street" column of the *Wall Street Journal* that incorrectly stated the amount of target company stock it owned and stated an offer price for which there was no basis. The court stated that "[w]hile a company may choose to correct a misstatement in the press not attributable to it . . . we find nothing in the securities legislation requiring it to do so."[63] The court emphasized that there was no duty to correct, particularly "when the misstatement relates to its plans in regard to another company and it has reason to think the comment was an effort by the target corporation to obtain disclosure before the time Congress had stipulated."[64]

> non-public information. Whenever managers and analysts meet elsewhere than in public, there is a risk that the analysts will emerge with knowledge of material information which is not publicly available.

Id.

57. 103 S. Ct. 3255 (1983).

58. *Id.* at 3265. *See also* State Teachers Retirement Bd. v. Fluor Corp., 592 F. Supp. 592, 594 (S.D.N.Y. 1984) ("a tipper breach will be found only when material, nonpublic information is transferred for the personal benefit of the tipper"). *But see* Brodsky, *Insider Trading,* N.Y.L.J., Jan. 3, 1985, at 1, col. 1 (criticizing *Fluor* decision).

59. [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,911 (S.D.N.Y. Jan. 11, 1985).

60. *Id.* at 90,511.

61. State Teachers Retirement Bd. v. Fluor Corp., 654 F.2d 843, 850 (2d Cir. 1981). *See also* Zuckerman v. Harnischfeger Corp., 591 F. Supp. 112, 119 (S.D.N.Y. 1984).

62. 409 F.2d 937 (2d Cir. 1969).

63. *Id.* at 949.

64. *Id.* The SEC has taken the position that there is a duty to correct market rumors in certain instances. The § 21(a) report emanating from the SEC's investigation of Sharon Steel Corporation

This general rule has a caveat: if an issuer chooses to respond to a rumor, its response must be accurate.[65]

Duty to Correct Statements by Third Parties

The rule regarding misstatements by third parties is similar to the rule for rumors. Ordinarily, an issuer is under no obligation to correct the misstatement. An obligation does arise, however, if the issuer is so entangled with the third party that the statement can be attributed to the issuer. This problem arises most frequently from issuer communications with analysts.

In *Elkind v. Liggett & Myers, Inc.*,[66] for instance, Liggett had a practice of reviewing draft reports of analysts and making factual corrections, and had expressed to the analysts a general optimism that the company was progressing well even though the company's management had a less favorable view of its prospects internally. The court found that Liggett's review of the reports did not "sufficiently entangl[e] itself with the analysts' forecasts to render those predictions 'attributable to it.' "[67] However, the court cautioned:

> While we find no liability for non-disclosure in this aspect of the present case, it bears noting that corporate pre-release review of the reports of analysts is a risky activity, fraught with danger.
>
> . . . .
>
> The record . . . raises the possibility that management was indulging in Delphic pronouncements intended to give the false impression that all was well without stating any untrue facts. The misleading character of a statement is not changed by its vagueness or ambiguity. Liability may follow where management intentionally fosters a mistaken belief concerning a material fact, such as its evaluation of the company's progress and earnings prospects in the current year.[68]

There may also be a duty to correct inaccurate statements by third parties if there is a "special relationship" between the source of the statement and the company. In *Green v. Jonhop, Inc.*,[69] for instance, a company was held liable for

states that Sharon should have announced its stock position in Reliance Electric Company earlier than it did, especially when it appeared that the rumors in the marketplace originated with the company and the company knew of ongoing insider trading. *In re* Sharon Steel Corp., [1981–1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83,049 (Nov. 19, 1981).

65. SEC v. Texas Gulf Sulphur Co., 401 F.2d at 863–64. *See also* Greenfield v. Heublein, 742 F.2d 751 (3d Cir. 1984), discussed *infra* in text accompanying notes 99–104; Schlanger v. Four-Phase Sys., Inc., 582 F. Supp. 128 (S.D.N.Y. 1983).

66. 635 F.2d 156 (2nd Cir. 1980).

67. *Id.* at 163.

68. *Id.* at 163–64.

69. 358 F. Supp. 413 (D. Or. 1973). *See also* Swanson v. Wabash, Inc., 577 F. Supp. 1308, 1321 (N.D. Ill. 1983) (target company may be liable for misrepresentations in offeror's tender offer materials "when the target company's officers or directors act in concert with the offeror in a fraudulent scheme").

misleading statements by its underwriter and principal market maker when the company was aware of the misstatements but made no attempt to correct them.

In summary, the number and character of the rules of disclosure, and the exceptions thereto, under the general antifraud provisions of the federal securities laws are such that a general duty of disclosure is nearly—but not quite—implicit. If an issuer is able to avoid affirmative disclosures and is not entangled in third parties' statements, it may be able to escape a general duty of disclosure. Such situations are not the norm, however, and an issuer opting for non-disclosure must exercise considerable care.

DISCLOSURE REQUIREMENTS UNDER STOCK EXCHANGE AND NASD RULES

Issuers listed on the New York Stock Exchange (NYSE), the American Stock Exchange (ASE), or the National Association of Securities Dealers Quotation System (NASDAQ) have an affirmative duty to disclose material information under the internal rules of those organizations. The NYSE rules provide that a corporation whose securities are listed on the NYSE "is expected to release quickly to the public any news or information which might reasonably be expected to materially affect the market for those securities."[70]

The rules permit delaying disclosure when there are legitimate business reasons;[71] but if the information has been disclosed to other than senior management, or if there is a leak, the rules mandate immediate public release.[72]

The ASE guidelines likewise provide: "A listed company is required to make immediate public disclosure of all material information concerning its affairs,

70. New York Stock Exchange Listed Company Manual, *reprinted in* 2 Fed. Sec. L. Rep. (CCH) ¶ 23,121, at 17,097.

71. Section 202.01 of the NYSE Listed Company Manual, *id.* at 17,097-2, provides in pertinent part:

> Negotiations leading to mergers and acquisitions, stock splits, the making of arrangements preparatory to an exchange or tender offer, changes in dividend rates or earnings, calls for redemption, and new contracts, products, or discoveries are the type of developments where the risk of untimely and inadvertent disclosure of corporate plans are [*sic*] most likely to occur. Frequently, these matters require extensive discussion and study by corporate officials before final decisions can be made. Accordingly, extreme care must be used in order to keep the information on a confidential basis.
>
> Where it is possible to confine formal or informal discussions to a small group of the top management of the company or companies involved, and their individual confidential advisors where adequate security can be maintained, premature public announcement may properly be avoided. In this regard, the market action of a company's securities should be closely watched at a time when consideration is being given to important corporate matters. If unusual market activity should arise, the company should be prepared to make an immediate public announcement of the matter.

72. *Id. See also* Sheffey, *supra* note 7, at 758.

except in unusual circumstances."[73] Unusual circumstances permitting nondisclosure occur "[w]hen immediate disclosure would prejudice the ability of the company to pursue its corporate objectives"[74] and "[w]hen the facts are in a state of flux and a more appropriate moment for disclosure is imminent."[75]

The National Association of Securities Dealers (NASD) requires that issuers listed on the NASDAQ disclose to the public "any material information which may affect the value of its securities or influence investors' decisions."[76] Unlike the exchanges, the NASD does not give the issuer discretion to withhold disclosure temporarily for legitimate business purposes.

The rules of these organizations also require companies to clarify rumors or give reasons for unusual market activity. For example, the NYSE Listed Company Manual provides:

> The market action of a Corporation's securities should be closely watched at a time when consideration is being given to significant corporate matters. If rumors or unusual market activity indicate that information on impending developments has leaked out, a frank and explicit announcement is clearly required. If rumors are in fact false or inaccurate, they should be promptly denied or clarified. A statement to the effect that the company knows of no corporate developments to account for the unusual market activity can have a salutary effect. . . . If rumors are correct or there are developments, an immediately, candid statement to the public as to the state of negotiations or the state of development of corporate plans in the rumored area must be made directly and openly. . . . The Exchange recommends that its listed companies contact their Liaison Representative if they become aware of rumors circulating about their company.[77]

Violation of these disclosure requirements may result in delisting but probably not in civil damage liability.[78] In *State Teachers Retirement Board v. Fluor Corp.*,[79] the Second Circuit specifically rejected a private right of action for violation of section A2 of the NYSE Company Manual requiring disclosure of general corporate news. The court found that the implication of a private right of action was unwarranted since "section A2 . . . touches upon areas of corporate activity already extensively regulated by Congress and the Securities and

73. American Stock Exchange Company Guide § 401(a), *reprinted in* 2 Fed. Sec. L. Rep. (CCH) ¶ 23,124A, at 17,097-8.

74. *Id.* ¶ 23,124B, at 17,097-10.

75. *Id.* at 17,097-11.

76. National Association of Securities Dealers Manual, sched. D, pt. II, § (B)(3)(b).

77. NYSE Listed Company Manual, *supra* note 70, ¶ 23,123, at 17,097-6. *See also* ASE Company Guide, *supra* note 73, ¶ 23,124B, at 17,097-8. The NASD does not have an equivalent provision.

78. *See* Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 267–69 (2d Cir. 1984) (the threat of delisting due to the issuer's violation of exchange rules constitutes sufficient irreparable injury to support the issuance of a preliminary injunction barring the violative actions).

79. 654 F.2d 843 (2d Cir. 1981).

Exchange Commission."[80] This decision is in line with the recent trend of cases denying private rights of action for violations of other exchange rules.[81]

Although there is some disagreement whether there is a general affirmative duty to disclose, the situations when the duty to disclose does arise—under the express reporting requirements, the antifraud provisions, or the rules of the exchanges—are nearly all-encompassing. Except in narrowly defined circumstances, issuers will frequently find themselves facing a duty of disclosure, and the key question will be not whether material information should be disclosed, but when.

TIMING OF DISCLOSURE

The timing of disclosure can be crucial, particularly in the sensitive areas of disclosure of negative financial information and disclosure of imminent business developments. A premature announcement can have extremely adverse consequences for an issuer;[82] yet delayed disclosure may subject the issuer to liability under the federal securities laws.

NEGATIVE FINANCIAL INFORMATION

The disclosure of negative financial information raises particularly difficult questions because disclosure might prompt adverse consequences that otherwise might be avoided. If the time for filing a quarterly or annual financial report has arrived, there is no question but that complete and candid disclosure is required.[83] If the issuer is between mandatory reporting periods, however, it has greater flexibility.

The leading case on the timing of disclosure of negative financial information is *Financial Industrial Fund, Inc. v. McDonnell Douglas Corp.*,[84] in which the question was whether management's decision to delay the release of an unfavorable special earnings report evidenced scienter, which would sustain an action under rule 10b-5. The Tenth Circuit held that the business judgment rule applied: "[T]he *timing* of the disclosure of material facts ' . . . is a matter for the business judgment of the corporate officers entrusted with the management of

80. *Id.* at 852–53.

81. *See, e.g.*, Carrott v. Shearson Hayden Stone, Inc., 724 F.2d 821, 823 (9th Cir. 1984); Jablon v. Dean Witter & Co., 614 F.2d 677, 681 (9th Cir. 1980); Chapman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,419, at 96,408 (D. Md. 1983).

82. *See, e.g.*, Segal v. Coburn Corp. of Am., [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,002, at 94,020 (E.D.N.Y. Apr. 30, 1973) (company not liable for failing to disclose decision to withdraw from line of business: "To make the decision public property might . . . have impaired the collectibility of the paper, disturbed credit relations and forced a precipitous liquidation of the business").

83. *See supra* text accompanying notes 9–30.

84. 474 F.2d 514 (10th Cir.), *cert. denied*, 414 U.S. 874 (1973).

the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC.' "[85] Based on this rule, the court concluded:

> The defendant as a . . . defense could show either good faith or the exercise of good business judgment in its acts or inaction. The evaluation of the significance of the change in defendant's earnings as it might affect the corporation, its stockholders, or persons considering the purchase of stock, called for the exercise of discretion, and upon a showing of the exercise of due care in the gathering and consideration of the facts, a presumption arose that the evaluation made was in the exercise of good business judgment although subsequent events might show the decision to have been in error.[86]

The Tenth Circuit in *Financial Industrial Fund* also indicated that it may be inappropriate and misleading to publish information prematurely and that a corporation should wait until the information is "ripe":

> [T]he information . . . must be "available and ripe for publication" before there commences a duty to disclose. To be ripe under this requirement, the contents must be verified sufficiently to permit the officers and directors to have full confidence in their accuracy. It also means, as used by the Second Circuit, that there is no valid corporate purpose which dictates the information be not disclosed.[87]

At least one commentator has criticized the use of the business judgment rule in the disclosure context:

> The business judgment rule was not intended to protect the corporation itself in a suit by its stockholders. Rather, it was designed to encourage corporate officers to take risks when making business decisions knowing that the courts will defer to their good faith determinations. If this rule is applied to the corporation's decision to disclose, however, great latitude afforded timing decisions will encourage corporations to delay or even forgo disclosure. This will frustrate one of the basic purposes of the federal securities laws, which is to "substitute a philosophy of full disclosure for the philosophy of *caveat emptor*."[88]

85. *Id.* at 518 (quoting SEC v. Texas Gulf Sulphur, 401 F.2d at 850 n.12 (emphasis added in *Financial Industrial Fund*)).

86. *Id.* at 521–22.

87. *Id.* at 519. *See also* SEC v. Texas Gulf Sulphur Co., 401 F.2d at 850 n.12; Elkind v. Liggett & Myers, Inc., 472 F. Supp. 123 (S.D.N.Y. 1978), *aff'd in relevant part,* 635 F.2d 156 (2d Cir. 1980) (a corporation could reasonably determine not to release information on a decline in monthly earnings if it considered the drop temporary and not significant to corporation's condition). *But see* Fisher v. Plessey Co., 559 F. Supp. 442 (S.D.N.Y. 1983) (a company cannot claim that it is exercising its business judgment in not making a disclosure when it is making a tender offer for the debentures of a wholly owned subsidiary).

88. Bauman, *supra* note 7, at 960.

Nevertheless, whether characterized as a question of business judgment or otherwise, the timing of disclosure of negative information is surely a matter of discretion to some degree. Twenty-twenty hindsight may help in pinpointing the precise time at which disclosure should have been made (or withheld), but the vagaries of the business world and the stock markets are not so certain. The disclosure of negative financial information, in particular, can require the issuer to choose between the self-fulfilling prophecies of premature disclosure and the heavy liabilities of tardy disclosure.

MERGER NEGOTIATIONS

The general rule established by the cases is that merger negotiations that have not ripened into an agreement do not have to be disclosed. In *Reiss v. Pan American World Airways,*[89] for instance, Pan Am was sued by debentureholders under rule 10b-5 for failing to disclose that it was involved in merger negotiations with National Airlines at the time that it called for a redemption of convertible debentures. The plaintiffs claimed that if they had known of the negotiations, they would have converted their debentures into common stock instead of selling them. The Second Circuit held that Pan Am was not obligated to disclose the merger negotiations:

> It does not serve the underlying purposes of the securities acts to compel disclosure of merger negotiations in the not unusual circumstances before us. Such negotiations are inherently fluid and the eventual outcome is shrouded in uncertainty. Disclosure may in fact be more misleading than secrecy so far as investment decisions are concerned. We are not confronted here with a failure to disclose hard facts which definitely affect a company's financial prospects. Rather, we deal with complex bargaining between two (and often more) parties which may fail as well as succeed, or may succeed on terms which vary greatly from those under consideration at the suggested time of disclosure. We have no doubt that had Pan Am disclosed the existence of negotiations on August 15 and had those negotiations failed, we would have been asked to decide a section 10b-5 action challenging that disclosure.[90]

Similarly, in *Staffin v. Greenberg,*[91] an issuer that made a tender offer for its own stock was sued for failing to disclose merger negotiations. The Third Circuit held that the negotiations did not have to be disclosed, noting the policy reasons for its conclusion:

> The reason that preliminary merger discussions are immaterial as a matter of law is that disclosure of them may itself be misleading. A substantial body of opinion suggests that disclosure of preliminary merger discussions

89. 711 F.2d 11 (2d Cir. 1983).
90. *Id.* at 14 (citations omitted).
91. 672 F.2d 1196 (3d Cir. 1982).

> would, by and large, do more harm than good to shareholders and the values embodied in the anti-fraud provisions of the Act.[92]

The court did indicate, however, that "[w]here an agreement in principle has been reached a duty to disclose *does* exist" and further suggested that circumstances might arise where liability would attach for "failure to disclose discussions which have not reached an agreement in principle, but are in some sense the functional equivalent thereof."[93]

Subsequent cases have added a gloss to these decisions for situations in which it is likely that information about the merger negotiations has leaked to the public. In *Schlanger v. Four-Phase Systems, Inc.,*[94] for instance, the court held that a company could be liable under rule 10b-5 for failing to disclose merger negotiations in a public announcement when unusual market activity indicated that there had been leaks of inside information about the negotiations.

In *Schlanger,* Four-Phase, on December 2, 1982, responded to a New York Stock Exchange inquiry concerning a "steep and sudden rise" in the company's market price and trading volume by issuing an announcement that "the Company is not aware of any corporate developments which would affect the market of its stock."[95] In fact, the company had been meeting with Motorola concerning the possibility of merger, but, at the time of the announcement, no offer to acquire Four-Phase had been made. On December 10, Four-Phase announced that it had entered into a merger agreement with Motorola whereby Motorola would acquire Four-Phase's stock at a very favorable exchange value. Subsequently, shareholders who had sold their stock sued Four-Phase under rule 10b-5 for failing to disclose in the earlier announcement the existence of the merger negotiations.

In denying the defendants' motion for summary judgment, the court stated that it recognized that "the federal securities laws do not impose a general duty upon an issuer to disclose material facts or new developments when it is not trading in its own securities"[96] but that on the facts of this case, including a strong likelihood of leaks concerning the merger negotiations, the failure to mention the negotiations in the earlier announcement may have been misleading. The court emphasized the likelihood of a leak:

> No explanation of the price activity prior to December 2nd is suggested, other than leaks of the existence of the merger discussions. Of course, the defendants knew that there is no secret when two people know it. More than a few persons knew Four-Phase was actively seeking to merge and if

92. Id. at 1206 (citations omitted). *See* Susquehanna Corp. v. Pan Am. Sulphur Co., 423 F.2d 1075, 1084–85 (5th Cir. 1970).

93. Staffin v. Greenberg, 672 F.2d at 1207 (emphasis in original).

94. 582 F. Supp. 128 (S.D.N.Y. 1984). *See* Kaufman & Hoyns, *Disclosure Dilemma: What to Say When the Stock Exchange Calls?,* Nat'l L.J., Jan. 18, 1985, at 1; Brodsky, *Timing of Corporate Disclosure,* N.Y.L.J., Nov. 6, 1984, at 1.

95. 582 F. Supp. at 129.

96. *Id.* at 133.

> Four-Phase's managers had not thought that the negotiations were worthy of further pursuit, presumably they would have suspended the discussions or reopened dealings with others. They knew of no *other* fact, apart from leaks, which could have explained the sudden rise in price and volume.[97]

The court noted that the presence of a potential leak distinguished this case from *Reiss* and *Staffin*, and that once the defendant decided to issue a statement, it may have been required to disclose the negotiations:

> This Court concludes that defendants, once having chosen to make a statement of fact, had a duty to disclose all material facts "necessary in order to make the statement made, in light of the circumstances under which it was made, not misleading." Accordingly, the Hodder Statement may give rise to liability if at trial it is determined that the statement was intentionally or recklessly false, in light of what was known at the time, including any facts from which a leak could be inferred, and was also material.[98]

However, a recent Third Circuit decision, *Greenfield v. Heublein, Inc.*,[99] with facts similar to those of *Schlanger*, reached an opposite conclusion. In *Greenfield*, the defendant Heublein was fending off a hostile takeover bid by General Cinema, while at the same time engaging in merger negotiations with a white knight, R.J. Reynolds. General Cinema announced to Heublein on July 14, 1982, that it was going to sell a major subsidiary, which Heublein realized would allow General Cinema to resume large-scale open market purchases of Heublein's stock. On the same day, there was a dramatic increase in trading activity in Heublein's stock, and the market price rose significantly.

A representative of the New York Stock Exchange contacted Heublein and asked for a public statement. In response, Heublein, like Four-Phase in *Schlanger*, issued a "no corporate development" statement on July 14: "A spokesman for Heublein, Inc. said the Company was aware of no reason that would explain the activity in its stock in trading on the NYSE today."[100]

Shortly thereafter, General Cinema made several non-negotiable demands on Heublein. Heublein then began discussing a merger with Reynolds, and late on July 27 the parties reached an agreement in principle. The Stock Exchange requested another "no corporate development" statement on July 28, but Heublein responded that it could not issue such a statement and requested that

97. *Id.* at 132–33 (emphasis in original).

98. *Id.* at 134. *See also In re* Spartek Inc., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,961, at 81,407 (1979) ("Candor by corporate officials and others is especially important in responding to inquiries [by the exchanges] regarding such events as tender offers and other types of acquisitions because of their often substantial effect on the trading market for an issuer's securities").

99. 742 F.2d 751 (3d Cir. 1984), *cert. denied,* 53 U.S.L.W. 3594 (U.S. Feb. 19, 1985) (No. 84-1025).

100. *Id.* at 754.

trading in its stock be halted. The following day the merger agreement was announced.

A Heublein stockholder, who sold his stock on July 27, after the commencement of the Reynolds negotiations but before announcement of the merger agreement, sued Heublein under the antifraud provisions. The complaint alleged that Heublein was under a duty to disclose its merger negotiations with Reynolds and General Cinema and that the July 14 "no corporate development" statement was misleading, either when it was first issued or soon thereafter.

The Third Circuit rejected all these claims. The court stated unequivocally that "preliminary merger negotiations are immaterial as a matter of law"[101] and that only an agreement in principle is material and must be disclosed. Adopting the reasoning of the lower court, the Third Circuit held that an agreement in principle exists only if the parties have agreed upon *both* the price and the structure of the merger. Following this rule, the court found that, while Heublein and Reynolds had worked out the structural details of the proposed merger prior to the plaintiff's sale of his stock, they had not yet agreed upon a price. Thus, Heublein had been under no obligation to disclose its negotiations with Reynolds.[102] Similarly, the court found that Heublein's rather unfriendly conversations with General Cinema were also only preliminary negotiations that did not have to be disclosed.

In addition, and perhaps most important, the court found that the July 14 "no corporate development" statement was not misleading even though the Heublein executives "clearly knew of information that might have accounted for the increase in trading."[103] The court held that the executives had no duty to disclose because "there was no indication that any of this privileged information had been leaked or that they knew of, or had, information that insiders were engaged in trading."[104]

The latter ruling drew a sharp dissent from one judge, who believed that Heublein was under no obligation to respond to the Stock Exchange inquiry (that is, it could have replied "no comment") but that once Heublein did respond, it was required to do so accurately. The dissenting judge believed that because Heublein had a good idea of why trading had increased in its stock, it could not say otherwise and that its "no corporate development" statement was misleading.

101. *Id.* at 756.

102. *Id.* at 756–57.

103. *Id.* at 759.

104. *Id. See also* Levinson v. Basic, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 91,801 (N.D. Ohio 1984), in which the court also found that a company's "no corporate development" statement prior to its acquisition was not misleading. In *Levinson,* however, the company had not had talks with its suitor for two months prior to the issuance of the statement.

TAKEOVER DEFENSES

As in the merger negotiations area, courts have not required disclosures of takeover defenses if the defensive plans are uncertain or contingent. In *Warner Communications, Inc. v. Murdoch,*[105] for instance, Warner management was charged with failing to disclose an alleged "entrenchment scheme" to block a takeover bid by Rupert Murdoch's News Corporation. The court cited *Reiss v. Pan American World Airways* for the proposition that "the federal securities laws do not impose a duty to disclose information regarding current or future plans that are uncertain and contingent in nature" and suggested that "[t]his principle is grounded in the concern that it might be just as misleading to investors to disclose contingent plans as it might be to fail to disclose such plans."[106] Indeed, the court recognized that "[r]equiring disclosure [of contingent plans] would place a party in the harsh position of facing liability if the plans are not disclosed but they come to fruition, as well as liability if the plans are disclosed but they fail to be consummated."[107]

Proxy materials with anti-takeover proposals, however, must not be misleading or incomplete. They should fully discuss the advantages and disadvantages of the proposals, including the impact of their adoption on any proposed corporate transaction, whether hostile or friendly.[108] In *SEC v. Dorchester Gas Corp.,*[109] for instance, a company was charged with sending shareholders misleading proxy statements concerning anti-takeover proposals. The proxy materials stated that the Board "has no knowledge at the present time of any specific effort to accumulate the company's securities or to obtain control of the Company"[110] without disclosing that the company's senior management had discussed among themselves and with an investment banker the possibility of a leveraged buyout.

Thus, the mere fact that anti-takeover plans may be contingent does not immunize them from disclosure in a timely fashion. The question of when such plans must be disclosed depends upon the totality of the circumstances.

PROJECTIONS OR OTHER "SOFT" INFORMATION

The courts historically have not required the inclusion of appraised asset valuations, projections, or other "soft" information in proxy or tender offer materials.[111] Recently, however, a new trend has developed toward encouraging and, indeed, requiring some disclosure.

105. 581 F. Supp. 1482 (D. Del. 1984).

106. *Id.* at 1491.

107. *Id.*

108. *See Disclosure in Proxy and Information Statements; Anti-Takeover or Similar Proposals,* SEC Exchange Act Release No. 15,230, [1978 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 81,748 (Oct. 13, 1978).

109. [1983–1984 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,613 (D.D.C. Jan. 9, 1984).

110. *Id.* at 97,410.

111. *See, e.g.,* South Coast Servs. Corp. v. Santa Ana Valley Irrigation Co., 669 F.2d 1265, 1271 (9th Cir. 1982); Gerstle v. Gamble-Skogmo, Inc., 478 F.2d 1281, 1292–94 (2d Cir. 1973).

The SEC has encouraged the publication of projections and has promulgated rule 175 under the 1933 Act and rule 3b-6 under the 1934 Act, which provide a safe harbor for projections made in good faith and on a reasonable basis.[112] The SEC has also suggested that there is a duty to correct projections that have "become inaccurate by virtue of subsequent events, or are later discovered to have been false and misleading from the outset, and the issuer knows or should know that persons are continuing to rely on all or any material portion of the statements."[113] However, as a general matter, a company should not have to correct or respond to projections made by outsiders that are not attributable to the company.[114]

In *Flynn v. Bass Brothers Enterprises, Inc.*,[115] the court went so far as to hold that disclosure of soft information may be required in some circumstances. In this case, the defendant was sued under section 14(e) and rule 10b-5 for failing to disclose internal asset valuations made by the target and by itself during a friendly tender offer.

The court first recognized that a tender offeror has a duty during a tender offer to disclose all material facts in connection with the offer. While noting that asset valuations, like other soft information, have traditionally not been considered material facts ripe for disclosure, the court nevertheless found an apparent trend in the case law in the opposite direction. The court therefore announced the following new standard for determining whether such information should be disclosed:

> Henceforth, the law is not that asset appraisals are, as a matter of law, immaterial. Rather, in appropriate cases, such information must be disclosed. Courts should ascertain the duty to disclose asset valuations and other soft information on a case by case basis, by weighing the potential aid such information will give a shareholder against the potential harm, such as undue reliance, if the information is released with a proper cautionary note.
>
> The factors a court must consider in making such a determination are: the facts upon which the information is based; the qualifications of those who prepared or compiled it; the purpose for which the information was originally intended; its relevance to the stockholders' impending decision; the degree of subjectivity or bias reflected in its preparation; the degree to

112. Safe Harbor Rule for Projections, SEC Securities Act Release No. 6084, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,117, at 81,943 (June 25, 1979).

113. *Id. See also* Fogelson, *The Reporting Company's Duties to Disclose and Correct in the Absence of Trading; Timely Disclosure of Negative Information,* Second Annual Securities Law & Enforcement Institute 3, 21–25 (1983).

114. *See* Bauman, *supra* note 7, at 975. *See also supra* text accompanying notes 66–69 for discussion of duty to correct statements by third parties.

115. 744 F.2d 978 (3d Cir. 1984).

which the information is unique; and the availability to the investor of other more reliable sources of information.[116]

Thus, the disclosure of certain kinds of soft financial information is becoming more significant. Such information, if accurate or predictive, is unquestionably helpful to investors. Balanced against this usefulness, however, is the fact that projections are inherently uncertain and that the ultimate actual results may not compare favorably with the disclosed projections.

CONCLUSION

The disclosure of material corporate events such as developing financial difficulties (whether temporary or otherwise) and business negotiations is a matter of considerable sensitivity. The express disclosure provisions require detailed disclosure and analysis of financial information at specified intervals, and the antifraud provisions and securities exchange regulations require disclosure of a broader range of events on a more flexible timetable.

The issuer thus must walk a tightrope between premature disclosure, which might prove damaging to its business, and thus to its stockholders, and tardy disclosure, which may cause unwarranted injury to the investing public and consequent securities law liability.

116. *Id.* at 988. Despite its announcement of this new standard, the court felt constrained not to apply the standard retroactively and held that the disclosure was adequate under the old standard. *See also* Goldman v. Belden, No. 84-7273 (2d Cir. Feb. 12, 1985) (sustaining complaint against company and its officers for making positive predictions at a shareholder meeting with knowledge that these predictions were based on flawed assumptions). *But see* Dixon v. Ladish Co., 597 F. Supp. 20 (E.D. Wis. 1984) (failure to disclose in proxy materials internal valuation studies prepared for merger negotiations was not deceptive because valuations were tentative and of little value outside the negotiations).