The Securities Law Disclosure Rules of the Road Regarding Executive Illness

*By Allan Horwich**

I. Introduction

This article analyzes the federal securities law principles that apply to disclosures regarding the health of certain senior corporate executives and other persons whose contribution to the financial performance of the company is particularly significant. I addressed these issues in detail in 2009.[1] The recent death of the CEO of CSX Corporation[2] suggests that it is time to revisit that analysis. This Article will not discuss the basic principles in the level of detail presented in 2009. The reader is also referred to subsequent articles cited here, which address basic securities law concepts summarized in this Article. The purpose here is to present, succinctly albeit without oversimplification, the principal concepts applicable to disclosure issues regarding executive health.

In the earlier article I focused on a narrow category of persons I termed "luminaries," defined there as "an executive or other person . . . who is perceived as pivotal to the financial health and prospects of the corporation."[3] Limiting the disclosure question to "luminaries," though it facilitated the analysis, may have been unduly narrow. Facts regarding persons whose performance is less than pivotal may nevertheless be material to the financial performance of the company,[4] applying the standards of materiality discussed later.[5] Where the analysis largely duplicates my earlier arguments, I will direct the reader to that discussion.

II. Factual Background

To set the stage for the legal analysis, here are some more recent serious illnesses and deaths of senior executives of public reporting companies.[6] The purpose here is not to critique their employer's compliance with the securities laws. Rather, this demonstrates that the issue of corporate disclosure regarding executive health is a recurring and important issue.

> On December 14, 2017, CSX Corporation announced that its CEO E. Hunter Harrison "is on medical leave due to unexpected

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complications from a recent illness."[7] Harrison died the next day.[8] The press had earlier reported questions about his health.[9]

On February 15, 2017, CoreLogic, Inc. announced that its CEO Anand Nallathambi had been granted "a temporary medical leave of absence."[10] He died 15 days later.[11]

On April 25, 2011, Acura Pharmaceuticals, Inc. announced that Andrew Reddick, its CEO, "has begun a leave of absence for health reasons for an as-yet undetermined period."[12] He died three days later.[13]

In many cases, illness, or the potential for some disability, has been disclosed before the executive took any leave of absence.[14] One notable instance was when Sergey Brin, a founder of the company now known as Alphabet Inc., announced in 2008 that he has a gene mutation that increases his likelihood of contracting Parkinson's disease.[15] Cardiovascular Systems, Inc. announced in late 2015 that its CEO David Martin "has recently been diagnosed with cancer and is undergoing treatment. [He] is feeling well and will continue to perform his duties as CEO, though some activities, such as travel, may be limited."[16] Martin began a leave of absence two months later[17] and resigned early the following year.[18] In December 2014 Dale B. Schenk, CEO of Prothena Corporation PLC announced that he had been diagnosed with pancreatic cancer.[19] Nearly two years later he began a medical leave of absence.[20] He died four days later.[21]

III. The Legal Principles, Including Executive Health

(a) No Rule of the Securities and Exchange Commission Directly Addresses Health-Related Disclosures

There is no Securities and Exchange Commission (SEC) rule that expressly requires any disclosure regarding executive health. I recommended that a narrow disclosure requirement be added to Form 8-K.[22] I am not aware of any support for, much less consideration by the SEC staff of, the proposed rule. While one commentator has suggested that the SEC "clarify that corporate executives do not need to disclose their personal information to shareholders,"[23] others have supported a disclosure requirement. One commentator has proposed that there be SEC rules requiring disclosure regarding executive "personal facts."[24] Another proposal suggested leaving the decision in the hands of the board of directors.[25] After analyzing the complexities that would be entailed in making public disclosures about executive health, two commentators concluded, "In the end, given the impracticability associated with fashioning and enforcing a rule requiring disclosures related to a CEO's health, it appears to be most feasible to expect investors to make do with a simple, accurate disclosure of the CEO's age."[26]

In today's regulatory climate, which concentrates on paring superfluous and overlapping disclosure rules, as in the pending sweeping review of Regulation S-K,[27] there is no reason to believe that the SEC will take up this sensitive issue. The public's interest to know personal matters regarding executives, including their marital infidelity and drug use,[28] is not matched by mandatory disclosure requirements. This Article is limited to one area of potential investor concern, situations where ill health may impair job performance. This is not to suggest that other matters, including conduct that could expose the executive to blackmail or substance abuse that could impair performance, are not worthy of similar consideration applying the same legal concepts.

(b) The Basic Concepts of Disclosure under the Federal Securities Laws

Where there is no specific SEC mandatory disclosure rule applicable to public reporting companies, the principal legal concepts that apply are the prohibitions on materially false statements and so-called half-truths imposed by Rule 10b-5.[29] Rule 10b-5(b) makes it unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading."[30] Thus if a company knowingly or recklessly[31] made a materially false statement about an executive's medical condition it would violate Rule 10b-5, exposing the company to an SEC enforcement action or a civil damage class action.[32]

(c) The Importance of the Half-Truth Concept

The knowing affirmative false statement is the easy case. The more vexing issue where executive health is involved is liability for the material half-truth. When is an affirmative statement about an executive who happens to be seriously ill misleading when the statement says nothing about his health? In my prior article I stated:

> If the CEO were mentally incapacitated, a statement that the senior management team is poised to execute the company's growth plan, if not outright false, may be a misleading half-truth in failing to disclose that a primary member of that team is, in fact, not up to the task . . . Publication in the annual report of a picture of the management team that includes the CEO, taken some months earlier, when at the time of publication he is undergoing aggressive chemotherapy that materially interferes with his mental acuity, could also be a half-truth if not altogether misleading—the photograph is accurate, but it is incomplete in not disclosing the condition of the CEO that renders the message conveyed by the photograph misleading.[33]

Not everyone may agree with the implications I drew from hypothetical disclosures, such as that a statement that the senior management team is poised to execute the company's growth plan necessarily means that every single member of the team is fully up to the task. These may be close questions, especially where the underlying issue is the highly sensitive, and often factually complex, one of an individual's health.

An extreme version of the half-truth argument is that the mere identification of the executive, such as in the annual proxy statement, is misleading if it fails to disclose a significant illness, perhaps even a debilitating one, because identifying without qualification someone as occupying a specific position arguably necessarily implies that she is capable of, and is in fact performing, the duties associated with that position, whether as defined in an employment agreement, a corporate governance document (such as bylaws that specify the duties of someone with a particular title[34]), or simply as generally understood. If this argument were accepted, then the half-truth concept would compel the disclosure of any material health impairment or disability no later than the next proxy statement. This does not appear to be the practice of public companies generally.

(d) The Important Role of Scienter When Addressing Corporate Liability

Liability arises under Rule 10b-5 only if the party that made the statement, here the corporation, acted with scienter.[35] As explained in the seminal decision, here scienter "refers to a mental state embracing intent to deceive, manipulate, or defraud."[36] In *Hochfelder*, the Court reserved whether scienter includes reckless conduct; the lower courts have concluded that recklessness is encompassed by scienter.[37]

Thus, a knowingly false statement by the corporation regarding an executive's health, as well as a knowing half-truth on the approach advanced above,[38] would, if material, expose the company to liability. The courts have not developed a uniform definition of recklessness in this context.[39] One definition specifies that

> reckless conduct may be defined as a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it.[40]

If the company had "obvious" indications of an executive's significant infirmity, such as lengthy absences from work, aberrant behavior, or medical treatment in the office, any explicit or perhaps implicit statement to the effect that the individual was up to the tasks at hand, that his performance was not materially impaired by ill-health, might be reckless in violation of Rule 10b-5. Willful blindness is recognized as a form of scienter.[41]

(e) The Materiality Test

As the text of Rule 10b-5(b) makes plain, the rule prohibits only material misrepresentations and half-truths. A fact that is omitted is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding whether to buy or sell securities, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[42] One of the most difficult judgments in complying with securities law disclosure requirements, avoiding missteps, is determining whether a particular fact is material.[43] It may not be easy to determine with confidence whether a particular medical condition is material to an executive's ability to perform his job, the factor that would fit neatly in the materiality category—something investors would consider important in deciding whether to buy or sell company stock. At the very least, however, it seems facile to dismiss health issues as immaterial, as two authors have done.[44] For example, when the CEO of CSX Corp. took a medical leave of absence the stock of the company declined more than 7%.[45] Immediate stock market reaction to news is often a strong indicator of the materiality of the information whose disclosure preceded the movement.[46]

This difficulty may even be greater in the case of disclosure regarding a medical condition when the information has a forward-looking dimension to it. As discussed in my earlier article, complex issues of probability arise when addressing a prognosis and the likelihood of an adverse outcome, which may be short term, intermediate term, or only long term.[47]

One of the factors that must go into any materiality determination is whether the information that has not been disclosed would, if disclosed, alter the total mix of information made available to investors. The "total mix" test takes into account what investors already know, not only from the company itself but from other sources.[48] For example, the public appearance of an executive that reveals a significant infirmity or disability, especially where that has been the subject of public commentary, may mean that any further disclosure by the company would not "significantly alter[] the total mix of information" because the public already knows the substance of the situation.[49] On the other hand, one's outward appearance or manner may be ambiguous or reveal far less than the full story. This, again, presents the conundrum of applying the concept of materiality to a specific set of facts, for which there are no bright line guidelines.

In a case where the plaintiff seeks to prove reliance on a defendant's deception applying the fraud-on-the-market presumption,[50] the total mix concept is related to the truth-on-the-market defense. This is invoked where the defendant argues that the facts it allegedly omitted or misrepresented were already known to the market, so that its own failure of disclosure did not harm investors. In a leading case the court held that "in a fraud on the market case, the defendant's failure to disclose material information may be excused where that information has been made credibly available to the market by other sources."[51]

(f) The Duty to Correct, the Duty to Update, and Liability for Forward-Looking Statements

There are two significant liability pitfalls for a company that chooses to make a disclosure regarding an executive's medical condition. These both entail the application of existing, even if not easily applied, concepts under Rule 10b-5.

If a company made a statement regarding someone's medical condition that was believed to be accurate at the time but the company later learned that the information was not correct when the statement was made, when the company does learn of the inaccuracy there is a duty under Rule 10b-5 to correct the earlier statement.[52] The failure to make the correction once the company learns that the earlier statement was not accurate when made will subject the company to liability from that point forward.

Exposure under this principle could arise where questions are raised about an executive's health and the company chooses to respond, denying the rumors.[53] If it later learns that the denial was not accurate, it is exposed to liability beginning a reasonable time after it learns that the earlier statement was false when made.

A much more problematic situation arises when the statement was accurate when made but, because of intervening events, is no longer true. Is there a duty to update the earlier statement? The Seventh Circuit has held that there is no liability under Rule 10b-5 for a failure to update.[54] Other courts, however, recognize a duty to update, albeit in narrow circumstances, generally only when the statement that allegedly should have been updated itself had some forward-looking component to it.[55] This might arise in the illness context when the company made a statement about an executive's prognosis, and later developments caused a change in the prognosis. If the earlier statement remained "alive" in the minds of investors,[56] the company may be obligated to provide new information when that is materially different from what was said earlier. The duty to update, at least in theory, imposes a slippery slope of ongoing assessments of whether and when a prior statement must be revised.

A very real practical problem may arise here. The executive may have been quite willing at the outset to provide favorable health information to dispel a rumor. The executive may, however, choose not to volunteer a change in his health, or at the very least be less forthcoming, if he suffers a turn for the worse, making it difficult for the company to fulfill any duty to update. This duty—where again liability arises only if the company acts with scienter (an intent to deceive or recklessness)—should not be triggered if the company had no information about the deterioration of the executive's health. This presents the issue of whether, when the company makes a statement about someone's health, it should obtain an agreement obligating that individual to update the company if there is a material change.

There can also be liability for making a false forward-looking statement, most commonly an earnings projection.[57] To tamp down on Rule 10b-5 claims based on forward-looking statements that did not bear out, Congress adopted a safe harbor for forward-looking statements. For claims based on Rule 10b-5 the protection is provided by Section 21E(c) of the Exchange Act.[58] A public reporting company can rely upon the statutory safe harbor for forward-looking statements to defeat a claim that a forward-looking statement turned out not to be true if the company made "meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement."[59] However, this statutory defense is available only with regard to forward-looking statements as defined in the statute.[60] The covered statements are fundamentally of a financial nature.[61] This protection seems not to be available as a defense to liability for a deceptive forward-looking statement limited to a prognosis of someone's health. If, however, this statement were coupled with a forward-looking statement about the financial effect on the company, then at least that portion of the statement could take advantage of the liability shield in Section 21E(c).

An alternative, that is not constrained by a statutory definition, is the bespeaks caution doctrine, from which the statutory safe harbor was developed.[62] The leading case on the judicial doctrine held that

> when an offering document's forecasts, opinions or projections are accompanied by meaningful cautionary statements, the forward-looking statements will not form the basis for a securities fraud claim if those statements did not affect the "total mix" of information the document provided investors. In other words, cautionary language, if sufficient, renders the alleged omissions or misrepresentations *immaterial as a matter of law*.[63]

While expressed in terms of financial projections, nothing in the judge-made doctrine, which is an interpretation of the general concept of materiality,[64] should be understood as confined to statements about financial outcomes. Thus, a statement containing a medical prognosis that does not bear out ought to be immaterial *if* the original statement included appropriate cautions and qualifiers clearly stating the contingencies and uncertainties that apply, qualifiers of the type a medical professional could provide regarding the uncertainty of a prognosis.

IV. The Tension with Medical Privacy

There is inevitably a clash between any proposal for mandatory disclosure of health information by any executive to his company for its use in crafting public disclosures and the executive's desire for privacy, to keep personal medical information out of the public domain. Commentators who have delved into the various sources of legal privacy protection have generally not found a basis to protect executives under existing statutes and regulations, where the disclosure would be made by the corporation rather than, for example, someone treating the executive.[65]

One way to deal with any issue about corporate access to executive medical information would be to include in any employment contract between the executive and the company an obligation on the part of the employee to disclose to the company any information that may be material to the executive's ability to perform his job functions together with a waiver granting the company the discretion to make disclosure as it deems appropriate.[66] Because there is no mandatory disclosure requirement on the part of the company, this would place the executive in the hands of the company to decide whether to reveal private medical information that was not required to be disclosed by an explicit rule. There is, of course, nothing remarkable about a company disclosing more than may be required by law, either for its direct benefit or to curry favor with the investing community by adopting a transparent approach.

V. Best Practices

In this highly sensitive area of personal health, where a statement believed to have been true when made often does not comport with the ultimate reality, there are a few guidelines.

A. Many of the thorny questions can be side-stepped if the executive agrees to make prompt disclosure to the company of an adverse medical development and is willing to defer to the company to make a good faith judgment, after consultation with counsel, about whether, and if so what, to disclose, principally whether the information is material, applying the fundamental Rule 10b-5 disclosure concepts summarized above. This may be a fair price to pay in exchange for the opportunities of employment, not the least of which may be very substantial compensation. If the executive and the company decide to proceed without making that agreement, the company in particular must recognize that the potential for liability is uncertain, albeit this has not been an area of active litigation—yet.

B. Any statement about health must be made carefully, with the full verification of a medical professional. If an employee makes disclosure directly to the company, she should to permit her doctor to confirm the information before the company makes a public disclosure. The employee should agree to provide updates as requested by the company, which, again, would exercise its good faith judgment, based on advice by counsel, whether any earlier statement (i) was not correct when made or (ii) should be updated, based on cases applying Rule 10b-5.

C. Any statements about health, whether or not forward-looking on their face, should be accompanied by meaningful cautionary statements stating what could occur that would change the situation described. This is essential if there is—as seems inherent—any element of a prognosis in the statement, such as the prospects for a full recovery or for a return to work by a date certain.

NOTES:

[1]Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When is a Corporation Obligated to Disclose that Illness and Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?*, 5 N.Y.U. J. L.& Bus. 827 (2009), https://docs.wixstatic.com/ugd/716e9c_a96f78188aca4f9e84f46cbf850faa8b.pdf.

[2]*See infra* text accompanying notes 7–9.

[3]Horwich, *supra* note 1, at 828.

[4]The discussion in this Article is in terms of disclosures regarding an "executive." The health of some non-executive employee, or even an independent contractor to the company, may also be material. My thinking at the time was that in many situations the loss of, say, a chief executive officer may not be a significant blow to the company, where a replacement could be found without undue difficulty while someone else satisfactorily filled the role on a temporary basis. In many cases a company has a succession plan in place, so that someone is already in a position to move up if something precludes the incumbent from serving. This requires a case by case assessment of the materiality of the role of the particular person whose health has become an issue.

[5]*See infra* text accompanying notes 42–51.

[6]This Article assumes the reader's general familiarity with the SEC mandatory disclosure regime for reporting companies under the Securities Exchange Act, 15 U.S.C. §§ 78a et seq.

[7]CSX Corporation Form 8-K, Ex. 99.1 (Dec. 15, 2017).

[8]CSX Corporation Form 8-K (Dec. 22, 2017).

[9]Jacquie McNish, Paul Ziobro & Joann S. Lublin, *Health of New CSX Chief in Focus Ahead of Compensation Vote*, Wall St. J. (May 17, 2017), https://www.wsj.com/articles/as-csx-vote-looms-investors-worry-about-ceo-hunter-harrisons-health-1495052146 (reporting that Harrison "appears no more than a few days a week at the company's Jacksonville, Fla., headquarters and has been spotted using a portable, over-the-shoulder oxygen system").

[10]CoreLogic, Inc. Form 8-K (Feb. 15, 2017).

[11]CoreLogic, Inc. Form 8-K (Mar. 6, 2017).

[12]Acura Pharmaceuticals, Inc. Form 8-K, Ex. 99.1 (Apr. 25, 2011).

[13]Acura Pharmaceuticals, Inc. Form 8-K (Apr. 29, 2011).

[14]There are other examples of disclosures of illness, some more forthcoming, in Horwich, *supra* note 1, at 829–30.

[15]Miguel Helft, *Google Co-founder Has Genetic Code Linked to Parkinson's*, N.Y. Times (Sept. 19, 2008), http://www.nytimes.com/2008/09/19/technology/19google.html.

[16]Cardiovascular Systems, Inc. Form 8-K, Ex. 99.1 (Sept. 14, 2015).

[17]Cardiovascular Systems, Inc. Form 8-K, Ex. 99.1 (Nov. 16, 2015).

[18]Cardiovascular Systems, Inc. Form 10-Q p. 11 (May 6, 2016).

[19]Prothena Corporation PLC Form 8-K, Exhibit 99.1 (Dec. 3, 2014).

[20]Prothena Corporation PLC Form 8-K, Exhibit 99.1 (Sept. 26, 2016).

[21]Prothena Corporation PLC Form 8-K (Oct. 3, 2016).

[22]Horwich, *supra* note 1, at 862–70.

[23]Victoria L. Schwartz, *Corporate Privacy Failures Start at the Top*, 57 B.C. L. Rev. 1693, 1737 (2016). The author acknowledges that "[t]his is unlikely to occur, and potentially undesirable because counterbalancing the executives' privacy interest is a legitimate disclosure interest on the part of shareholders." *Id.* (footnote omitted).

[24]Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 Wake Forest L. Rev. 749, 790–91 (2007) (proposing that there be rules providing for "baseline mandatory corporate disclosures of executives' personal facts" coupled with guidance from the SEC on "event-based" personal facts).

[25]*See* Tom C. W. Lin, *Undressing The CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. Pa. J. Bus. L. 383, 413 (2009) ("First, the disclosing senior officer should disclose in a timely manner the private information to the board of directors or the appropriate committee. Second, once the board determines that such information is material and should be made available to the public, it should be timely disclosed within the existing disclosure framework." (footnote omitted)). This author would leave resolution of any privacy interest the public company executive may think he has to the discretion of the board. *Id.* at 423–25. *See infra* text accompany notes 65–66 for a brief examination of privacy issues.

[26]Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 Hous. L. Rev. 1545, 1588–89 (2010). These authors are generally skeptical of the materiality of facts regarding a CEO's health. *Id.* at 1604 ("a publicly traded company is not likely to become extinguished or suffer irreparable long-term harm if its corporate figurehead dies or falls in infamy"). Materiality is discussed *infra* text

accompanying notes 42–51.

[27]Business and Financial Disclosure Required by Regulation S-K, Securities Act Release No. 33-10064, 81 Fed. Reg. 23916 (Apr. 22, 2016) (concept release seeking public comment on modernizing certain business and financial disclosure requirements in Regulation S-K).

[28]At the extreme pre-disclosure end of the continuum of proposals, *see* Schwartz, *supra* note 23, at 1720 (positing that "[v]arious personal facts about corporate executives may satisfy [the securities law materiality] test including health information, financial trouble, divorce, extramarital affairs or other romantic liaisons, the purchase of homes or other large luxury items, and the death or illness of a child or other loved one").

[29]17 C.F.R. § 240.10b-5 (2017). A company listed on a stock exchange has an obligation to make prompt public disclosure of material information. Breach of that obligation, however, is not enforceable by the SEC or by an investor seeking damages. *See* Allan Horwich, *The Legality of Opportunistically Timing Public Company Disclosures in the Context of Rule 10b5-1*, 71 Bus. Law. 1113, 1128–29 (2016).

[30]Similarly, Rule 12b-20 under the Exchange Act, 17 C.F.R. § 240.12b-20 (2017) provides, "In addition to the information expressly required to be included in a statement or report, there shall be added 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." The focus here is on the second clause of Rule 10b-5, and not the first or third clauses, which respectively prohibit more generally "any device, scheme, or artifice to defraud" and "any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person."

[31]Regarding the test for culpability, *see infra* text accompanying notes 35–41.

[32]A full discussion of the elements of an SEC enforcement action and of a private action for damages, including a class action, is beyond the scope of this Article. The focus here is on statements made by the corporation sufficient to be covered by the prohibitions in Rule 10b-5(b), which requires that the defendant have "made" the statement. *See Janus Capital Group, Inc. v. First Derivative Traders*, 564 U.S. 135, 142, 131 S. Ct. 2296, 180 L. Ed. 2d 166, Fed. Sec. L. Rep. (CCH) P 96327 (2011) ("For purposes of Rule 10b-5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.").

[33]Horwich, *supra* note 1, at 846–47 (footnotes omitted).

[34]For example, one template for corporate bylaws states that the duties of the president of the corporation include "general supervision of the affairs of the corporation" and "all other duties as are incident to his office." Northwest Registered Agent, LLC, Corporation Bylaws Template, Art. 5, Section 5.2, https://www.northwestregisteredagent.com/pdf/corporation-bylaws-fillin-for-website.pdf.

[35]*Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 201, 96 S. Ct. 1375, 47 L. Ed. 2d 668, Fed. Sec. L. Rep. (CCH) P 95479 (1976), interpreting Section 10(b) of the Exchange Act (15 U.S.C. § 78j(b) (2012)), pursuant to which Rule 10b-5 was promulgated and sets the limits for the scope of Rule 10b-5.

[36]*Id.* 425 U.S. at 193 n. 12.

[37]"In certain areas of the law recklessness is considered to be a form of intentional conduct for purposes of imposing liability for some act." *Id.* The

Court has repeatedly reserved this question, most recently in *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48, 131 S. Ct. 1309, 179 L. Ed. 2d 398, Fed. Sec. L. Rep. (CCH) P 96249, 62 A.L.R. Fed. 2d 737 (2011). All courts of appeal, however, have found reckless conduct to violate Rule 10b-5. *See* Donna M. Nagy, et al., Securities Litigation and Enforcement: Cases and Materials 113–14 (4th ed. 2017); Marc I Steinberg, et al., Securities Litigation 227 (2016).

[38]*See supra* text accompanying notes 33–34.

[39]*See* Nagy et al., *supra* note 37, at 113–14; Steinberg et al., *supra* note 37, at 227–28.

[40]*Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045, Fed. Sec. L. Rep. (CCH) P 95887 (7th Cir. 1977), quoting *Franke v. Midwestern Oklahoma Development Authority*, 428 F. Supp. 719, Blue Sky L. Rep. (CCH) P 71331, Fed. Sec. L. Rep. (CCH) P 95786 (W.D. Okla. 1976).

[41]*See, e.g., In re Kidder Peabody Securities Litigation*, 10 F. Supp. 2d 398, 415 (S.D. N.Y. 1998) (holding that reckless conduct, at a minimum, encompasses willful blindness).

[42]*Basic Inc. v. Levinson*, 485 U.S. 224, 231–32, 108 S. Ct. 978, 99 L. Ed. 2d 194, Fed. Sec. L. Rep. (CCH) P 93645, 24 Fed. R. Evid. Serv. 961, 10 Fed. R. Serv. 3d 308 (1988). A fact need not be outcome-determinative to be material. *See, e.g., Folger Adam Co. v. PMI Industries, Inc.*, 938 F.2d 1529, 1533, Fed. Sec. L. Rep. (CCH) P 96131 (2d Cir. 1991) ("it is well-established that a material fact need not be outcome-determinative").

[43]One leading casebook states, "Unfortunately, determining whether a particular morsel of information is material is often an uncertain process." Stephen J. Choi & A.C. Pritchard, Securities Regulation: Cases and Analysis 48 (4th ed. 2015). A securities law text cautions, "For the securities lawyer worrying about disclosure, digging to find nonspecified information and then determining whether it is material takes the most skill and judgment." Larry D. Soderquist & Theresa A. Gabaldon, Securities Law 75 (5th ed. 2014). *See also* Dale A. Oesterle, *The Overused and Under-Defined Notion of "Material" in Securities Law*, 14 U. Pa. J. Bus. L. 167, 167 (2011) ("the case-law [of materiality under the federal securities laws] is quixotic at best, and fickle at worst").

[44]*See supra* note 26.

[45]Paul Ziobro & Jacquie McNish, *CSX Loses $4 Billion in Value After CEO Harrison Takes Medical Leave*, Wall St. J. (Dec. 15, 2017), https://www.wsj.com/articles/csx-loses-6-billion-in-value-after-ceo-harrison-takes-medical-leave-1513344068.

[46]*In re Apple Computer Securities Litigation*, 886 F.2d 1109, Fed. Sec. L. Rep. (CCH) P 94714 (9th Cir. 1989) ("Dramatic price movements in response to an optimistic statement would provide a strong indication that the statement itself was material," although that "would not suggest that material information tending to undermine the statement has not been made available to the market.").

[47]Horwich, *supra* note 1, at 858–60.

[48]*See, e.g., In re Convergent Technologies Securities Litigation*, 948 F.2d 507, 513–14, Fed. Sec. L. Rep. (CCH) P 96211 (9th Cir. 1991), as amended on denial of reh'g, (Dec. 6, 1991) (finding that the total mix was not altered by the defendant's alleged omissions where analyst reports and articles in the trade and financial press had reported the information).

[49]As long ago as 1997 a leading casebook included a problem with a scenario of a CEO who was unable to manage his own affairs because of brain

tumor surgery, where the company had not disclosed these facts, though he had sued his wife for mismanaging his affairs while he was disabled. James D. Cox, et al., Securities Regulation 105 (2d ed. 1997), citing Note, *Disclosure of Executive Illness under the Federal Securities Law and the Americans with Disabilities Act: Hobson's Choice or Business Necessity*, 16 Cardozo L. Rev. 537 (1994).

[50]For basic discussions of fraud on the market providing a presumption of reliance for the private damage claimant, *see* Nagy et al., *supra* note 37, at 151–63; Steinberg et al., *supra* note 37, at 250–61.

[51]*In re Apple Computer Securities Litigation*, 886 F.2d 1109, Fed. Sec. L. Rep. (CCH) P 94714 (9th Cir. 1989).

[52]*See, e.g., Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331, Fed. Sec. L. Rep. (CCH) P 98,668 (7th Cir. 1995), as amended, (Apr. 7, 1995) (holding that "when a company makes a historical statement that, at the time made, the company believed to be true, but as revealed by subsequently discovered information actually was not . . . [t]he company then must correct the prior statement within a reasonable time").

[53]A company has no duty to correct rumors for which it is not responsible. *See* Horwich, *supra* note 1, at 847.

[54]*Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1332 n.3, Fed. Sec. L. Rep. (CCH) P 98,668 (7th Cir. 1995), as amended, (Apr. 7, 1995) ("No duty to update an historical statement can logically exist. By definition an historical statement is addressing only matters at the time of the statement. Thus, that circumstances subsequently change cannot render an historical statement false or misleading.").

[55]*See* Nagy et al., *supra* note 37, at 54.

[56]*See, e.g., In re International Business Machines Corporate Securities Litigation*, 163 F.3d 102, 110, Fed. Sec. L. Rep. (CCH) P 90328 (2d Cir. 1998):

> A duty to update may exist when a statement, reasonable at the time it is made, becomes misleading because of a subsequent event.[Citations omitted] However, there is no duty to update vague statements of optimism or expressions of opinion. [Citation omitted]There is also no need to update when the original statement was not forward looking and does not contain some factual representation that remains "alive" in the minds of investors as a continuing representation, [citation omitted], or if the original statements are not material [citation omitted].

[57]*See, e.g., Frank v. Dana Corp.*, 646 F.3d 954, 961, Fed. Sec. L. Rep. (CCH) P 96319 (6th Cir. 2011) (upholding statement of claim under Rule 10b-5 for making false earnings projections).

[58]15 U.S.C.A. § 78u-5 (2012). For an extensive discussion of this safe harbor, *see* Allan Horwich, *Clearing the Murky Safe Harbor for Forward-Looking Statements: An Inquiry into Whether Actual Knowledge of Falsity Precludes the Meaningful Cautionary Statement Defense*, 35 J. Corp. L. 519 (2010).

[59]Securities Exchange Act Section 21E(c)(1)(A)(i), 15 U.S.C § 78u-5(c)(1)(A)(i) (2012).

[60]Section 21E(i)(1), 15 U.S.C. § 78u-5(i)(1).

[61]*Id*.

[62]Horwich, *supra* note 58, at 537–39.

[63]*In re Donald J. Trump Casino Securities Litigation-Taj Mahal Litigation*, 7 F.3d 357, 371, Fed. Sec. L. Rep. (CCH) P 97789, 130 A.L.R. Fed. 633 (3d Cir. 1993) (emphasis added).

[64]*Id.* 7 F.2d at 373 ("warnings and cautionary language will sometimes suf-

fice to render the allegedly misleading misrepresentations or omissions immaterial as a matter of law").

[65] *See, e.g.,* Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 Fla. St. U.L. Rev. 487, 510–11 (2013) (discussing cases applying federal medical privacy laws). As two commentators observed, after an extensive analysis of medical privacy laws:

> In most foreseeable circumstances relating to CEOs, the company would likely acquire CEO health information through the CEO's own voluntarily offered disclosure, not prompted by an employer inquiry . . . Executives would likely feel morally or legally obligated to share their health status for the sake of the company. Such voluntary disclosure would not be subject to the ADA's confidentiality requirement.

Abril & Olazábal, *supra* note 26, at 1573.

[66] One commentator suggests that if an executive is vulnerable to disclosure about private matters, she may seek a career elsewhere. Schwartz, *supra* note 23, at 1729–30 (positing that the market for corporate executives will be "subject to a sorting effect in which highly qualified individuals who strongly value privacy will choose to take their talents in different directions and instead will opt for other sorts of careers, which would be less likely to require them to forego their own personal privacy.") This author suggests the following solution to accommodate the competing interests:

> the best way to satisfy the shareholders' disclosure interest while allowing potential corporate executives to guard their privacy is to make a more minor change in the law to permit a two-step process: (1) mandatory contracting between the corporate executive and the corporation regarding the plan for the corporation's disclosures of the executive's personal information, combined with (2) mandatory disclosure of the negotiated disclosure plan to the shareholders.

Id. at 1738 (footnote omitted).