

**NEWS**

**SECURITIES AND  
EXCHANGE COMMISSION**

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"QUALITATIVE AND DIFFERENTIAL DISCLOSURE"

By  
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THE TITLE OF THIS SPEECH -- "QUALITATIVE AND DIFFERENTIAL DISCLOSURE" -- SOUNDS VERY EXACT AND MATHEMATICAL. IT COULD BE THE TITLE OF A COURSE IN SOME COLLEGE CATALOGUE, AND SO PERHAPS YOU ARE FACING YOUR LECTURER WITH THAT SAME MIXTURE OF ANTAGONISM, APPREHENSION AND BEMUSEMENT WITH WHICH YOU ONCE CONFRONTED YOUR MATH PROFESSORS. I WISH I COULD REPRESENT THAT I AM GOING TO ENUNCIATE THE BASIC PRINCIPLES OF SEC DISCLOSURE POLICY IN A SIMPLE AND EASILY COMPREHENSIBLE WAY.

UNFORTUNATELY, MY THESIS TODAY IS THAT SEC DISCLOSURE POLICY HAS DRIFTED AWAY FROM THE SECURE MOORINGS OF AN OBJECTIVE, QUANTITATIVE AND UNIFORM MATERIALITY STANDARD. BY THAT I MEAN A STANDARD OF MATERIALITY WHICH CAN BE READILY TRANSLATED INTO A CURRENT IMPACT ON AN ISSUER'S FINANCIAL STATEMENTS. THIS IS SOMETIMES REFERRED TO AS ECONOMIC MATERIALITY. RATHER, IN A NUMBER OF SIGNIFICANT AREAS THE COMMISSION HAS BEGUN TO APPLY A MATERIALITY STANDARD WHICH IS SUBJECTIVE, QUALITATIVE AND DIFFERENT FOR DIFFERENT TYPES OF ISSUERS OR DIFFERENT TYPES OF CONDUCT.

I SEE THIS AS A PROBLEM FOR BOTH THE COMMISSION AND THE CORPORATE COMMUNITY. THE COMMISSION IS BEING ACCUSED OF SUBSTITUTING MORAL FOR ECONOMIC OR LEGAL MATERIALITY. 1/

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1/ KRIPKE, THE SEC AND CORPORATE DISCLOSURE: REGULATION IN SEARCH OF A PURPOSE 18-20 (1979).

## 2.

PUBLIC COMPANIES HAVE BECOME UNCERTAIN ABOUT THE EXTENT AND NATURE OF THEIR DISCLOSURE OBLIGATIONS AND IN SOME INSTANCES ARE BEING DIRECTED TO DISCLOSE INFORMATION WHICH BUSINESSMEN BELIEVE IS HARMFUL TO THEIR CORPORATIONS AND SHAREHOLDERS. WHATEVER YOUR VIEWS MAY BE AS TO WHETHER THE SEC IS ACTING EFFECTIVELY AND APPROPRIATELY IN THE PUBLIC INTEREST, YOU SHOULD APPRECIATE THAT THE CASES AND PROBLEMS WHICH CONFRONT THE COMMISSION ARE INCREASINGLY COMPLEX AND HARD TO SOLVE.

THE SEC IS BEING CHALLENGED TO EVOLVE AND DEFEND A QUALITATIVE MATERIALITY STANDARD IN TWO KINDS OF CASES WHICH I WILL DISCUSS TODAY: (1) CASES WHERE THE KIND OF CONDUCT INVOLVED SUGGESTS THAT MANAGEMENT IS NOT QUALIFIED TO EXERCISE STEWARDSHIP OF A CORPORATION; AND (2) CASES WHERE CORPORATE CONDUCT IS REASONABLY LIKELY TO RESULT IN SIGNIFICANT ECONOMIC HARM. IN ADDITION, DIFFERENTIAL DISCLOSURE STANDARDS FOR CERTAIN ISSUERS ARE BEING PRESSED. THE COMMISSION ITSELF HAS BEEN DEVELOPING DIFFERENTIAL DISCLOSURE STANDARDS FOR PURPOSES OF THE GENERAL ANTI-FRAUD AND PROXY SOLICITATION RULES. A DIFFERENTIAL DISCLOSURE STANDARD ALSO HAS BEEN APPROVED WITH RESPECT TO ONE CATEGORY OF INFORMATION -- ENVIRONMENTAL MATTERS -- BECAUSE OF THE MANDATES OF A NON-SECURITIES STATUTE.

THE STATUTORY PROVISIONS REQUIRING PUBLIC CORPORATIONS TO DISCLOSE MATERIAL INFORMATION THEMSELVES HAVE PRODUCED DIFFERENTIAL DISCLOSURE BECAUSE THEY APPLY TO TWO DIFFERENT FORMS OF CORPORATE DISCLOSURE. THESE ARE THE DISSEMINATION OF INFORMATION TO THE TRADING MARKET, AND THE REPORTING OF INFORMATION TO SHAREHOLDERS WHILE SOLICITING THEIR PROXIES. IN PRACTICAL APPLICATION, TWO DIFFERENT STANDARDS OF MATERIALITY HAVE EVOLVED BASED UPON THESE TWO DIFFERENT PURPOSES FOR CORPORATE DISCLOSURE.

IN THE FORTY YEARS SINCE THE 1933 AND 1934 ACTS IMPOSED ANTI-FRAUD STANDARDS ON PUBLIC ISSUERS, THE COMMISSION HAS ATTEMPTED TO PROVIDE GUIDANCE BY RULEMAKING CONCERNING DISCLOSURE OF INFORMATION NECESSARY TO THE TRADING MARKET. 2/ VARIOUS NUMERICAL TESTS FOR ECONOMIC MATERIALITY, RANGING FROM 1 TO 10 PERCENT, OF CRUCIAL FINANCIAL FIGURES, LIKE EARNINGS OR ASSETS, HAVE BEEN INCORPORATED IN RULES DEALING WITH SPECIFIC FINANCIAL DISCLOSURE. 3/ ALTHOUGH THE COMMISSION'S APPROACH TO MATERIALITY HAS GIVEN GREAT DEFERENCE TO QUANTITATIVE,

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2/ THE BASIC CATALOGUE OF DISCLOSURE ITEMS DEEMED NECESSARY BY CONGRESS IS SET FORTH IN SCHEDULE A OF THE 1933 ACT. THE COMMISSION'S FORMS FOR THE REGISTRATION OF SECURITIES AND FOR CERTAIN REPORTS TO BE MADE BY ISSUERS LIST AND DESCRIBE ITEMS WHICH SHOULD BE DISCLOSED. SEE GENERALLY, REGULATION S-K, 17 CFR 229.1 THROUGH 229.30.

3/ SEE, E.G., 17 CFR 210.4-02, 210.12-06, 210-08, 210.12-11, 210.12-16.

HISTORICAL MATERIALITY, THE COMMISSION -- AND THE COURTS -- HAVE BEEN EVOLVING A STANDARD FOR MATERIAL INFORMATION WHICH IS MORE QUALITATIVE AND FORWARD LOOKING.

THE LANDMARK CASE ARTICULATING A STANDARD FOR THE MATERIALITY OF CORPORATE INFORMATION TO THE TRADING MARKETS IS SEC v. TEXAS GULF SULPHUR DECIDED IN 1968. <sup>4/</sup> IN THAT CASE THE SECOND CIRCUIT PRONOUNCED A FACT MATERIAL IF IT MIGHT AFFECT THE VALUE OF A SECURITY IN THE MINDS OF THE "SPECULATORS AND CHARTISTS OF WALL AND BAY STREETS," AND NOT, AS HAD PREVIOUSLY BEEN CONSIDERED, IF IT WOULD AFFECT THE DECISION OF ONLY A REASONABLE, PRUDENT AND CONSERVATIVE PERSON.

IN TEXAS GULF SULPHUR, THE STOCK MARKET HAD RUN UP WILDLY ON RUMORS THAT THE DEFENDANT HAD MADE A REMARKABLE DISCOVERY OF COPPER ORE IN CANADA. THE COMPANY DID NOT PROMPTLY OR ACCURATELY DISCLOSE THE FACTS CONCERNING ITS STRIKE. IN REACHING ITS DECISION, THE SECOND CIRCUIT OBVIOUSLY TOOK NOTE OF THE FACT THAT THE STOCK MARKET HAD BEEN CONSIDERABLY MORE IMPRESSED BY THE RUMORS THAN THE TRIAL JUDGE HAD BEEN. THEREFORE, THE SECOND CIRCUIT RULED THAT THE FACT OF TEXAS GULF SULPHUR'S TREMENDOUS FIND WAS MATERIAL INFORMATION TO THE TRADING MARKETS.

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<sup>4/</sup> 401 F.2d 833 (2d CIR, 1968), CERT. DENIED SUB. NOM. COATES V. SEC, 394 U.S. 976 (1969).

THE SEC HAS ELABORATED ON THE TEXAS GULF SULPHUR STANDARD BY STATING THAT A FACT IS MATERIAL WHEN IT IS --

OF SUCH IMPORTANCE THAT IT COULD BE EXPECTED TO AFFECT THE JUDGMENT OF INVESTORS WHETHER TO BUY, SELL OR HOLD ... /A SECURITY AND/IF GENERALLY KNOWN, ... TO AFFECT MATERIALLY THE MARKET PRICE OF THE STOCK. 5/

IN SEC V. GEON INDUSTRIES, INC., 6/ THE SECOND CIRCUIT EXTENDED SOME OF ITS ANALYSIS IN TEXAS GULF SULPHUR BY FORMULATING A "BALANCING" TEST FOR THE MATERIALITY OF INFORMATION, AND A CORPORATION'S DISCLOSURE OBLIGATIONS. THE COURT HELD THAT THE MATERIALITY OF INFORMATION DEPENDS ON THE MAGNITUDE OF THE EVENT AND THE PROBABILITY OF ITS OCCURRENCE. 7/

ALL OF THE CASES I HAVE MENTIONED INVOLVED THE MISUSE OR SELECTIVE DISCLOSURE OF CORPORATE INFORMATION BY INSIDERS OR THEIR TIPPEES. IT IS MORE DIFFICULT TO FORMULATE A STANDARD OF LEGAL MATERIALITY, IN THE ABSENCE OF INSIDER TRADING, WHICH IS FAIR AND EFFECTIVE FOR THE GENERAL OBLIGATION OF PUBLIC COMPANIES TO AFFIRMATIVELY DISCLOSE

5/ MERRILL LYNCH, PIERCE, FENNER & SMITH, INC. ET AL., 43 SEC 933 (1968), AT 937.

6/ 531 F.2D 39 (2D CIR. 1976).

7/ ONE SCHOLARLY COMMENTATOR HAS ATTEMPTED TO FORMULATE A DISCLOSURE STANDARD AS FOLLOWS:

A FACT IS MATERIAL IF ITS DISCLOSURE IN REASONABLE AND OBJECTIVE CONTEMPLATION WOULD HAVE A SUBSTANTIAL MARKET IMPACT WHICH IS MORE THAN MOMENTARY ON THE CORPORATION'S APPROPRIATE SECURITY. (FOOTNOTE OMITTED) 5 JACOBS, THE IMPACT OF RULE 10B-5, SECTION 61.02 AT 3-94.

INFORMATION WHICH WOULD OTHERWISE BE KEPT CONFIDENTIAL. IN PART, THIS IS BECAUSE SUCH A STANDARD OFTEN MUST RESOLVE A CONFLICT BETWEEN NON-DISCLOSURE FOR THE BENEFIT OF EXISTING SHAREHOLDERS AND DISCLOSURE FOR THE BENEFIT OF PURCHASERS AND POTENTIAL PURCHASERS IN THE PUBLIC TRADING MARKETS.

THE DEFINITIONS OF MATERIALITY I HAVE SET FORTH THUS FAR RELATE TO THE STREAM OF INFORMATION NECESSARY FOR INVESTMENT DECISIONS. A RELATED BUT SLIGHTLY DIFFERENT STANDARD HAS EVOLVED FOR PROXY SOLICITATIONS. I SHOULD NOTE THAT THE PROBLEM OF QUALITATIVELY MATERIAL INFORMATION FIRST AROSE IN THIS CONTEXT. IN GENERAL, THE STANDARD OF MATERIALITY FOR INFORMATION IN PROXY SOLICITATIONS IS WHETHER "THERE IS SUBSTANTIAL LIKELIHOOD THAT A REASONABLE SHAREHOLDER WOULD CONSIDER IT IMPORTANT IN DECIDING HOW TO VOTE." 8/

MOST OF THE TIME, INFORMATION IS EQUALLY MATERIAL TO BOTH INVESTMENT AND VOTING DECISIONS BY INVESTORS. HOWEVER, A RECENT CASE DEMONSTRATES HOW QUALITATIVE INFORMATION MAY BE DEEMED MATERIAL IN A PROXY SOLICITATION BUT NOT TO THE TRADING MARKETS. IN MALDONADO v. FLYNN, 9/ A DERIVATIVE SUIT AGAINST A GROUP OF DIRECTORS, IT WAS ALLEGED THAT THE DEFENDANTS APPROVED AND IN SOME CASES SUBSTANTIALLY BENEFITTED

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8/ TSC INDUSTRIES v. NORTHWAY, 426 U.S. 438 (1976).

9/ [CURRENT] CCH FED. SEC. L. REP. PAR. 96,805 (2D CIR. 1979)

FROM, A TRANSACTION BETWEEN THE CORPORATION AND CERTAIN OFFICERS AND DIRECTORS WHICH WAS DISADVANTAGEOUS TO THE CORPORATION. THE SECOND CIRCUIT HELD THAT THE FAILURE OF THE CORPORATION TO DISCLOSE THE TERMS OF THIS TRANSACTION WAS NOT A FRAUD ON THE PUBLIC TRADING MARKETS, EVEN IF THE DEFENDANT DIRECTORS BREACHED THEIR FIDUCIARY DUTIES IN VIOLATION OF STATE LAW. HOWEVER, THE COURT HELD THAT THE NON-DISCLOSURE OR MISLEADING DISCLOSURE OF THIS TRANSACTION MAY HAVE VIOLATED THE PROXY RULES.

SINCE SELF-DEALING PRESENTS OPPORTUNITIES FOR ABUSE OF A CORPORATE POSITION OF TRUST, THE CIRCUMSTANCES SURROUNDING CORPORATE TRANSACTIONS IN WHICH DIRECTORS HAVE A PERSONAL INTEREST ARE DIRECTLY RELEVANT TO A DETERMINATION OF WHETHER THEY ARE QUALIFIED TO EXERCISE STEWARDSHIP OF THE COMPANY. 10/

IN ANOTHER CASE, THE COURT PUT THE MATTER MORE BLUNTLY:

"ONE DOES NOT ELECT AS A DIRECTOR AN INDIVIDUAL WHO IS USING THE CORPORATION HE REPRESENTS FOR PERSONAL GAIN." 11/

WHERE NO SELF-DEALING IS INVOLVED, IT IS MORE DIFFICULT TO JUSTIFY THE IMPOSITION OF LIABILITY UNDER THE PROXY RULES FOR THE NON-DISCLOSURE OF CONDUCT WHICH REFLECTS POORLY ON MANAGEMENT'S INTEGRITY. IN ONE RECENT CASE, 12/

10/ Id. AT P. 95,148.

11/ SEC V. KALVEX, INC., 425 F. SUPP. 310 (S.D.N.Y. 1975).

12/ ALMAGAMATED CLOTHING V. J.P. STEVENS & Co., 1979 TRANSFER BINDER FED. SEC. L. REP. (CCH) PAR. 96,927 (S.D.N.Y. JULY 11, 1979), APPEAL DOCKETED, No. 79-7595 (2D CIR. AUG. 17, 1979).



A UNION WHICH WAS ALSO A SHAREHOLDER SUED A CORPORATION AND ITS DIRECTORS FOR PROXY RULE VIOLATIONS BASED ON THE FAILURE TO DISCLOSE A CONCERTED EFFORT TO THWART OR VIOLATE THE LABOR LAWS RESULTING IN THE EXPENDITURE OF LARGE SUMS OF MONEY AND LOSS OF GOOD WILL. THE COURT DISMISSED THE COMPLAINT ON TWO GROUNDS. FIRST, ALLEGATIONS RELATING TO A QUESTION OF BUSINESS JUDGMENT ARE NOT ACTIONABLE EVEN IF CLAIMS OF ILLEGALITY ARE INVOLVED. SECOND, THE PROXY RULES DO NOT REQUIRE MANAGEMENT TO ACCUSE ITSELF OF EVIL, ANTISOCIAL OR ILLEGAL POLICIES.

THERE IS SOME QUESTION WHETHER THESE NICE DISTINCTIONS BETWEEN MATERIALITY FOR MARKETPLACE TRADING AND PROXY RULE SOLICITATIONS SHOULD CONTINUE TO BE MADE WHEN THE COMMISSION IS MOVING TOWARD AN INTEGRATION OF THE REPORTING AND DISCLOSURE PROVISIONS APPLICABLE TO REGISTRATION STATEMENTS AND ANNUAL REPORTS FILED WITH THE COMMISSION.

THE COMMISSION'S ADVISORY COMMITTEE ON CORPORATE DISCLOSURE WAS UNABLE TO REACH A CONSENSUS ABOUT A COMMON STANDARD FOR INFORMATION MATERIAL BOTH TO THE MARKETPLACE AND THE PROXY STATEMENT. 13/ NONETHELESS, THE COMMITTEE

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13/ THE REPORT STATED:

IN THE VIEW OF SOME MEMBERS OF THE COMMITTEE, INFORMATION RELATING TO THE "QUALITY" AND "INTEGRITY" OF MANAGEMENT AND ITS DIRECTORS, ITS COMPENSATION, AND THE FUNCTIONING OF THE BOARD IS MATERIAL ON A CONTINUOUS BASIS FOR INVESTMENT DECISIONS. ... 10/ OTHER MEMBERS ... BELIEVE THAT, IN THE CONTEXT OF AN ELECTION OF DIRECTORS, MORE EXTENSIVE INFORMATION IS APPROPRIATELY CALLED FOR CONCERNING MANAGEMENT AND THE DIRECTORS THAN WOULD ROUTINELY BE PROVIDED TO THE MARKETPLACE FOR INVESTMENT JUDGMENTS.  
(CONTINUED)

RECOMMENDED THE ADOPTION OF A SINGLE INTEGRATED DISCLOSURE FORM FOR REGISTRATION, REPORTING, AND PROXY SOLICITATIONS.

ANOTHER TYPE OF DIFFERENTIAL DISCLOSURE IS DIFFERENT REQUIREMENTS FOR PARTICULAR CLASSES OF ISSUERS. A WIDE VARIETY OF ISSUERS ARE SUBJECT TO SEC REPORTING AND DISCLOSURE REQUIREMENTS. BECAUSE UNIFORM REQUIREMENTS MAY PLACE UNEQUAL OR INAPPROPRIATE BURDENS ON SOME ISSUERS, OR FAIL TO ELICIT MEANINGFUL INFORMATION FROM OTHERS, THE COMMISSION HAS BEEN PERSUADED TO GIVE SOME COMPANIES SPECIAL TREATMENT.

FOR EXAMPLE, INFORMATION WHICH IS MATERIAL WITH RESPECT TO AMERICAN ISSUERS MAY NOT BE MATERIAL WITH RESPECT TO FOREIGN ISSUERS. THEY ARE USUALLY ALREADY REGULATED IN THEIR HOME COUNTRIES, AND ONE PART OF THAT REGULATION IS THE REQUIREMENT THAT THEY ARE AUDITED ACCORDING TO THE GENERALLY ACCEPTED ACCOUNTING PRACTICES AND STANDARDS IN THEIR NATIONS -- WHICH ARE INVARIABLY DIFFERENT IN SOME RESPECTS FROM THOSE IN THE UNITED STATES.

THE COMMISSION IS SENSITIVE TO THE PROBLEMS OF FOREIGN ISSUERS, AND HAS IN THE PAST EXEMPTED FOREIGN ISSUERS FROM SOME OF OUR DISCLOSURE REQUIREMENTS. AT THE

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13/ (CONTINUED) REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SECURITIES AND EXCHANGE COMMISSION, SUBMITTED TO THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, U.S. HOUSE OF REPRESENTATIVES, 95TH CONG., 1ST SESS. 326 AT N.2 (Nov. 3, 1977).

SAME TIME, THE SEC IS RELUCTANT TO PUT U.S. CORPORATIONS AT A COMPETITIVE DISADVANTAGE IN THE CAPITAL MARKETS BECAUSE OUR OWN DISCLOSURE RULES AND ACCOUNTING STANDARDS ARE MORE RIGOROUS. IN ANY EVENT, THE COMMISSION WILL BE CONTINUING TO REVIEW DISCLOSURE REQUIREMENTS FOR FOREIGN ISSUERS, AND SOME CONTINUING DIFFERENTIAL DISCLOSURE IS LIKELY.

ANOTHER CLASS OF ISSUERS DEMANDING DIFFERENTIAL DISCLOSURE IS SMALL BUSINESS. FOR SUCH ISSUERS, THE DIFFICULTY OF DETERMINING MATERIAL INFORMATION WHICH THEY MUST DISCLOSE IS THE REVERSE OF THE DIFFICULTY FOR THE VERY LARGE COMPANY: IN A SMALL COMPANY, ANY CONTINGENCY OR EVENT COULD REPRESENT 10 PERCENT OF ITS INCOME, OR 5 PERCENT OF ITS ASSETS, AND THEREFORE BE ECONOMICALLY MATERIAL. FURTHER, SOME MANDATED DISCLOSURE DEVELOPED IN RESPONSE TO OBTAINING MEANINGFUL INFORMATION FROM MULTI-NATIONALS OR CONGLOMERATES, LIKE SEGMENT REPORTING, MAY BE AN UNNECESSARY AND INAPPROPRIATE REPORTING BURDEN FOR SMALLER COMPANIES.

AT THE SAME TIME, IT IS DIFFICULT FOR THE COMMISSION TO DETERMINE THAT INVESTORS IN SMALL CORPORATIONS NEED LESS INFORMATION OR PROTECTION THAN INVESTORS IN LARGE COMPANIES. AND DIFFERENTIAL DISCLOSURE TENDS TO UNDERMINE A GENERAL DISCLOSURE STANDARD.

THE DEPARTURE FROM UNIFORM, OBJECTIVE STANDARDS HAS OCCURRED IN PART BECAUSE IN SOME CASES AN ISSUER WILL EXPEND OR PLAN TO EXPEND SUMS OF MONEY WHICH ARE SIGNIFICANT BUT NOT NECESSARILY ECONOMICALLY MATERIAL. LET ME GIVE YOU AN EXAMPLE OF MANDATED DISCLOSURE, WHICH MAY BE ANALYZED AS EITHER QUALITATIVE OR DIFFERENTIAL, WHICH ILLUSTRATES THE COMPLEXITY OF THIS PROBLEM OF "NON-MATERIAL MATERIALITY."

IN THE COMMISSION'S RECENT OPINION IN THE MATTER OF UNITED STATES STEEL, 14/ THE COMMISSION DISCUSSED ENVIRONMENTAL DISCLOSURE. CONCURRENTLY, THE DIVISION OF CORPORATE FINANCE ISSUED AN INTERPRETATIVE RELEASE RELATING TO AN ISSUER'S OBLIGATION TO DISCLOSE SUCH INFORMATION. 15/

IN LIGHT OF A NATIONAL POLICY ON THE ENVIRONMENT, EXPRESSED IN THE NATIONAL ENVIRONMENTAL PROTECTION ACT OF 1969, THE COMMISSION REQUIRES PUBLIC ISSUERS TO DISCLOSE THE COSTS OF COMPLIANCE WITH ENVIRONMENTAL PROTECTION LAWS AND TO DISCLOSE ADMINISTRATIVE PROCEEDINGS PENDING OR CONTEMPLATED BY REGULATORY AUTHORITIES. DISCLOSURE OF SUCH FORWARD LOOKING INFORMATION IS REQUIRED REGARDLESS OF ITS ECONOMIC MATERIALITY TO THE ISSUER. THESE RELEASES ALSO STATE THAT IF A CORPORATION HAS A POLICY OR AN APPROACH TOWARD COMPLIANCE WITH ENVIRONMENTAL REGULATIONS WHICH IS REASONABLY LIKELY TO RESULT IN SUBSTANTIAL FINES,

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14/ SECURITIES EXCHANGE ACT RELEASE No. 16223 (SEPT. 27, 1979).

15/ SECURITIES ACT RELEASE No. 6130 (SEPT. 27, 1979).

PENALTIES OR OTHER SIGNIFICANT ECONOMIC EFFECTS ON THE CORPORATION, IT MAY BE NECESSARY FOR THE REGISTRANT TO DISCLOSE THE LIKELIHOOD OF SUCH COSTS.

BECAUSE OF THE MANDATES OF NEPA, AND LITIGATION INTERPRETING THE COMMISSION'S RESPONSIBILITIES UNDER NEPA, 16/ IT IS HARD TO INSIST ON A QUANTITATIVE MATERIALITY STANDARD FOR ENVIRONMENTAL DISCLOSURE. I HOPE, HOWEVER, THAT THIS REQUIRED DISCLOSURE OF MATTERS WHICH ARE NOT NECESSARILY ECONOMICALLY MATERIAL IS NOT EXTENDED TO OTHER CORPORATE CONDUCT OR REGULATORY POLICIES.

PUBLIC CORPORATIONS ARE SUBJECT TO A WIDE VARIETY OF LAWS AND REGULATIONS. GOVERNMENT RELATIONS AND REGULATORY STRATEGY ARE AN IMPORTANT COMPONENT OF CORPORATE PLANNING. THE FACT IS THAT COMPLIANCE WITH SOME OF THESE REGULATIONS IS NOT ALWAYS COMPATIBLE WITH BUSINESS SURVIVAL. MANY RULES ARE IGNORED OR COMPROMISED BY GOVERNMENT OFFICIALS. SOMETIMES AN ENTIRE INDUSTRY IS RUN IN VIOLATION OF A REGULATORY SCHEME AND IN SUCH CASES THE REGULATORY SCHEME MAY BE CONTRARY TO ECONOMIC REALITY AND WRONG.

THE SEC SHOULD NOT BE TURNED INTO A POLICEMAN FOR THE ENTIRE BUSINESS COMMUNITY BY A THEORY THAT ILLEGAL

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16/ NATURAL RESOURCES DEFENSE COUNCIL v. SEC, CIV. ACT. No. 77-1761 F. 2d (D.C. CIR, APRIL 20, 1979), REVERSING 432 F. SUPP. 1190 (D.D.C. 1977), NATURAL RESOURCES DEFENSE COUNCIL v. SEC, 389 F. SUPP. 689 (D.D.C. 1974).

CONDUCT OR IMPROPER REGULATORY POLICIES MUST BE DISCLOSED UNDER THE FEDERAL SECURITIES LAWS WITHOUT REGARD TO QUANTITATIVE MATERIALITY. WHILE I DO NOT CONDONE QUESTIONABLE OR ILLEGAL CONDUCT BY CORPORATIONS OR THEIR MANAGEMENT, I AM NOT PERSUADED SUCH CONDUCT IS MATERIAL TO INVESTORS OR SHAREHOLDERS UNLESS IT RESULTS IN SIGNIFICANT ECONOMIC HARM TO AN ISSUER. THERE MUST BE AT LEAST A REASONABLE LIKELIHOOD THAT THE CONDUCT WILL HAVE A MATERIAL EFFECT ON EARNINGS, ASSETS OR LIABILITIES. OTHERWISE, THE INFORMATION IS UNLIKELY TO AFFECT THE MARKET PRICE OF THE ISSUER'S SECURITIES.

IF A CORPORATION VIOLATES OR THWARTS THE LAW, BUT BY DOING SO SUBSTANTIALLY BETTERS ITS FINANCIAL POSITION, DOES NOT JEOPARDIZE ITS FUTURE, AND DOES NOT ALLOW ITS OFFICERS TO PROFIT AT THE CORPORATION'S EXPENSE, I AM HARD PUT TO DETERMINE THAT INFORMATION ABOUT ITS VIOLATIONS IS MATERIAL OR REQUIRED TO BE DISCLOSED UNDER THE FEDERAL SECURITIES LAWS. REGULATORY POLICY IS A MATTER OF BUSINESS JUDGMENT.

MOREOVER, I AM TROUBLED BY THE POSSIBILITY THAT THE SECURITIES LAWS COULD BE UTILIZED TO REQUIRE INDIVIDUALS TO ACCUSE THEMSELVES OF ILLEGAL ACTS. IT DOES NOT SEEM TO ME THAT AN INDIVIDUAL SHOULD BE REQUIRED COMPLETELY TO FOREGO HIS FIFTH AMENDMENT PROTECTION BECAUSE HE IS EMPLOYED BY, OR IS AN OFFICER OR A DIRECTOR OF, A PUBLICLY-HELD CORPORATION. AS POINTED OUT IN A RECENT EDITORIAL CRITICIZING

THE COMMISSION'S U.S. STEEL OPINION:

PUBLICALLY ANNOUNCING AN INTENTION TO RESIST COMPLIANCE AMOUNTS TO WAVING A SIGNAL FLAG IN THE REGULATORS' FACES ... SO FORCING DISCLOSURE ADDS ANOTHER VERY HEAVY COST TO THE OTHER COSTS OF RESISTANCE. 17/

IN THE CASE OF ENVIRONMENTAL DISCLOSURE, I THINK THIS CRITICISM IS UNFAIR BECAUSE NEPA APPEARS TO REQUIRE THE SEC TO USE ITS REGULATORY LEVERAGE IN PRECISELY THIS WAY. HOWEVER, I WOULD BE UNHAPPY IF THE U.S. STEEL PRECEDENT WERE EXTENDED TO OTHER REGULATORY VIOLATIONS -- EITHER BECAUSE OF MORE LEGISLATION LIKE NEPA OR BECAUSE OF SEC POLICY DETERMINATIONS. AMONG OTHER THINGS, I BELIEVE THAT THIS USE OF THE SECURITIES LAWS TO COMPEL COMPLIANCE WITH OTHER LAWS UNDERMINES AT LEAST THE APPEARANCE, IF NOT THE FACT, OF THE COMMISSION'S INDEPENDENCE. IN ADDITION, I SERIOUSLY DOUBT THAT SUCH DISCLOSURE IS IN THE BEST INTERESTS OF INVESTORS OR STOCKHOLDERS.

I SHOULD NOTE, HOWEVER, THAT ONE OF THE ARGUMENTS FOR THE PRINCIPLE THAT INFORMATION RELATING TO REGULATORY VIOLATIONS OR POLICY IS MATERIAL IS THAT RESISTANCE TO FEDERAL OR LOCAL LAW RISKS THE LOSS OF BUSINESS TO THE CORPORATION. ALTHOUGH I AM NOT PERSUADED BY THIS ARGUMENT IN THE ABSTRACT, I RECOGNIZE THAT IN CERTAIN SITUATIONS IT MAY

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17/ "THE COSTS OF RESISTANCE," WALL STREET JOURNAL, P. 22, COL. 1 (OCTOBER 10, 1979).

BE VALID. HOWEVER, IF AN ENTIRE INDUSTRY IS ENGAGED IN REGULATORY VIOLATIONS, I FAIL TO SEE HOW ANY ONE COMPANY IN THAT INDUSTRY WILL SUFFER MORE THAN OTHERS. ALSO, IF THE REGULATORY POLICY IS ONE WHICH MIGHT INJURE A CORPORATION'S REPUTATION, IN THE EVENT IT IS PUBLICIZED, THEN THE REQUIREMENT FOR DISCLOSURE MAY SIMPLY FORCE THE ISSUE -- AND BECOME A SELF-FULFILLING PROPHECY.

MY OPPOSITION TO THE NOTION THAT ILLEGAL CONDUCT IS PER SE MATERIAL TO INVESTORS OR STOCKHOLDERS DOES NOT MEAN I BELIEVE ILLEGAL CONDUCT IS NEVER MATERIAL, OR IS SOMEHOW IMMUNE FROM SEC. DISCLOSURE REQUIREMENTS. WHERE SUCH CONDUCT HAS ALREADY RESULTED IN QUANTITATIVELY SIGNIFICANT ECONOMIC HARM TO THE CORPORATION, OR IS REASONABLY LIKELY TO DO SO IN THE FUTURE, IT IS MATERIAL. AND SUCH A DETERMINATION FOLLOWS FROM THE HOLDINGS OF THE TEXAS GULF SULPHUR AND GEON CASES WHICH I DISCUSSED PREVIOUSLY.

IN ITS STANDARD ON CONTINGENT LIABILITY DISCLOSURE, FASB 5, THE FINANCIAL ACCOUNTING STANDARDS BOARD INTERPRETS GENERALLY ACCEPTED ACCOUNTING PRACTICES IN THE UNITED STATES TO REQUIRE THAT A FINANCIAL STATEMENT MUST DISCLOSE A LOSS CONTINGENCY WHEN A REASONABLE POSSIBILITY EXISTS THAT A LOSS MAY HAVE BEEN INCURRED, REGARDLESS OF WHETHER A LOSS RESERVE HAS BEEN ESTABLISHED. THE STANDARD DEFINES A REASONABLE



POSSIBILITY AS ONE WHICH IS MORE THAN SLIGHT, BUT LESS THAN LIKELY. I AM CONCERNED WITH THE CASE IN WHICH A NEGATIVE FORECAST MAY NOT BE SUFFICIENTLY HARD, OR RIPE FOR DISCLOSURE, TO WARRANT TREATMENT AS A CONTINGENT LIABILITY.

WHILE IT MAY BE UNREALISTIC AND EVEN INAPPROPRIATE FOR THE SEC TO EXPECT A COMPANY TO DISCLOSE SUCH A SOFT NEGATIVE FORECAST, INVESTORS WHO ARE INJURED BY A CORPORATION'S FAILURE TO MAKE SUCH DISCLOSURE MIGHT BE ENTITLED TO DAMAGES. WHEN CORPORATIONS BEHAVE WITHOUT REGARD TO THE ADVERSE CONSEQUENCES OF THEIR CONDUCT, SOMETIMES INVESTORS ARE AMONG THE GROUPS OF PEOPLE DAMAGED BY THE ULTIMATE DISCLOSURE OF IMPROPER OR EVEN CRIMINAL CONDUCT. FOR EXAMPLE, THE CONTINUED MANUFACTURE AND SALE OF A MAJOR PRODUCT KNOWN TO BE A DANGEROUS HEALTH OR SAFETY HAZARD MAY MATERIALLY AFFECT A COMPANY'S FUTURE SALES, SO THAT WHEN THE PRODUCT'S DEFECTS BECOME PUBLICLY KNOWN THAT INFORMATION CAUSES A DECLINE IN THE PRICE OF THE ISSUER'S SECURITIES. IF INFORMATION ABOUT THE DEFECT IS DELIBERATELY WITHHELD FROM THE MARKETPLACE, INVESTORS SHOULD BE ENTITLED TO REDRESS, PARTICULARLY IF THE INFORMATION IS QUANTITATIVELY SIGNIFICANT TO AN ISSUER'S EARNINGS, ASSETS OR LIABILITIES. AT THE SAME TIME, COMPELLED PREMATURE DISCLOSURE IN CLOSE CASES MAY PUT AN IMPROPER CHILL ON THE EFFECTIVE EXERCISE OF BUSINESS JUDGMENT.

THE FOREGOING ANALYSIS IS NO MORE THAN AN UPDATE AND RESTATEMENT OF TRADITIONAL PRINCIPLES OF TORT LAW. WHY THEN, HAVE I STRUGGLED SO MUCH TO ARRIVE AT THIS RESTATEMENT? ONE REASON IS THE COMMISSION'S SENSITIVE PAYMENTS PROGRAM AND THE ENSUING ENACTMENT OF THE FOREIGN CORRUPT PRACTICES ACT. NO DISCUSSION OF QUALITATIVE AND DIFFERENTIAL MATERIALITY WOULD BE COMPLETE WITHOUT SOME REFERENCE TO THESE MATTERS.

THE SEC'S SENSITIVE PAYMENTS PROGRAM AROSE OUT OF THE DISCOVERY BY THE OFFICE OF THE SPECIAL PROSECUTOR DURING THE WATERGATE ERA THAT SEVERAL CORPORATIONS AND THEIR EXECUTIVE OFFICERS HAD USED CORPORATE FUNDS TO MAKE ILLEGAL DOMESTIC CAMPAIGN CONTRIBUTIONS. SUBSEQUENT SEC INVESTIGATIONS REVEALED THAT SOME CORPORATIONS HAD FALSIFIED THEIR FINANCIAL RECORDS IN ORDER TO CONCEAL THE PRACTICE OF MAKING PAYMENTS INDIRECTLY OR DIRECTLY TO OBTAIN BUSINESS. COMPANIES WHICH HAD MADE "QUESTIONABLE OR ILLEGAL FOREIGN OR DOMESTIC PAYMENTS" GENERALLY WERE REQUIRED TO DISCLOSE THE MATTER IN A PUBLIC FILING.

THE COMMISSION ARTICULATED VARIOUS REASONS FOR DISCLOSURE OF THESE PAYMENTS IN A REPORT TO CONGRESS. 18/ IN ADDITION TO REQUIRING DISCLOSURE WHEN THE PAYMENTS WERE OF A MATERIAL

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18/ REPORT OF THE SEC ON QUESTIONABLE AND ILLEGAL CORPORATE PAYMENTS AND PRACTICES TO THE SENATE BANKING, HOUSING AND URBAN AFFAIRS COMMITTEE (MAY 12, 1976).

SIZE OR A MATERIAL AMOUNT OF BUSINESS DEPENDED ON THEIR CONTINUATION, THE COMMISSION INSISTED ON A REPORTING OBLIGATION WHEN A COMPANY'S RECORDS WERE INADEQUATE. THE COMMISSION'S RATIONALE, IN PART, WAS THAT THE FALSIFICATION OF CORPORATE RECORDS FRUSTRATES THE SYSTEM OF CORPORATE ACCOUNTABILITY DESIGNED TO ASSURE PROPER ACCOUNTING IN DOCUMENTS FILED WITH THE COMMISSION AND CIRCULATED TO ITS SHAREHOLDERS.

IN OTHER WORDS, THE COMMISSION ARGUED THAT SINCE THE INTEGRITY AND RELIABILITY OF CORPORATE BOOKS AND RECORDS ARE THE VERY FOUNDATION OF THE DISCLOSURE SYSTEM ESTABLISHED BY THE FEDERAL SECURITIES LAWS, THE DELIBERATE FALSIFICATION OF SUCH RECORDS IS A KIND OF CONDUCT WHICH IS PER SE MATERIAL TO INVESTORS, LIKE SELF-DEALING. THE VALIDITY OF THIS THEORY UNDER EITHER THE GENERAL ANTI-FRAUD OR PROXY RULES WAS NEVER SERIOUSLY TESTED IN THE COURTS, BECAUSE HUNDREDS OF COMPANIES ENTERED THE SEC'S VOLUNTARY DISCLOSURE PROGRAM AND CONGRESS THEN PASSED THE FOREIGN CORRUPT PRACTICES ACT.

THE IMPORTANCE TO ANY CORPORATION AND ITS SHAREHOLDERS OF ACCURATE CORPORATE BOOKS AND RECORDS AND AN ADEQUATE SYSTEM OF INTERNAL ACCOUNTING CONTROLS IS SELF-EVIDENT. IF THE FOREIGN CORRUPT PRACTICES ACT IMPROVES THE ACCOUNTING RECORDS AND SYSTEMS OF PUBLIC CORPORATIONS, IT WILL PROVE TO BE WORTHWHILE AND COMMENDABLE LEGISLATION. BUT THE SEC'S

SENSITIVE PAYMENTS PROGRAM GAVE RISE TO CERTAIN ATTITUDES TOWARD MATERIALITY WHICH HAVE BEEN EXTENSIVELY CRITICIZED, AND I BELIEVE WITH SOME JUSTIFICATION.

TO THE EXTENT THAT THE DISCLOSURE OF QUESTIONABLE PAYMENTS WAS MATERIAL TO ASSESSING THE QUALITY OF MANAGEMENT 19/ MANY REASONABLE INVESTORS DID NOT AGREE. TO THE EXTENT THE COMMISSION TOOK THE POSITION THAT THE CHARACTERIZATION OF A PAYMENT AS A COMMISSION RATHER THAN A BRIBE WAS A FALSIFICATION, OR THAT THE NAMES OF THE COUNTRIES OR OFFICIALS WHERE BRIBES WERE PAID WAS MATERIAL, I BELIEVE THAT MATERIALITY AS AN EFFECTIVE AND RESPECTED LEGAL STANDARD WAS IMPAIRED. WHEN DISCLOSURE OBLIGATIONS BECOME THIS DETAILED AND SUBJECTIVE, THE SECURITIES LAWS BECOME ONLY A MECHANISM FOR THE AFTER THE FACT IMPOSITION OF LIABILITY WHEN GOVERNMENT OFFICIALS DO NOT APPROVE OF BUSINESS CONDUCT. 20/

THE COMMISSION'S INSISTENCE THAT THE DISCLOSURE OF INADEQUACIES IN ACCOUNTING CONTROLS IS REQUIRED REGARDLESS OF THE FINANCIAL STATEMENT MATERIALITY OF SUCH PROBLEMS

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19/ Id. AT 15.

20/ SEE REPORT OF THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE TO THE SEC SUBMITTED TO THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE, 95TH CONG., 1ST SESS., CH. XXII (NOV. 3, 1977), WHICH CONCLUDES THAT THE DEGREE OF CONCERN BY THOSE IN GOVERNMENT CONCERNING THE DISCLOSURE OF SENSITIVE PAYMENTS "DOES NOT APPEAR ENTIRELY COMMENSURATE WITH THE SMALL TEMPORARY IMPACT OF THE DISCLOSURE ON THE VALUE OF THE CORPORATION."

WAS CARRIED OVER INTO THE SEC'S PROPOSED RULES FOR A STATEMENT OF MANAGEMENT ON INTERNAL ACCOUNTING CONTROL. 21/ I NOTE THAT EVEN IF THE STATUTE DOES NOT COMPEL THE COMMISSION TO USE AN ECONOMIC MATERIALITY STANDARD ONE COULD BE DEvised AS A MATTER OF POLICY. SINCE THESE RULEMAKING PROCEDURES ARE STILL OPEN, IT WOULD BE INAPPROPRIATE FOR ME TO COMMENT ON THEM. I WILL NOTE, HOWEVER, THAT OF THE NEARLY 950 COMMENT LETTERS THE COMMISSION RECEIVED ON THESE PROPOSALS, OVER 90% ARE NEGATIVE, AND OVER 35% OF THESE OPPONENTS SPECIFICALLY EXPRESSED THE NEED FOR A MATERIALITY STANDARD FOR PUBLIC REPORTING PURPOSES.

I DO NOT BELIEVE THAT THE COMMISSION CAN RETURN TO A STANDARD OF MATERIALITY WHICH IS STRICTLY QUANTITATIVE AND HISTORICALLY BASED. WE HAVE TRAVELED TOO FAR AND IN TOO MANY DIRECTIONS ON THE ROAD TO QUALITATIVE AND DIFFERENTIAL MATERIALITY. EARNINGS ARE AFFECTED TODAY AS MUCH BY GOVERNMENT ACTION AS THE MARKETPLACE. TO THE EXTENT THAT SEC FORMULATIONS OF MATERIALITY ARE ONE SUCH ACTION, I HOPE THAT THE COMMISSION WILL BE ABLE TO MAKE DECISIONS WHICH COMMAND THE RESPECT OF BOTH CORPORATE MANAGEMENT AND THE INVESTING PUBLIC.

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21/ SECURITIES EXCHANGE ACT RELEASE No. 15772 (APRIL 30, 1979).