Examining Timely Disclosure of Material Information to Shareholders and the Privacy Concerns of Executive Officers

Ufuoma Barbara Akpotaire, Columbia University

Available at: https://works.bepress.com/ufuoma_barbara_akpotaire/9/
Examining Timely Disclosure of Material Information to Shareholders and the Privacy Concerns of Executive Officers

3/29/2011
Columbia University School of Law, New York
Ufuoma Barbara Akpotaire
# TABLE OF CONTENTS

1. **Introduction** ........................................................................................................... 3

2. **Basic Principles of Disclosure under the Federal Securities Laws** ............................. 5
   i. Disclosure Under the Securities Act ........................................................................... 5
      a. Section 11 of the Securities Act ............................................................................. 6
      b. Section 12 of the Securities Act ............................................................................. 6
      c. Section 17 of the Securities Act ............................................................................. 7
   ii. Disclosure Under the Exchange Act ........................................................................ 8
      a. Form 8-K, Form 10-Q, and Form 10-K ................................................................. 8
      b. Rule 10b-5 ............................................................................................................. 9

3. **Executive Officers** .................................................................................................... 10
   i. Disclosure Obligations imposed by the Securities and Exchange Commission Regulations ........................................................................ 10
      a. The Executive Officer’s Age .................................................................................. 10
      b. The CEO’s personal bankruptcy and violation of SEC laws .................................. 10
      c. The CEO’s involvement in certain legal proceedings ............................................. 11
      d. Executive Compensation ....................................................................................... 11
      e. Regulation Fair Disclosure and NASDAQ Rule 5250 .......................................... 16
   ii. Health of Executive Officers and Past Disclosures ..................................................... 17
      a. Tenneco – Michael Walsh .................................................................................... 17
      b. Pacific Biosciences – Hugh Martin ...................................................................... 18
      c. General Motors – Harry Pearce ............................................................................ 18
      d. Apple Inc. – Steve Jobs ......................................................................................... 18
      e. Time Warner – Steve Ross ................................................................................... 20
      f. Berkshire Hathaway – Warren Buffett .................................................................... 22
   iii. Employment-Related Privacy Laws ......................................................................... 22
      a. The Electronic Communication Privacy Act ......................................................... 23
      b. Health Insurance Portability and Accountability Act of 1996 ............................... 23
      c. Americans with Disability Act of 1990 ................................................................. 24
   iv. Corporate Concerns .................................................................................................. 24

4. **Securities and Exchange Commission’s Position and Court Interpretations** ............... 25

5. **Analysis** .................................................................................................................... 25
   a. Arguments in favor of additional disclosure ............................................................ 25
   b. Criticism about additional disclosure ..................................................................... 28

6. **Conclusion** ............................................................................................................... 31
1. INTRODUCTION

On January 20, 1993, Michael Walsh, the former Chairman and CEO of Tenneco revealed to the public that he had brain cancer.¹ This type of disclosure of health issues are arguable serious enough to affect Wall Street. Other company officials have previously made similar disclosures such as Hugh Martin, CEO of Pacific Biosciences, who in October 2010 disclosed to his employees that he had cancer of the Blood (multiple myeloma),² and Harry J. Pearce, the Vice President of General Motors, who disclosed in 2001 that he had leukemia.³

The above public disclosures are however more the exceptions than the rule. When a CEO becomes ill, most public companies usually respond by keeping the full details of the illness a secret without violation of Securities Laws.⁴ The concern of these companies is that investors would abandon ship and that stock prices would decline if this information gets to the market. Classic examples are Apple Inc.,⁵ and Sara Lee.⁶

The Securities and Exchange Commission (SEC) rules seem to be silent on such situations. The Securities Act of 1933 and the Securities and Exchange Commission Act of 1934 require companies with publicly traded securities to make fair, timely disclosures of material information to the investing public.

⁴ Supra note 2.
The question therefore remains whether the health situation of an executive officer of a company is material information within the contemplation of the SEC rules that must be disclosed. If answered in the affirmative, then to what extent do executive officers have a right to privacy? If this information is not material information that is subject to disclosure, should the company in the absence of specific SEC rules, disclose facts about the illness of executives as a matter of good corporate governance. This paper will look at the position of the securities laws\(^7\) with regard to the duty to disclose and some of the arguments in support of material disclosure of the health of executive officers. This paper will also examine some of the opposing arguments and criticism about additional disclosures, which are mostly based on privacy-related statutes,\(^8\) absence of specific SEC rules for such situations, and the burden that such a requirement might place on companies. The paper will also attempt to strike a balance between the need to provide material information that may influence the investment decision of shareholders, and the need for the protection of the right to privacy of executive officers of a company.

\(^7\)See The Securities Act of 1933; The Securities and Exchange Commission Act of 1934; and NASDAQ rules.

\(^8\)Health Insurance Portability and Accountability Act (HIPPA) of 1996; Americans with Disability Act of 1990; Electronic Communications Privacy Act of 1986.
2. BASIC PRINCIPLES OF DISCLOSURE UNDER THE FEDERAL SECURITIES LAWS

i. DISCLOSURE UNDER THE SECURITIES ACT

The Securities Act of 1933 (the Act) covers the initial issuance of securities in the United States (U.S.).\(^9\) The Act requires that most public offerings of securities in the U.S. undergo a registration process with the SEC.\(^{10}\) In order to register securities in the U.S., the issuer publicly files a registration statement with the SEC.\(^{11}\) The registration statement and the accompanying prospectus must include certain disclosures outlined in the registration form itself and in Regulation S-K.\(^{12}\) The main purpose of the Act is to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mail.\(^{13}\) The Act also seeks to prevent fraud in the sale thereof, and for other purposes.\(^{14}\)

The Act requires the registration of any offer and sale of securities using the means or instruments of transportation or communication in interstate commerce.\(^{15}\) The basic idea is for investors to receive truthful, accurate, and material information about the issuer and the securities being offered, by mandating certain line item disclosures,\(^{16}\) and more meaningful narrative disclosure through Regulation S-K.\(^{17}\)

---

\(^{10}\) Securities Act of 1933, 15 U.S.C. § 77g (outlining the information required for registration).
\(^{11}\) Id.
\(^{12}\) Securities Act and Exchange Commission, [RELEASE NOS. 33-8518; 34-50905; File No. S7-21-04], 17 C.F.R. § 229.
\(^{13}\) Supra note 9.
\(^{14}\) Id.
\(^{17}\) Regulation S-K is a prescribed regulation under the Securities Act of 1933 that lays out reporting requirements for public companies; Supra note 12.
a. **Section 11 of the Securities Act of 1933**

Section 11 of the Securities Act creates liability for registration statements that contain an untrue statement of a material fact or omit to state a material fact required to be stated therein or necessary to make the statement therein not misleading.\(^{18}\) If the registration statement contains a materially false statement or omissions, the issuing company will be strictly liable for such false statements or omissions.\(^{19}\) The Plaintiff however does not have to prove reliance on the materially false statement or omission, and the defense cannot use the absence of such reliance as an affirmative defense.\(^{20}\)

b. **Section 12 of the Securities Act of 1933**

Section 12 of the Securities Act broadens the scope of liability to cover communications made outside the registration statement in connection with a securities offering.\(^{21}\) Under Section 12, any person who offers or sells a security by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statement, in the light of the circumstances under which they were made, not misleading, and who shall not sustain the burden of proof that he did not know of such untruth or omission, shall be liable to the person purchasing such security from him.\(^{22}\) This means that while Section 11 prohibits material misstatements or omissions in a registration statement,


\(^{19}\) See, e.g., Herman & MacLean v. Huddleston, 459 U.S. 375, 382 (1983), for the view that liability against the issuer of a security is virtually absolute; Degulis v. LXR Biotechnology, Inc., 928 F. Supp. 1301, 1314 (S.D.N.Y. 1996) (“Sections 11 and 12(2) provide for strict liability....”); In re Worlds of Wonder Sec. Litigation, 694 F. Supp. 1427, 1434 (N.D. Cal. 1988) (“Plaintiffs need only show a material misstatement or omission to establish their prima facie case.”).

\(^{20}\) Supra note 18; Under Section 11, the burden is on the defendant, but loss causation is still relevant; Dura Pharmaceutical, Inc. v. Broudo, 544 U.S. 336, 341-42 (2005); In re Salomon Analyst Metromedia Litigation, 544 F.3d 474, 478 n. 1 (2d Cir.2008); In re Vivendi Universal, S.A. Securities Litigation 2011 WL 590915.


\(^{22}\) Id.
Section 12(a)(2) prohibits material misstatements and omissions in a prospectus. Another basic difference between Section 11 and Section 12 is that, Section 12 offers an affirmative defense for parties that did not know, and in the exercise of reasonable care could not have known, of such untruth or omission.

c. Section 17 of the Securities Act of 1933

Section 17 of the Securities Act is the general antifraud provision that governs all securities transactions. It prohibits fraud, deception and material misstatements and omissions in connection with the purchase and sale of a security-based swap. It serves as a shield for purchasers and a sword against sellers. The elements of proof under Section 17 are similar to those under Section 10(b) of the Exchange Act and Section 10(b) was based in part on Section 17. As a result, many plaintiffs join their Section 17(a) actions with Section 10(b) actions. There are however differences between Section 10(b) and Section 17(a), one of which is the fact that scienter is necessary in actions under Section 10(b) and Section 17(a)(1), but not required in actions under Sections 17(a)(2) and 17(a)(3).

References:
24 Supra note 21.
26 Securities Act of 1933, Section 17(a)(1)
29 Landry v. All Am. Assurance Co., 688 F.2d 381, 386 (5th Cir. 1982) (“Perhaps the main reason for the somewhat awkward development of the law under § 17(a) of the 1933 Act is the fact that it has traditionally lived in the shadow of another area of securities law: Rule 10b-5.”); Spatz v. Borenstein, 513 F. Supp. 571, 578 (N.D. Ill. 1981) (“Plaintiffs have often ‘boot-strapped’ § 17(a) allegations to their 10b-5 claims.”).
ii. **DISCLOSURE UNDER THE EXCHANGE ACT**

The Exchange Act governs the trading and sale of securities issued under the Securities Act of 1933.\(^\text{31}\) The main purpose of the Exchange Act is to ensure that investors in the secondary market receive truthful, accurate, and material information about the issuer and the securities being offered.\(^\text{32}\) The Exchange Act requires that companies with more than $10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports and make them available to the public.\(^\text{33}\) This requirement also extends to companies that are listed on the national securities exchanges.

a. **Form 8-K, Form 10-Q, Form 10-K.**

Under the Exchange Act, required reports such as Form 8-K, 10-Qs and 10-Ks, are often incorporated by reference into the registration statement and prospectus in the event of a securities offering and become part of the offering documents.\(^\text{34}\)

The general rule under Form 8-K is for prompt disclosure of a number of specific items within four business days of the triggering event.\(^\text{35}\) For example, Item 5.02(b) requires disclosure if certain officers retire, resign, or are terminated from employment. The form however does not

\(^\text{31}\) Section 10 provides that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange – (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), 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.

\(^\text{32}\) Securities Exchange Act of 1934 Section 13(a)(1), 15 U.S.C. § 78m(a)(1) (requiring public companies to “keep reasonably current the information and documents required to be included in or filed with an application or registration statement” required by Section 12 of the Exchange Act).

\(^\text{33}\) See also 17 C.F.R. § 240.12g-1 (exempting issuer from registration requirements if total assets do not exceed $10 million).

\(^\text{34}\) See Securities Act of 1933, 15 U.S.C. § 78m(a) (requiring the filing of annual reports and other information as prescribed by the SEC rules and regulations); 17 C.F.R. § 240.13a-1 (outlining the periodic disclosure requirements of Exchange Act registered companies); 17 C.F.R. § 249.310 (Exchange Act Form 10-K), 17 C.F.R. § 249.308a (Exchange Act Form 10-Q); 17 C.F.R. § 249.308 (Exchange Act Form 8-K).

\(^\text{35}\) [http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm](http://www.sec.gov/divisions/corpfin/guidance/8-kinterp.htm); Section 101 of Form 8-K
require disclosure of the death of a person otherwise covered by Item 5.02(b). According to the SEC’s interpretation of this Item, if a person’s who is covered by the Item 5.02 (b) has his duties permanently or temporarily reassigned, there must be disclosure of the permanent or temporary reassignment but not the reason for such. Item 8.01 of Form 8-K provides for discretionary disclosure of any information that the registrant deems of importance to security holders. This provision is however not mandatory and it does not illuminate what must be disclosed.

Both Form 10-K and Form 10-Q require certain disclosures prescribed by Item 303 of Regulation S-K i.e. Management’s Discussion and Analysis of Financial Condition and Results of Operations (MD&A).

b. **Rule 10b-5**

The Exchange Act encourages disclosures through a broad antifraud provision under Rule 10b-5. Rule 10b-5 provides that it shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange; to employ any device, scheme, or artifice to defraud, to make any untrue statement made, in the light of the circumstances under which they were made, not misleading; or to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.\(^{36}\)

To prevail on a Rule 10b-5 claim, a plaintiff must prove that the defendant acted with scienter in making the false statement or omission of material fact in connection with the purchase or sale of

\(^{36}\) 17 C.F.R. § 240.10b-5.
a security which caused the plaintiff economic loss after the plaintiff justifiably relied on such statements and omissions.\textsuperscript{37}

3. EXECUTIVE OFFICERS

i. DISCLOSURE OBLIGATION IMPOSED BY SECURITIES AND EXCHANGE COMMISSION REGULATIONS

The SEC requires companies to disclose the experiences and backgrounds of executive officers and other significant employees. There is no explicit requirement to disclose private, material matters, such as serious illness\textsuperscript{38} or significant changes in personal financial situations.\textsuperscript{39}

a. The Executive Officer’s age

Item 401 of Regulation S-K requires disclosure of the ages of all executive officers.\textsuperscript{40} The rationale behind the requirement is that investors might use the age of executive officers to draw conclusions, however tenuous, about the executive officer’s health.\textsuperscript{41}


\textsuperscript{39} Katherine Yung, Dean Foods Keeps Move in the Open: Company Says its CEO Will Sell Stock to Help in Divorce Settlement, Dallas Morning News, Aug. 28, 2003, at 2D (Reporting that the chairman and chief executive of Dean Foods Company announced that he was selling his shares in the company to facilitate his divorce settlement).

\textsuperscript{40} Item 401 provides requires that you list the names and ages of all directors of the registrant and all persons nominated or chosen to become directors; indicate all positions and offices with the registrant held by each such person; state his term of office as director and any period(s) during which he has served as such; describe briefly any arrangement or understanding between him and any other person(s) (naming such person(s)) pursuant to which he was or is to be selected as a director or nominee.

b. The CEO’s Personal Bankruptcy and Violation of SEC Laws

Item 401(f) of Regulation S-K requires companies to disclose the CEO’s personal bankruptcy and violations of the securities laws.\(^{42}\)

\(^{42}\) Item 401(f) requires that you describe any of the events that occurred during the past ten years and that are material to an evaluation of the ability or integrity of any director, person nominated to become a director or executive officer of the registrant. This includes a petition under the Federal bankruptcy laws or any state insolvency law that was filed by or against, or a receiver, fiscal agent or similar officer was appointed by a court for the business or property of such person, or any partnership in which he was a general partner at or within two years before the time of such filing, or any corporation or business association of which he was an executive officer at or within two years before the time of such filing.

\(^{43}\) Abril and Olazabal, 11 UPAJBL 383 (2009).

\(^{44}\) Id.


\(^{46}\) Id.


c. The CEO’s Involvement in Certain Legal Proceedings

Item 401(f) of Regulation S-K also requires companies to disclose whether the CEO is named or convicted in a criminal proceeding.\(^{43}\) This information must be disclosed only if it occurred within five years and it is material to an evaluation of the ability or integrity of the CEO.\(^{44}\)

According to the SEC, a company is also required to disclose petitions and comparable events in foreign countries except in the unusual situation where it is not material.\(^{45}\) For example, disclosure should be provided when a director of a U.S. public company is also the CEO of a non-U.S. company and a receiver is appointed for the non-U.S. company.\(^{46}\)

Some courts have held that the involvement in criminal proceedings need not be disclosed until the person is indicted.\(^{47}\) This means that an SEC investigation is not a pending legal process.
d. Executive Compensation

The disclosure of executive compensation was first introduced by the SEC on August 11, 1938. In July 2006, the SEC overhauled the former executive compensation disclosure rules. The 2006 rules were intended to “provide investors with a clearer and more complete picture of the compensation earned by an issuer’s principal executive officer, principal financial officer and highest paid executive officers and members of its board of directors.” In addition, they were intended to make proxy and information statements, reports and registration statements “easier to understand” by adopting a requirement that disclosure generally be provided in plain English.

The Dodd-Frank Wall Street Reform and Consumer Protection Act, 2010 (Dodd Frank Act) requires new rules for executive compensation disclosures and shareholder approval for publicly traded banks. These rules include:

1. **Shareholder advisory vote on executive compensation disclosures**

   The Dodd Frank Act requires public companies subject to Federal proxy rules to provide their shareholders with a non-binding say-on-pay vote on executive compensation and a...
separate non-binding vote on how often such votes should occur.\textsuperscript{54} This means that shareholder approval of executive compensation disclosures is expected to occur through two separate resolutions and votes.\textsuperscript{55} The first resolution must occur at least every six years and is used to determine how often shareholders must approve required compensation disclosures.\textsuperscript{56} The issuer will be required to disclose the number of votes cast annually, every two years or every three years, as well as the number of abstentions\textsuperscript{57}. The shareholders must then vote on a second resolution to decide how often shareholders would like to be presented with the say-on-pay vote (frequency vote).\textsuperscript{58} Following this frequency vote, a company must disclose on a SEC Form 8-K, how often it will hold the say-on-pay vote.\textsuperscript{59} The Form 8-K disclosure is required no later than 150 calendar days after the date of the annual meeting in which the vote took place, but in any event no later than 60 calendar days prior to the deadline for submission of Rule 14a-8\textsuperscript{60} shareholder proposals for the subsequent annual meeting.\textsuperscript{61}


\textsuperscript{55} Section 14A(a)(1) of the Exchange Act requires that the shareholder advisory vote must be to approve the compensation of executives, as disclosed pursuant to Item 402 of Regulation S-K or any successors thereto. The SEC has added an instruction to Rule 14a-21(a) to indicate that this language from Section 14A(a)(1) should be included in an issuer’s resolution for the say-on-pay vote and to provide a non-exclusive example of a resolution that would satisfy the applicable requirement.


\textsuperscript{59} Id

\textsuperscript{60} Rule 14a-8 provides eligible shareholders with an opportunity to include a proposal in an issuer’s proxy material for a vote at an annual or special meeting of shareholders.

2. “Golden parachute” compensation

Golden parachute compensation means substantial compensation given to top executives as a severance bonus when they are dismissed due to a corporate transaction.\textsuperscript{62} It also includes changes in compensation of a new named executive officer, additional grants of equity compensation in the ordinary course, and salary increases.\textsuperscript{63} These are considered significant changes and as such, are subject to a shareholder vote.\textsuperscript{64}

Section 951 of the Dodd Frank Act amends the Securities Exchange Act of 1934 by adding Section 14A. It requires specific disclosure of golden parachutes in merger transactions.\textsuperscript{65} The SEC provides that with regard to any proxy or consent solicitation material, where shareholders are asked for approval of an acquisition, merger, consolidation or proposed sale, the company shall disclose agreements or understandings of executive compensation.\textsuperscript{66} The disclosure includes all current compensation as well as any deferred or contingent compensation dependent upon future outcomes as a result of the transaction.\textsuperscript{67} This disclosure is also subject to a

\textsuperscript{64} \textit{Id.}
\textsuperscript{66} Supra note 62
\textsuperscript{67} \textit{Id.}
separate resolution voted on and approved by the shareholders. In each of the above cases, the shareholder vote is nonbinding on the issuer.

3. **Compensation committee independence**

Section 952 of the Dodd Frank Act requires disclosure about the role of, and potential conflicts involving compensation consultants. The Act essentially requires an independent compensation committee. Each member of the compensation committee must be on the board of directors and deemed independent of management. The act also requires that advisors to the compensation committee, such as compensation consultants and attorneys, must be independent of management.

4. **Pay-for-performance**

Section 953 of Dodd-Frank directs the SEC to adopt rules that require companies to provide in any proxy statement for an annual meeting, disclosure that shows the relationship between executive compensation actually paid by the company and the company’s financial performance, which disclosure may be included in a graphic representation.

---

68 Id.
69 Id.
71 SEC, *Corporate Governance issues, Including Executive Compensation Disclosure and Related SRO Rules*.
73 Id.
5. Disclosure regarding employee and director hedging

Section 955 of the Dodd Frank Act requires additional disclosure about whether directors and employees are permitted to hedge any decrease in market value of the company’s stock.\textsuperscript{75} This means that where there is proxy, consent or authorization for an annual or other shareholder meeting for which the SEC proxy solicitation rules apply, there is a requirement to disclose any employee, member of the board of directors or designee who is permitted to purchase financial instruments to hedge or offset market value decreases of the issuer’s securities.\textsuperscript{76} These include forward contracts, equity swaps, collars and exchange funds.\textsuperscript{77}

e. Regulation Fair Disclosure and NASDAQ Rule 5250

Regulation Fair Disclosure (Regulation FD) addresses the selective disclosure of material nonpublic information. The Regulation does not define the term “material” but instead relies on the same definition as is generally applicable under the federal securities laws.\textsuperscript{78} In Basic v. Levinson, the court held that trading and profit making by insiders can serve as an indication of materiality.\textsuperscript{79} However, in an opinion issued on February 10, 2011, in Landmen Partners, Inc. v. The Blackstone Group, L.P.,\textsuperscript{80} a panel of the United States Court of Appeal for the Second

\textsuperscript{75} Id.
\textsuperscript{77} Id.
\textsuperscript{79} Basic Inc. v. Levinson, 485 U.S. 224, 108 S. Ct. 978
\textsuperscript{80} Supra note 24; Landmen Partners, Inc. v. The Blackstone Group, L.P., No. 09-4426, slip op. at 1 (2d Cir. Feb. 10, 2011); The ruling minimizes the pleading obligations in claims under Sections 11 and 12(a)(2) of the Securities Act of 1933, focusing on the importance of the allegedly misleading statement to a corporate segment, rather than the public entity itself and permitting a claim to be based on corporate and market developments that were publicly known but not specifically described in the registration statement at issue.
Circuit adopted a view of materiality that may potentially reduce the pleading burden of plaintiffs asserting claims under the federal securities laws.\textsuperscript{81}

NASDAQ Rule 5250 (b)(1) requires companies listed on the NASDAQ, such as Apple Inc., to promptly disclose to the public any material information that would reasonably be expected to affect the value of the company's securities or influence investors' decisions.\textsuperscript{82} The purpose of this rule is also to limit insider trading by eliminating selective disclosure of information to certain investors.\textsuperscript{83}

ii. HEALTH OF EXECUTIVE OFFICERS AND PAST DISCLOSURES

a. Tenneco – Michael Walsh

On January 19, 1993, Michael Walsh, the former CEO of Tenneco was diagnosed with brain cancer.\textsuperscript{84} Walsh was credited with overseeing a $3-billion restructuring at the Houston-based conglomerate, which has businesses ranging from heavy equipment to chemicals.\textsuperscript{85} After receiving the results of his biopsy, he decided immediately to inform the company's directors and senior management.\textsuperscript{86} At the time of the announcement to the public, Mr. Walsh explained that his main reasons for getting the news out quickly was to avoid the spread of rumors and to assure investors that Tenneco would remain on its current path and that he had no intention of

\textsuperscript{81} Supra note 24
\textsuperscript{82} Adopted March 12, 2009 (SR-NASDAQ-2009-018)
\textsuperscript{83} Timothy S. Farber and Wesley S. Walton, Corporate Communications Handbook Current through the November 2010, Corp. Communications Handbook § 4:88 (2010)
\textsuperscript{84} Times Staff and Wire Reports, Tenneco Chief Gives Up Duties Due to Illness: Executives: Michael Walsh will step down from the Houston-based conglomerate to focus full time on defeating cancerous brain tumor, (February 25, 1994) available at http://articles.latimes.com/1994-02-25/business/ft-27246_1_michael-walsh
\textsuperscript{85} Supra note 1
\textsuperscript{86} Id.
resigning. In his remarks to reporters during a 50-minute telephone conversation, Mr. Walsh's joked by saying that, after hearing the news, analysts and reporters would stop speculating that he would join another company or the Clinton Administration. On February 25, 1994, more than a year after the initial disclosure, Tenneco announced that Walsh had relinquished his duties as the company's chief executive to focus on his treatment full time. On May 6, 1994, Michael Walsh passed away.

b. Pacific Biosciences – Hugh Martin

In October 2010, Pacific Biosciences provided detailed disclosure about CEO Hugh Martin's diagnosis of multiple myeloma. The company stated that he had been diagnosed with a form of cancer, and the impact of this condition on his ability to lead the company in the future may be uncertain. Although Mr. Martin’s condition had not had any impact on his performance in his role as CEO or on the overall management of the company at the time, Pacific stated that if Mr. Martin was unable to continue to perform his role as CEO, they would select a new CEO.

c. General Motors – Harry Pearce

When Harry Pearce, the Vice Chairman of General Motors disclosed in 2001 that he had leukemia, he said “there is an absolute requirement to make full [public] disclosure…any investor in the company is entitled to know the health of all the members of the senior management team. We're being paid to take on serious management responsibilities that can

87 Id.
88 Supra note 1
89 Id.
affect the financial health of the company. If we are in any way seriously impaired and can't perform those responsibilities, the shareholders need to be apprised.”

**d. Apple Inc. - Steve Jobs**

The waning health of Apple Inc.’s CEO Steve Jobs has slowly been revealed to the public over the years with stories often broken by the media months after the occurrence and not the board of directors. In October 2003, he was diagnosed with pancreatic cancer. No public announcement was made from Apple Inc., although the board of directors was notified of his condition. The specific form of cancer was rare but was at the time considered treatable. On July 31, 2004, he was admitted at Stanford Hospital for treatment. Upon admission, he sent an email to Apple employees stating he underwent a successful surgery to remove a cancerous tumor from his pancreas. A copy of that message was subsequently distributed to the Associated Press. It was the first public disclosure of his condition. The next day, Apple Inc. stock fell by 2.4%.

---


92 *Supra note* 2


94 *Id.*

95 Stock price information from: Center for Research in Securities Prices (University of Chicago); Betsy Schiffman “When a CEO Coughs, Do Shareholders Catch a Cold?”, Published June 12, 2008 available at http://www.wired.com/epicenter/2008/06/apple-says-stev/

96 *Id.*

97 *Id.*

98 *Id.*
In June 2008, his health issues resurfaced again when he appeared noticeably thin at a public function but Apple Inc. insisted that Steve Jobs’ health was a private matter.99

In January 2009, Apple Inc. released a letter from Steve Jobs in which he explained that his recent weight loss was due to a hormone imbalance and that he would continue as Apple’s CEO during his recovery.100 Ten days later, however, Apple Inc. announced that Steve Jobs would take another leave of absence until the end of June that year.101 No elaboration was offered. In the two-week period following these announcements, Apple stock fell by 17%.102

In January 2011, Steve Jobs took a third leave of absence. There was also no elaboration except for the fact that he and his family were requesting that their privacy be respected.103

e. Time Warner Inc. – Steve Ross

In June 1980, Steve Ross suffered a heart attack that incapacitated him for the summer.104 Instead of disclosing this development, Ross “ordered that it be kept a secret, saying it would be “bad for the company” if it became public. (His wife) reportedly was instructed to tell people who called that he had a “bad back.”105 Sometime in the mid-1980s, Ross was diagnosed with prostate cancer. This was never publicly disclosed, and was known only by a handful of people.

104 Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307
apart from his family and closest associates.\textsuperscript{106} Apparently he then underwent surgery and received radiation. After that his doctors regularly monitored his blood chemistry.\textsuperscript{107} Then, in November 1991, Ross's prostate cancer recurred and he began chemotherapy.\textsuperscript{108} Although the prognosis under these circumstances was poor and his doctors at New York's Memorial Sloan-Kettering Hospital told his family that the treatment at best might give him an extra year to live, Time Warner put out a very positive public statement on the matter: “My physicians are optimistic, and I am maintaining my normal work schedule,” Ross said in a prepared press release. In fact, from that day forward, Ross never returned to his office. Throughout the spring of 1992, Ross continued the pose of being in full command of the company\textsuperscript{109}. In early June, Ross indicated his intention to be back at work in time to attend the annual shareholders' meeting in July.\textsuperscript{110} It was not until mid-June 1992 that Ross finally conceded publicly the gravity of his illness and that he would be taking a temporary leave of absence. Ross nevertheless insisted that his relationship with Time Warner would not change. Time Warner's official company line throughout this period was optimistic. In April 1992, Time Warner's newly-appointed co-CEO, Gerald Levin, told investment analysts that Ross's cancer was in remission and that he no longer had a tumor. At the annual shareholders' meeting in July, Levin informed those present that “Ross is continuing his treatment. . . . He is responding to his treatment and is eager to get back as soon as his doctors permit.” Ross's wife, Courtney Sales, also appeared at the meeting and confirmed Ross's eagerness to return to work.\textsuperscript{111} In fact, by July, Ross was gravely ill, drugged for pain, unable to receive visitors outside of his immediate family, and constantly in and out of

\textsuperscript{106} Id. at 281.
\textsuperscript{107} Id. at 317.
\textsuperscript{108} Id. at 301.
\textsuperscript{109} Id. at 322
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 323
the hospital where he received transfusions. In November 1992, Ross entered the University of Southern California Cancer Center in Los Angeles for an operation his New York doctors had characterized as futile. After a ten-hour operation, his new surgeon declared that Ross's tumor was gone at last. 112 The doctor said that what cancer remained “could be treated with chemotherapy once Ross regained his strength.” Time Warner issued an enthusiastic press release. The UPI reported that “Time Warner Inc. said Tuesday that chairman Steven J. Ross has undergone successful surgery for prostate cancer . . . . (The company is) pleased to confirm that Steven Ross has made satisfactory progress in the chemotherapy treatments, so much so that he has been able to receive successful surgical treatment.”113 Ross died on December 20, 1992, after additional surgery, never having left the hospital. Shortly before his death, but more than a year after Ross had stopped coming to work, Time Warner's board had finally requested an accounting of his condition from his surgeon. The doctor told them in writing that Ross would eventually be able to resume some level of participation in the company, but never his full-time duties. 114 Nevertheless, in mid-December, Time Warner executive vice-president Geoffrey Holmes, told a group of analysts that Ross would soon be returning to work.”115

f. Berkshire Hathaway - Warren Buffett

On June 21, 2000, Warren E. Buffett, Chairman of Berkshire Hathaway Inc., announced that he was going to enter an Omaha hospital within the next month to undergo surgery to remove several benign polyps in his colon. According to him, the polyps were discovered when he underwent a routine physical examination, which otherwise found him to be in excellent health.

112 Id.
113 Id.
114 Id. at 228
115 Id.
Berkshire Hathaway (the company) stated that the surgery was expected to keep Mr. Buffett in the hospital for several days after which he was expected to return to work. The Company stated that it was releasing these facts to forestall the kind of false rumors about Mr. Buffett’s health that had disrupted the market for its stock earlier that year.

iii. EMPLOYMENT–RELATED PRIVACY LAWS

The general rule is that privacy laws do not prevent corporate disclosure of personal information about the CEO, rather what they protect is the way in which the corporation received the information.116 There are however a number of Federal Statutes that prohibit certain types of intrusive behavior in the workplace.117 For example, private-sector employees are protected from employer intrusion by the Employee Polygraph Protection Act of 1988, the Fair Credit Reporting Act, the Electronic Communications Privacy Act of 1986,118 and the Americans with Disabilities Act.119

a. The Electronic Communication Privacy Act

This Act prohibits unauthorized access to and disclosure of electronic communications. However, employees are generally viewed as having consented to company access to their email under the terms of the company’s internet and email policies.120

117 Id. at 1567
118 Id. at 1570
119 Id. at 1567
When a company discloses personal information about the CEO, the company could be liable for one of several invasions of privacy torts. These include intruding on an area where the CEO has a reasonable expectation of privacy, publicly revealing a closely guarded secret or producing publicity that shows the CEO in a false light. To be protected from the disclosure, the information disclosed must be highly offensive to a reasonable person. Liability does not arise from public disclosure if the information is newsworthy. If the CEO is a public figure, proof of actual malice is required.\(^\text{121}\)

b. Health Insurance Portability and Accountability Act of 1996

Every citizen is protected by the Health Insurance Portability and Accountability Act (HIPPA). HIPPA however permits use and disclosure of protected health information, without an individual's authorization or permission, when required by law (including by statute, regulation, or court orders).\(^\text{122}\) Some people argue that disclosure of the CEO’s health information would violate HIPPA while others argue that by permitting the disclosure of protected health information when required by law, a SEC regulation or an administrative enforcement activity, inquiring into a specific company, would not violate HIPPA.\(^\text{123}\)

\(^{121}\) Times v. Sullivan 376 U.S. 254 (1964)


\(^{123}\) Id.; HIPPA provides that a covered entity is permitted, but not required, to use and disclose protected health information, without an individual’s authorization, for the following purposes or situations: (1) To the Individual (unless required for access or accounting of disclosures); (2) Treatment, Payment, and Health Care Operations; (3) Opportunity to Agree or Object; (4) Incident to an otherwise permitted use and disclosure; (5) Public Interest and Benefit Activities; and (6) Limited Data Set for the purposes of research, public health or health care operations. Covered entities may rely on professional ethics and best judgments in deciding which of these permissive uses and disclosures to make.
c. **Americans with Disabilities Act of 1990 (ADA)**

This Act prohibits disclosure of health information learned by a company through permitted health inquiries related to performance of the employee’s job. Although the ADA does not specifically allow an employee to waive the right of confidentiality, the Eleventh Circuit has found that an employee’s voluntary disclosure, not made in response to the employer’s inquiry, would not be subject to the ADA’s confidentiality protection.\(^\text{124}\)

iv. **CORPORATE CONCERNS**

Generally speaking, many companies find it difficult to decide just how much to tell shareholders about a CEO’s sudden disabling illness because many executive officers prefer privacy and also because companies fear that stock prices would fall if the information gets to the market.\(^\text{125}\) Such fears are certainly not unwarranted especially based on the past experiences of some companies. For example, on January 18, 2011, U.S. stock futures signaled losses for benchmark indexes after Apple’s announcement that Steve Job was taking a leave of absence.\(^\text{126}\) Futures on the Nasdaq-100 Index, of which Apple makes up 21 percent, sank to 2,295.25 in Tokyo, down 1.1 percent from their close on January 14, 2011.\(^\text{127}\) Standard & Poor’s 500 Index futures which were to expire in March slipped 0.3 percent from their close a week prior to the announcement. In addition, Apple Inc. had risen to a record in New York a week prior to the

---

\(^\text{124}\) Supra note 90  
\(^\text{125}\) Supra note 2  
\(^\text{127}\) Id.
announcement but it slid 7.6 percent in Frankfurt on January 17, 2011 when U.S. exchanges were closed for Martin Luther King Jr. Birthday.\footnote{Id; Miguel Helft, “Job Takes Sick Leave at Apple Again, Stirring Questions”, available at http://www.nytimes.com/2011/01/18/technology/18apple.html?_r=1&ref=stevenjobs}

4. SECURITIES AND EXCHANGE COMMISSION’S POSITION AND COURT INTERPRETATIONS

Although the SEC has encouraged companies to disclose information on their succession plans to shareholders, disclosure of health issues are not considered mandatory under the current SEC Rules. It is therefore easy to deduce that the SEC’s position is that the public’s desire for medical disclosure takes a back seat to other concerns that are judged more important.

Courts have deferred to the SEC’s regulations that identify specific disclosure items in order to determine what information is material to investors. Some decisions find a duty to update disclosures that are no longer accurate but the duty to update out-dated information has never been applied to information about the CEO’s health.

5. ANALYSIS

a. Arguments in favor of additional disclosure

The importance of additional disclosure on health-related issues of executive officers is amplified in situations where the CEO or other executive officers are singularly involved in a particular facet of the company’s business, at a level where their inability to continue could significantly impair the company’s prospects for success.\footnote{Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307} In Steve Ross case, his personal

\footnote{Id; Miguel Helft, “Job Takes Sick Leave at Apple Again, Stirring Questions”, available at http://www.nytimes.com/2011/01/18/technology/18apple.html?_r=1&ref=stevenjobs}
charisma played an important role not only in maintaining the loyalty of Time Warner’s stars, but also in securing co-venture partners.\textsuperscript{130} Similarly, when the public is faced with a company like Apple Inc., which is arguably built around Steve Jobs, the importance of an accurate portrayal of his health prospects becomes material to investors, especially in view of the possible impact that a sudden departure would have on the company. Many authors argue that such CEO’s have no inherent right to privacy where their ability to act as CEO is concerned.\textsuperscript{131}

Another argument in support of additional disclosure is that serious illness for most people is a transformative experience.\textsuperscript{132} Pain can alter a patient’s personality, perceptions and judgment,\textsuperscript{133} and as such, it is material that such disclosures be readily available to the public.

In general, it seems hypocritical for companies and employers to rely on the right to privacy when employers are allowed to draw blood and demand urine from employees and job candidates on the grounds that a company’s interest in a drug-free workplace trumps the individual’s right to privacy. By parity of reasoning, the investor’s right to any information which could impact on their choice of investment such as the CEO’s health, trumps the CEO’s individual right to privacy.

Another argument in support of additional disclosure is that disclosure should be undertaken as a matter of good corporate governance.\textsuperscript{134} Although this argument is ethical, it stems from the

\begin{flushright}


\textsuperscript{133} Id.
point of view that such disclosure can further build loyalty and trust in the management of the company.

In 2004, when Steve Jobs sent an email to Apple employees stating he underwent a successful surgery to remove a cancerous tumor from his pancreas, Apple Inc. stock fell by only 2.4%, closing at $31.58. Notwithstanding this earlier drop in its stop prices, by 2008, the stock had climbed nearly six-fold, closing at $180.81. Although recent reports show that upon announcement of his leave of absence in 2011, stock prices fell by 7.6% on foreign exchanges, those in favor of additional disclosure argue that this is due to the fact that the company failed to give full disclosure in the first instance, leaving the need for public’s speculation. Clearly, secrecy and uncertainty are not looked upon positively by investors and some authors argue that information is good and makes markets operate more rather than less efficiently.

Another argument with regard to Apple’s stock price fluctuation is that if the stock prices dropped upon the news of Steve Job’s medical leave, then the drop in the stock prices may be an indication that the public considers his health material to their investment. I am of the opinion that this view can however be countered by the fact that there are many other factors that contribute to the drop in stock prices and some authors may assert that the drop was purely coincidental.
As stated above, the SEC defines material disclosure as a fact that a reasonable shareholder would consider important in making an investment decision. This definition implies that the aim is to protect the investor in his investment decision. If one accepts this as true, then in line with the argument that information is good and makes markets operate more efficiently, it seems inconsistent for the SEC to overlook the health of persons who are in control and management of the company.

b. Criticism about additional disclosure

Companies argue that the additional regulations will impose unnecessary costs on them and that such additional regulations could have a chilling effect on potential executives, and the U.S. capital market for initial public offering. These concerns stem from past experiences in which shareholders filed suit for the flimsiest of reasons. In response to this criticism, some authors argue that the cost for requiring additional disclosure by executive officers is minimal because it works within the current regulatory apparatus. The idea behind this rebuttal argument is that there are no new rules to be imposed, no new monitoring mechanism, and no new board committees.

Another criticism against additional disclosure is with regard to the right to privacy. The argument here is that by requiring additional disclosure from public company executives concerning their health, the individual’s right to privacy is triggered. One way this argument is rebutted is by arguing that the right to privacy is not absolute. There are clearly exceptions under the law. Some authors have drawn an analogy between the privacy rights of executive officers

---

139 The issue of employee right to privacy is not addressed directly under the U.S. Constitution but the fourth amendment to the U.S. Constitution, which protects against unreasonable search and seizures, has been interpreted by the Supreme Court to protect public employees’ right to privacy. Even this right is not absolute as the search or seizure must be unreasonable.
and those of celebrities,\textsuperscript{140} and therefore argue that a higher standard is required in order to prove that that right has been invaded.

Another objection to additional disclosure is the unreliability of early diagnosis.\textsuperscript{141} The argument here is that medical diagnosis is as much art as science and that there is good evidence that doctors are not 100\% accurate in making those estimates.\textsuperscript{142} For these reasons, many companies have delayed releasing medical information on grounds that the CEO’s circumstances have been unstable or evolving.\textsuperscript{143} For example, when Brinker International’s CEO Norman Brinker was seriously brain damaged in a polo accident, the company waited a full day before revealing that an accident had occurred.\textsuperscript{144} The rationale behind such delays according to Professor Alan Bromberg is that “wrong information can be as bad as no information at all. It is just as dangerous to make the stock market overreact as it is to deprive it of information to which it should react.”\textsuperscript{145}

One objection to the proposed bright-line disclosure rule is that such a rule will be both over-inclusive and under-inclusive.\textsuperscript{146} If it is mandatory that early medical disclosure be made without evidence of some adverse impact on an executive’s performance, this requirement would

\begin{itemize}
\item \textsuperscript{140} John R. Engen, “Hiring a Celebrity CEO, Board Member Magazine, winter 2000” (discussing the celebrity status of a CEO and the potential gains and perils of hiring a celebrity CEO).
\item \textsuperscript{141} Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307, pg. 326; Chris MacDonald, Ph.D., “Steve Jobs’ Health & a CEO’s Privacy”, available at http://businessethicsblog.com/2011/01/21/steve-jobss-health-a-ceos-privacy/
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307, Pg. 326
\item \textsuperscript{144} http://www.nytimes.com/1993/01/25/business/brinker-names-new-chief.html
\item \textsuperscript{145} Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307, Pg. 325
\item \textsuperscript{146} Id.
\end{itemize}
only confuse investors and run the risk of affecting the company’s shares without good reason.\textsuperscript{147}

In addition, some authors argue that it would be difficult to determine what types of medical issues should be disclosed.\textsuperscript{148}

With regard to determining what type of medical issues should be included, those who favor additional disclosure argue that the proposed bright-line rules can be limited to circumstances in which the health issues significantly impair a CEO’s ability to do his job for more than a short period of time or when the illness is life-threatening.\textsuperscript{149} As one court stated, “reasonable investors do not want to know everything that could go wrong, without regard to probabilities: that would clutter registration documents and obscure important information.”\textsuperscript{150} Practically speaking, this line of argument still leaves some difficult questions. For example, would you require that a CEO who is diagnosed with HIV or AIDS, which despite current innovations in science remain life-threatening, disclose their status to the public on grounds of material information? At what point do we draw the line?

Another objection to the proposed rule mandating timely medical disclosure is that many significant influences on corporate decision makers including religious, romantic, economic, and peer influences, are not routinely disclosed to investors.\textsuperscript{151} There is no requirement under securities laws that compel disclosure of the CEO’s private matters such as his sexual orientation,

\begin{thebibliography}{99}
\bibitem{147} Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307
\bibitem{148} Abril and Olazabal, 11 UPAJBL 383 (2009).
\bibitem{150} Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 517 (7th Cir. 1989)
\bibitem{151} Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307
\end{thebibliography}
marital status, spending habits or health.\textsuperscript{152} So the question remains why single out a CEO’s medical circumstance but exclude the other influences if the true intention of those in favor of additional mandatory disclosure is effective investment disclosure?\textsuperscript{153}

A particularly persuasive objection to the mandatory disclosure proposal is the problem of ongoing disclosure.\textsuperscript{154} Will a company be expected to update its initial medical disclosure?\textsuperscript{155} Will the company have to keep the shareholders apprised?\textsuperscript{156} Those who oppose additional disclosure argue that it is better that information regarding the health of executive officers is kept under wrap until it is clear that the CEO’s death is imminent.\textsuperscript{157} When such diagnosis has been confirmed with certainty, consideration of an orderly succession may outweigh any remaining consideration of privacy.\textsuperscript{158}

Other objections that are often asserted include: that a public company is not built on the efforts of one man alone and CEO’s like Steve Jobs, are exceptions rather than the rule; that the stock market is no place for those demanding certitude;\textsuperscript{159} that additional disclosures are not needed because the public are already aware and the information is already out there.\textsuperscript{160} For example, the former SEC Chair Arthur Levitt stated that with regard to Steve Job’s medical leave, that

\textsuperscript{152} Abril and Olazabal, 11 UPAJBL 383 (2009).  
\textsuperscript{153} Id.  
\textsuperscript{154} Sovereign Prerogatives, Reviewed by Jayne W. Barnard, 21 JCORPL 307  
\textsuperscript{155} Id.  
\textsuperscript{156} Id.  
\textsuperscript{157} Id.  
\textsuperscript{158} Id.  
“Jobs going on medical leave sends a message to the market….An intelligent investor should know the risks of Steve Jobs having a relapse. For the board to opine on what the extent of the illness is right now I don’t think is really necessary.”\textsuperscript{161}

Finally, it is argued that an outright admission about health would not make an investor feel enlightened and ready to go forth with an investment decision.\textsuperscript{162} It is mere curiosity masquerading as the right to know about a material fact.\textsuperscript{163}

6. CONCLUSION

Very often, CEO’s resist disclosure about health issues until the illness is critical. Although the SEC rules do not seem to mandatorily require disclosure of health issues of the CEO and other key executive officers, maintaining this laissez-faire policy will only lead to continuous withholding of information with regard to these issues. From an ethical point, it seems logical that such disclosure should be undertaken as a matter of good corporate governance even though there is presently no legal statutory hook to hang this view, and for now it remains only a policy argument. Admittedly, I can understand the need for protecting the privacy rights of executive officer but clearly the need for disclosure is heightened when the executive officer is a person whose presence in the company is important to investors in determining whether or not to continue to invest in the company. It seems that the issue as to whether the presence of a certain CEO or management staff would influence an investor in making an investment decision is that of a subjective test standard from a reasonable investor’s point of view. It may therefore be argued that if by the investor’s evaluation, the CEO’s health condition is important to investment

\textsuperscript{161} Id.
\textsuperscript{163} Id.
decisions, then the health condition of the CEO becomes material information which should be disclosed under the Securities Act.

Be that as it may, the SEC certainly needs to lay down precise rules that would require disclosure of health issues of key executive officers. It is not enough for the SEC to simply avoid this issue by remaining silent or giving the open-ended discretionary requirement of “material information”.

One basic reality of life is that health is something that can change at any time, and it is guaranteed that many more CEO’s in the future will be prone to diseases and other health-related conditions that would eventually render them incapable of performing their duties. For this reason, I am of the view that while it is not reasonable for the SEC to require the disclosure of health issues about every employee, it is certainly possible for the SEC to limit the requirement for disclosure to specific executive officers in reporting companies, whose presence determine whether or not a reasonable investor would invest in a company. The mere fact that this area is one that requires caution should not stop the SEC because many of the SEC’s current rules cover a range of possible outcomes from various highly complicated risks, and the SEC is certainly capable of delineating specific instances, as specified in Forms 8-K, 10Qs and 8-Ks. Apple's case is certainly one in which there is need for additional bright-line rules. This is because it can certainly be argued that never has there been one man so vital to the success of a company than Steve Jobs is to Apple Inc., and many people who have purchased the company’s stock were really buying into his vision, talent and unquestionable leadership.\(^\text{164}\) It is therefore not

\(^{164}\) This argument has been put forward by Michael Robinson, who heads the corporate and public affairs practice at Washington, D.C.-based crisis communications company.
reasonable, in my opinion, to argue that Apple shareholders have had all the information that a reasonable investor would consider important in making an investment decision.