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Celebrity CEOs: Disclosure at the Intersection of Privacy and Securities Law

Ann M. Olazábal
University of Miami, aolazabal@miami.edu

Patricia Sánchez Abril
University of Miami, pabril@miami.edu

ARTICLE

THE CELEBRITY CEO: CORPORATE DISCLOSURE AT THE INTERSECTION OF PRIVACY AND SECURITIES LAW

Patricia Sánchez Abril[*]
Ann M. Olazábal[**]

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* Assistant Professor, University of Miami School of Business Administration. B.A., Duke University, 1996; J.D., Harvard Law School, 2000.

** Associate Professor, University of Miami School of Business Administration. B.A., Texas Christian University, 1984; J.D., University of Notre Dame, 1987; M.B.A., University of Miami, 1997.

I. INTRODUCTION

In the mid-twentieth century, literary critics were bound to the notion that a work could only be judged and interpreted in the context of the life, intentions, and personal idiosyncrasies of its creator. As a reaction to this trend, theorists William Wimsatt and Monroe Beardsley identified the resulting interpretive problem, calling it the "intentional fallacy."[1] The intentional

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1. W.K. Wimsatt, Jr. & Monroe C. Beardsley, *The Intentional Fallacy*, *in* W.K. WIMSATT, JR., THE VERBAL ICON 3 (1954). Wimsatt and Beardsley use the term

fallacy refers to the unsound argument that the meaning and value of a work—literary, artistic, or otherwise—should first be assessed against the background of its creator's personal intentions, history, and foibles.[2] In the context of literary criticism, Wimsatt and Beardsley argued for the de-emphasis of details of the author's private life when assessing the meaning and value of her work.[3] To do otherwise, according to these philosophers, would be to judge primarily on bases other than the well-accepted standards of good art and, moreover, would force critics to make unverifiable and unnatural suppositions and inferences about the creator's life.[4]

Securities law is at risk of such an intentional fallacy with regards to the personal environs of chief executive officers. Like critics seeking to predict the value of a work of art by delving into the life story of its architect, investors are increasingly seeking to predict the value of a company with inferences about the private life of its CEO. To take one example, news reports of Apple CEO Steve Jobs's mysterious health issues have raised compelling legal questions regarding requisite compulsory disclosure of the private matters of CEOs.[5] Popular demand for such details has mounted, and some have suggested that liability may result when a publicly held corporation fails to disclose such information.[6] Never in the past has the spotlight shone so brightly on the sharp intersection of privacy rights and securities laws. Indeed, at that intersection are important legal issues that demand in-depth consideration.

Curiosity about the private lives of business titans is not limited to the Jobs case—witness, for example, the hubbub over the Martha Stewart ImClone insider trading affair,[7] the YouTube video of auto racing boss Max Mosley's sadomasochistic sex orgy

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"intentional" to refer to the author's plan, design, and context when creating the work. *Id.* at 4.

2. *Id.*

3. *See id.* In an effort to remain gender-neutral, the Authors alternate male and female pronouns where appropriate and feasible throughout the Article.

4. *See id.* at 5 ("[One] ought to impute the thoughts and attitudes of the poem immediately to the dramatic *speaker*, and if to the author at all, only by an act of biographical inference.").

5. *E.g.*, Yukari Iwatani Kane & Joann S. Lublin, *Jobs Had Liver Transplant*, WALL ST. J., June 20–21, 2009, at A1; Henry Blodget, *Does Apple's Steve Jobs Have Cancer Again?*, BUS. INSIDER, June 10, 2008, http://www.businessinsider.com/2008/5/does-apple-s-steve-jobs-have-cancer-again-.

6. *See* Roger Parloff, *Why the SEC Is Probing Steve Jobs*, CNNMONEY.COM, Jan. 22, 2009, http://money.cnn.com/2009/01/22/technology/stevejobs_disclosure.fortune/index.htm.

7. SEC, Litigation Release No. 18,169 (June 4, 2003), http://www.sec.gov/litigation/litreleases/lr18169.htm.

in Britain,[8] and the widespread journalistic coverage of former Tyco chief L. Dennis Kozlowski's $6,000 shower curtain.[9] The public, and investors in particular, are becoming increasingly inquisitive about the private facts of corporate personalities and, perhaps, increasingly dependent on them. The personal conditions, afflictions, relationships, proclivities, and conduct of corporate heads, the argument goes, give the public insight into their character and ability to lead their companies—companies in which the public invests its money and its trust. A CEO's adultery could signal dishonesty; his extravagant buying habits, squandering; her alcoholism, weakness or ineptitude. For some, these suppositions may then serve as a proxy for judging the organizations themselves. More immediately, a criminal investigation into the CEO's private activities or her terminal illness could signal an end to a leadership era, with all its attendant costs and uncertainties.

At a minimum, the private peccadilloes of business leaders, when revealed, can become media events that tarnish the company at least in the short term. The available commentary, therefore, assumes that a CEO's personal conduct or condition is financially relevant to shareholders. And, if so, failure to disclose it may or should be a transgression of the federal securities laws. The few scholarly treatments of this subject have proposed SEC-mandated disclosure of private matters related to corporate figureheads, such as their illnesses and the pendency of criminal investigations.[10] Part of a growing chorus of scholarly voices calling for more qualitative disclosure by public companies, these proposals are premised on an argument that such information is material to investors, and therefore should be the subject of line-item disclosure, despite any privacy law concerns.[11]

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8. John F. Burns, *A British Trial About Privacy in Which Not a Shred Remains*, N.Y. TIMES, July 9, 2008, at A1.

9. *E.g.*, Andrew Ross Sorkin, *Tyco Details Lavish Lives of Executives*, N.Y. TIMES, Sept. 18, 2002, at C1.

10. *See* James D. Redwood, *Qualitative Materiality Under the SEC Proxy Rules and the Fifth Amendment: A Disclosure Accident Waiting to Happen or Two Ships Passing in the Night?*, 1992 WISC. L. REV. 315, 407 (suggesting a line item disclosure rule that would require disclosure of the fact that a director or executive officer "is a subject or target of a criminal proceeding known to be contemplated by governmental authorities" (emphasis omitted)).

11. Jayne W. Barnard, *Sovereign Prerogatives*, 21 J. CORP. L. 307, 323–26 (1996) (reviewing CONNIE BRUCK, MASTER OF THE GAME: STEVE ROSS AND THE CREATION OF TIME WARNER (1994)); Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 756–57 (2007) (arguing an executive's personal facts may be material and, therefore, may have to be disclosed); Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When Is a Corporation Obligated to Disclose That Illness and*

In fact, no prior work on this subject has plumbed the depths of the privacy implications of this focus on every aspect of a CEO's life, nor has the scholarship addressed the more important underlying securities law question of a corporation's *duty* to disclose such information, even assuming it is material. We undertake to do so, ultimately arguing that current privacy and securities laws contend with the status of the contemporary CEO appropriately, if unintentionally. To date, securities law has averted the conundrum of intentional fallacy, limiting investor scrutiny to information upon which reasonable inferences can be made. Here, we demonstrate that any new regulation intruding upon what has traditionally been either closely held confidential information on the one hand, or tabloid fodder on the other, is not only unlikely but inadvisable.

In Part II, we briefly trace the rise of the celebrity executive. While corporate managers at the highest level have always been the subject of some popular attention, three primary influences have thrust CEOs into the limelight today more than ever. The democratization of stock ownership and the increase in the amount of detailed personal information available, coupled with the high-profile corporate issues of the day, have fostered an enormous interest in and scrutiny of the personal lives of CEOs. This state of affairs forms the basis for recent calls to require additional qualitative disclosure on the part of publicly traded companies.

In Part III we set forth a number of contemporary examples of the types of private matters related to executives that have interested the public and might plausibly form the basis for such a proposed new regulation. Most arguments advocating for formal disclosure of otherwise private CEO matters contend that such revelations evince a CEO's integrity and ability and, as such, influence the financial success of the corporation. In order to deconstruct this argument, it becomes necessary to put forth and classify popular CEO stories that might arguably bear on an executive's integrity or ability to lead: romantic liaisons, unlawful activity, and health concerns.

Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?, 5 N.Y.U. J.L. & BUS. 827, 867–70 (2009) (arguing same, limited to illness of corporate "luminary"); Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383, 394–95 (2009) (arguing same, but limited by the business judgment rule); Redwood, *supra* note 10, at 407 (suggesting a rule requiring disclosure of certain criminal proceedings); *see also* Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (advocating increased qualitative disclosure to inform investors about a corporation's social responsibility).

Parts IV and V lay out the black letter law associated with any proposal to mandate disclosure by publicly traded companies of important private facts about their CEOs. First, Part IV surveys existing privacy statutes and common law with an eye toward resolving whether any privacy laws preclude a corporation's disclosure of facts traditionally deemed private relating to its CEO. Part V tackles the important policy implications from the securities standpoint. In-depth analysis of the SEC's regulatory disclosure regime as well as the antifraud provisions of the federal securities statutes reveals that no extant law requires disclosure of most private matters concerning CEOs in which the public may be interested.

Against this backdrop, Part VI breaks down the syllogism that most commonly underpins arguments for increased disclosure. The impact of individuals at the top of corporations has been bloated by corporate hype, media attention, and celebrity. Viewing the CEO as a personification of the company she heads leads to misguided assumptions regarding her importance, dispensability, and ultimate humanness. Social and psychological dispositions toward fundamental attribution error and intentional fallacy reinforce this notion.

In our concluding Part, we revisit the arguably relevant information about CEOs for which the public may clamor, considering the policy questions raised, in light of privacy implications, by any new duty of a public company to report such information going forward. With an eye on the practical form such a disclosure would inevitably take, Part VII ultimately concludes that no legal or philosophical source can be found for such a duty, and that in actuality the formulation of, compliance with, and enforcement of a regulation in this area would be highly impracticable—particularly in light of its questionable value to shareholders even in the short term. To require otherwise would be to subject many CEOs to unnecessary intrusion as well as to inject the securities laws with a needless intentional fallacy.

II. THE CULT OF THE CEO

When discussing celebrity, most commentators have focused on its traditional archetypes: revered politicians, decorated military heroes, iconic innovators, gifted athletes, and entertainment idols. It stands to reason that one would ask how and why corporate executives as a group have risen to their ranks. Social science has addressed this topic, analyzing the rise of the CEO in particular in light of the history of American corporations and the varying trends in management that have emerged over the years, from the "professional manager" to "charismatic savior" and various monikers in between.[12] The purpose of this Part is to illuminate how CEOs in the last two decades have achieved high-profile status in the public eye. We posit that it is the confluence of three historical trends that has thrust CEOs onto center stage: higher levels of investment by average folk, dramatically increased availability of detailed personal information, and the reemergence of controversial business issues in popular debate.

America has always had its heroes. In the past it was the extraordinary accomplishments of the person that made him or her interesting to the public. Today, instead, celebrity status appears to revolve as much around the possession of wealth as it does any sort of unique attribute or contribution to society. So in recent decades not only has the breadth of so-called celebrity expanded, but the level of detail to which the public has been privy has grown dramatically.[13] Indeed, the public's thirst for more and detailed information about a broader range of public personalities seems almost unquenchable. The media evidently have found it profitable to at least try to quench this thirst with tabloid newspapers, magazines, TV shows, and blogs devoted exclusively to disclosure of the latest photos, video, and commentary, drilling ever deeper into the relationships, personal tastes and habits, possessions, and general comings-and-goings of the rich and (in)famous.

For years, CEOs seemed to escape the spotlight.[14] And naturally so—to the vast majority of average citizens business matters just may not have been all that compelling. Indeed, participation and interest in the stock markets in the early part

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12. *See generally* RAKESH KHURANA, SEARCHING FOR A CORPORATE SAVIOR (2002).

13. We have been treated to the minutiae of personal events in the lives of those in the public eye: their suicides, romantic liaisons, bizarre encounters with the police, travel itineraries, injuries and health conditions, birth plans, habits and hobbies, and more. *See, e.g.*, Ashling O'Connor & Ed Gorman, *Max Mosley Faces Calls to Quit as Formula One Chief After 'Nazi' Orgy*, TIMES ONLINE, Mar. 31, 2008, http://www.timesonline.co.uk/tol/sport/formula_1/article3649197.ece; Brad Stone, *Apple Chief Goes Public on Health*, N.Y. TIMES, Jan. 6, 2009, at B1.

14. This is not to say that CEOs had not been featured in the news until the corporate scandals of late. Indeed, the anti-establishment hangover from the 1960s and consumerism trend of the 1970s seems to have spawned a critical brand of business journalism, with the press in those years unearthing stories of lavish CEO perks being granted amid general economic downturn. KHURANA, *supra* note 12, at 55. This sounds hauntingly familiar. *See, e.g.*, Paul Krugman, Op-Ed., *Rewarding Bad Actors*, N.Y. TIMES, Aug. 3, 2009, at A21 ("[W]ith the economy still deeply depressed, the [financial] industry is paying itself gigantic bonuses. If you aren't outraged, you haven't been paying attention.").

of the twentieth century was limited to the wealthy elite. While the Great Depression highlighted for all the downside of unregulated markets, it was not until much later that widespread ownership of equities emerged in the United States. Individual ownership of equities exploded following changes in the Internal Revenue Code that permitted favorable tax treatment of individual retirement accounts in 1974[15] and employer-sponsored retirement plans in 1978.[16] By 2005, the number of households owning shares in publicly traded companies had increased more than three-fold since the early 1980s.[17] And by the first quarter of 2008, 54.5 million U.S. households were invested in corporate stocks and bonds.[18] Much of this growth is attributable to the rise of the mutual fund, which permits employee–investors to participate in the capital markets somewhat indirectly with their retirement savings.[19]

With the democratization of stock ownership came broader understanding of and interest in publicly traded companies and their performance. The "worker capitalist"[20] phenomenon was not only operating to erode class distinctions but also apparently "cultivating a deeper appreciation and understanding of private enterprise. The involvement of new stockholders in the capitalization of the companies that create wealth allows these new investors to have a better understanding of financial matters."[21]

Alongside and perhaps as a consequence of this development was the dawn of the round-the-clock cable news network CNN in 1980, and its progeny CNNfn, rival CNBC, the now defunct Financial News Network, and more recent entrants Bloomberg Television and the Fox Business Network. Throughout the 1990s, these networks began to offer a growing stable of business and

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15. JOINT ECON. COMM., THE ROOTS OF BROADENED STOCK OWNERSHIP 3 (2000), *available at* http://www.house.gov/jec/tax/stock/stock.pdf [hereinafter ROOTS].

16. Section 401(k) of the Internal Revenue Code came into effect on January 1, 1980. Revenue Act of 1978, Pub. L. No. 95-600, § 135(c), 92 Stat. 2763, 2787. The IRS issued interpretive regulations about IRAs in 1982, which resulted in an increase in their adoption. ROOTS, *supra* note 15, at 9.

17. INV. CO. INST., MUTUAL FUND FACT BOOK 80 (2004), *available at* http://www.ici.org/pdf/2004_factbook.pdf.

18. INV. CO. INST. & SEC. INDUS. & FIN. MKTS. ASS'N, EQUITY AND BOND OWNERSHIP IN AMERICA, 2008, at 7 (2008), *available at* http://www.ici.org/pdf/rpt_08_equity_owners.pdf.

19. *Id.* at 1; ROOTS, *supra* note 15, at 2–3.

20. For an explication of worker capitalism, see Richard Nadler, *The Rise of Worker Capitalism*, POL'Y ANALYSIS, Nov. 1, 1999, at 1, *available at* http://www.cato.org/pubs/pas/pa359.pdf.

21. ROOTS, *supra* note 15, at 1.

stock-focused news programs.[22] New magazines also moved into this space; in the early 1990s, time-honored business periodicals like Business Week, Forbes, and Fortune Magazine were joined by upstarts with more modern appeal, like Smart Money and Fast Company.[23]

The Internet also became a venue for the analysis and discussion of the latest business news by a new crop of nonprofessional analysts and traders. Then in the late 1990s, widespread accessibility of financial information, together with a bull market, fomented what came to be known as "day trading."[24] The fad reached its peak in late 1999 and early 2000, by which time amateur investors were quitting their regular jobs in large numbers in favor of making instant profits buying and selling stocks quickly via the Internet, fed by greed and a 24/7 flow of financial news.[25] With all the spin and hype available via print media, the Internet, and cable TV channels, hard corporate news straight-from-the-horse's-mouth seemed to be at more of a premium than ever. Unsurprisingly, day traders began to demand equal access to inside corporate information that for years had been quietly siphoned by privileged institutional investors and securities analysts in advance of its disclosure to the public.[26]

In the summer of 2000, in response to the perceived unfairness of corporate management's selective disclosure to brokers, analysts, and big institutional investors, the SEC promulgated Regulation FD (also known as "Fair Disclosure"), which became effective October 23, 2000.[27] The regulation requires simultaneous disclosure to the public of any material nonpublic information being released to market professionals.[28]

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22. Examples include Moneyline, Fast Money, Money for Breakfast, Mad Money with Jim Cramer, Squawk Box, Market Call, The Opening Bell, Power Lunch, Closing Bell, America's Nightly Scoreboard, and Bloomberg News.

23. *See* Deirdre Carmody, *A Magazine with 2 Parents May Spawn Industry Trend*, N.Y. TIMES, Dec. 28, 1992, at D1; Glenn Rifkin, *A Young Perspective on Management*, N.Y. TIMES, Aug. 30, 1993, at D8.

24. *See* SEC, Day Trading: Your Dollars at Risk, http://www.sec.gov/investor/pubs/daytips.htm (last visited Jan. 15, 2010).

25. *See, e.g.*, DAVID DENBY, AMERICAN SUCKER 5–6 (2004); David Barboza, *Why Big Firms Are Courting Day Traders*, N.Y. TIMES, Aug. 13, 1999, at C1; Patrick McGeehan, *Day Trading Is Here to Stay. Now How to Get a Piece of It?*, N.Y. TIMES, Mar. 29, 2000, at H16.

26. Commentators had long pointed out the fine line between this institutionalized practice and classic insider trading. *See, e.g.*, Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 355–57 (1979); Paul P. Brountas Jr., Note, *Rule 10b-5 and Voluntary Corporate Disclosures to Securities Analysts*, 92 COLUM. L. REV. 1517, 1527–28 (1992).

27. Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,716 (Aug. 24, 2000) (codified at 17 C.F.R. pts. 240, 243, 249).

28. 17 C.F.R. § 243.100 (2009).

According to its biggest proponent, then-SEC chief Arthur Levitt, the regulation had the desired salutary effect on market confidence,[29] creating an "information bonanza" for investors.[30]

It is questionable whether equal access alone sparked further or heightened interest. Indeed, the effect of Regulation FD may have been somewhat limited to day traders and other more sophisticated market players, with any new access to corporate information limited in its scope to details of corporate financial performance. But two other things happened at about that same time that undoubtedly put CEOs squarely in the public eye: first, the spectacular turn-of-the-millennium business scandals, and second, a related resurgence of controversy over shockingly high CEO pay.[31]

Enron, WorldCom, Tyco, and other corporate debacles focused the public's attention on the moral character of those at the helm when billions in investor money evaporated.[32] CEOs were now under an intense microscope. Not only was the public interested in the role highly paid top executives played in the corporate meltdown, but there were now more media outlets than ever looking to occupy more and more print columns, airwaves, and bandwidth. The level of detail sought, obtained, and disseminated by journalists was extraordinary. Press coverage interwove discussion of the massive business failures and corporate abuses with revelations of expensive CEO hobbies and extensive personal holdings. So, while their kingdoms were crumbling, the public learned of the $2.1 million birthday party Dennis Kozlowski had thrown for his wife, Karen, in Sardinia,[33]

29. ARTHUR LEVITT WITH PAULA DWYER, TAKE ON THE STREET: WHAT WALL STREET AND CORPORATE AMERICA DON'T WANT YOU TO KNOW 89 (2002).

30. JERRY W. MARKMAN, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS 403–04 (2006).

31. CEO compensation, particularly as compared to the earnings of the average worker, has long been a matter of public and scholarly debate in this country. *See* George T. Washington, *The Corporation Executive's Living Wage*, 54 HARV. L. REV. 733, 734–35 (1941) (reviewing the background of the CEO pay "problem" and noting that some companies were paying CEOs as much as $1.5 million annually by 1928). In 1965, studies found a multiplier of twenty between pay of rank-and-file employees and CEOs in America. Albert R. Hunt, *As Rich–Poor Gap Grows in U.S., So Does Clamor*, INT'L HERALD TRIB., Feb. 19, 2007, at 2 (comparing, *inter alia*, executive pay in the United States with CEO compensation abroad). The controversy escalated as CEO pay accelerated. In the period between 1991 and 2003, the ratio of big company CEO pay to the average worker's wage went from about 140:1 to approximately 500:1. LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE 1 (2004).

32. *See* BEBCHUK & FRIED, *supra* note 31, at ix; Andrew Ross Sorkin, *Tyco's Ex-Chief Going to Court in 'Greed Case,'* N.Y. TIMES, Sept. 29, 2003, at A1.

33. Alex Kuczynski, *Lifestyles of the Rich and Red-Faced*, N.Y. TIMES, Sept. 22, 2002, § 9, at 1. It is interesting to compare the tone of Kuczynski's exposé with the details of Kozlowski's upbringing, early employment, and hobbies described a year earlier in William C.

or of Bernie Ebbers indulging his personal "passion" for, among other things, ownership of a minor league hockey team and ranching in Canada.[34]

Washington was not uninvolved. The Sarbanes-Oxley Act of 2002, passed hastily following the collapse of Enron, directed the public's attention not only toward a purported need to make top officers "sign off" on the company's financials, but also on the possibility of clawing back executive pay when financials are found to have been misstated.[35] Thereafter, throughout the first decade of the new millennium, public outrage over high salaries and bonuses generally, and the stock option backdating scandal in particular, also served to focus journalists, and thereby the public, on the inner workings of publicly traded corporations.[36]

A similar focus on CEOs and their role emerged in the credit crisis and ensuing economic depression of 2009, when industry executives were criticized for paying and being paid outsized bonuses and for sumptuous spending on retreats and travel expenses while accepting taxpayer "bailout" money.[37] As a result, the Treasury Department issued guidelines on executive pay for financial institutions receiving bailout funds, which may have hastened congressional action on the controversial subject of "say on pay," an initiative seeking to require shareholder votes to approve executive pay packages awarded by publicly traded companies.[38]

Whether individual shareholders actually are interested or not, corporate governance practices are under siege. In fact,

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Symonds & Pamela L. Moore, *The Most Aggressive CEO*, BUS. WEEK, May 28, 2001, at 68.

34. Jayne O'Donnell & Andrew Backover, *Ebbers' High-Risk Act Came Crashing Down on Him*, USA TODAY, Dec. 12, 2002, at 1B.

35. Section 302 of the Sarbanes-Oxley Act of 2002 covers executive certifications of financial reports. Pub. L. No. 107-204, § 302, 116 Stat. 745, 777 (2002) (codified at 15 U.S.C. § 7241 (2006)); *see also* Pub. L. No. 107-204, § 906, 116 Stat. 745, 806 (2002) (codified at 18 U.S.C. § 1350 (2006)) (establishing criminal penalties for violations of Section 302). Section 304 covers forfeiture of bonus and profits upon restatement. Pub. L. No. 107-204, § 304, 116 Stat. 745, 778 (2002) (codified at 15 U.S.C. § 7243 (2006)).

36. *See, e.g.*, SUNIL PANIKKATH ET AL., OPTIONS BACKDATING 1 (2006), *available at* http://www.nera.com/image/PUB_Backdating_Part_1_Primer_SEC1381_final.pdf; Daren Fonda & Daniel Kadlec, *The Rumble over Executive Pay*, TIME, May 31, 2004, at 62, 62; David Leonhardt, *Is That Your C.E.O. Cashing Out?*, N.Y. TIMES, Apr. 6, 2003, § 3, at 1.

37. *See, e.g.*, Louise Story & Eric Dash, *Bankers Reaped Lavish Bonuses During Bailouts*, N.Y. TIMES, July 31, 2009, at A1; Peter Whoriskey, *AIG Spa Trip Fuels Fury on Hill*, WASH. POST, Oct. 8, 2008, at D1; Josh Levs, *Big Three Auto CEOs Flew Private Jets to Ask for Taxpayer Money*, CNN.COM, Nov. 19, 2008, http://www.cnn.com/2008/US/11/19/autos.ceo.jets/index.html.

38. *See* Corporate and Financial Institution Compensation Fairness Act of 2009, H.R. 3269, 111th Cong. § 2 (proposing to amend the Securities Exchange Act of 1934 to provide shareholders with an advisory vote on executive compensation and to prevent perverse incentives in the compensation practices of financial institutions).

scholars have noted that in times of publicized corruption, the public values moral integrity as a leadership quality much more highly.[39] As if to prove the point, the SEC recently has called for some controversial new changes in proxy disclosures by publicly held companies: disclosures about the relevant board experience of existing directors and any new nominees; disclosures regarding leadership structure, i.e., separation of the positions of top executive officer from board chair; and a lengthening of the look-back period during which top management's involvement in certain legal proceedings must be disclosed.[40]

For its part, the investing public demands more and more transparency of corporate America: more accurate financials, more detailed compensation disclosures, and more internal controls. And as to matters concerning those in command, the quest for transparency does not end in the C-suite. Instead, what were once the purely private lives of CEOs now routinely become the subject of investigation and speculation.

III. THE INDISCRETIONS AND IMPERFECTIONS OF CEOS

Recent stories touching upon the private lives of corporate heads abound. This Part details various CEO chronicles of note, foreshadowing their later analysis through the lenses of privacy and securities laws. The cardinal question in the background is whether or not company disclosure of such accounts is necessary or desirable from the perspective of securities laws. Should investors be entitled to such information directly from the corporation? Or would such disclosure simply feed a voyeuristic impulse?

Arguments for the disclosure of such information are inherently inferential and laden with assumptions. The revelation of certain private matters, the argument goes, sheds light on a CEO's core personal characteristics, values, and attributes. These serve as predictors of her integrity and ability to lead the corporation, which in turn will affect the financial performance of the corporation she leads.

This reasoning focuses on the ability of anecdotal evidence to support conclusions about the individual's *integrity and ability*. Integrity, a synonym of honesty, has been defined as a "firm

39. *See* Jeffrey A. Sonnenfeld, *Does It Matter Who Is the Boss?*, *in* NAVIGATING CHANGE: HOW CEOS, TOP TEAMS, AND BOARDS STEER TRANSFORMATION 98, 103 (Donald C. Hambrick et al. eds., 1998).

40. Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,706, 35,083–85 (July 17, 2009) (to be codified in scattered parts of 17 C.F.R.).

adherence to a code of esp[ecially] moral . . . values."[41] Organization scholars have noted that in the twentieth century American companies adopted a focus on charisma as an essential characteristic for effective leadership.[42] In the wake of Enron and other corporate scandals, investors and directors alike have demanded that CEO integrity accompany a winning smile or magnetic personality. Arguments could be made that issues like an executive's personal views, sexual practices, debt load, or marital fidelity could inform a conclusion as to his integrity.

Ability, on the other hand, refers to the "state of being able."[43] Ability encompasses the physical, mental, or legal power to perform. A CEO's health condition, drug use, or relationship turmoil are all circumstances that could foreseeably affect his capacity to come to the office, comprehend complex topics, and attend necessary corporate functions.

In order to understand the types of personal CEO information often alleged to be pertinent to their integrity and ability, it is necessary to contextualize. What follows is a compilation of recent cases involving CEO revelations, each of which tests the limits of privacy and public disclosure of facts relating to business leaders.

A. Romantic Liaisons and Relationships

From deviant sexual practices to the run-of-the-mill divorce, the personal intrigue surrounding powerful people captivates the public. The following cases illustrate that those known publicly for their corporate pursuits are not immune from prying into their corporal pursuits.

Max Mosley, the son of a notorious Nazi sympathizer, is the former president of the *Fédération Internationale de l'Automobile* (FIA), the world governing body for motor sports and Formula One.[44] In 2007, a British tabloid surreptitiously filmed him in a sexual tryst with several prostitutes.[45] It subsequently published a front-page article alleging he participated in a Nazi-themed orgy.[46] The print and video images depicted some prostitutes dressed in striped prison outfits and others brandishing whips,

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41. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 650 (11th ed. 2003) [hereinafter MERRIAM-WEBSTER'S].

42. *See* KHURANA, *supra* note 12, at 20.

43. MERRIAM-WEBSTER'S, *supra* note 41, at 3.

44. Burns, *supra* note 8; O'Connor & Gorman, *supra* note 13.

45. Burns, *supra* note 8.

46. Mosley v. News Group Newspapers Ltd. [2008] EWHC (QB) 1777, [1].

checking Mosley for lice, and barking orders in German.[47] The article and accompanying video were viewed by millions of people around the world via the tabloid's website.[48] Without delay, Mosley admitted participation but vehemently denied any Nazi connotation.[49] Meanwhile, onlookers both in and out of the world of motorsport called for his resignation.[50] The president of Formula One declared that Mosley "should go out of responsibility for the institution he represents,"[51] expecting the scandal to adversely affect the sport in financial terms.[52] Mosley sent a letter of apology to the membership of the FIA and subsequently survived a vote of no confidence.[53] He sued the tabloid for the English equivalent of the U.S. public disclosure tort and was awarded £60,000 in compensatory damages and £450,000 in attorneys' fees by England's High Court.[54]

Some executives have met grimmer fates after shameful public disclosures. Chris Albrecht, former chairman and CEO of Home Box Office (HBO), was forced to resign days after he was arrested in 2007 for choking his girlfriend outside a Las Vegas hotel.[55] Although he sent a contrite e-mail to HBO employees blaming his conduct on a relapse of alcoholism,[56] his past came back to haunt him and HBO. The *Los Angeles Times* soon discovered HBO had concealed similar misconduct by Albrecht in the past.[57] The *Times* reported that in 1991, Albrecht had attempted to choke his then-girlfriend, a rising HBO executive who declined to press charges and quietly left the company in exchange for a confidential payment of "at least $400,000" from HBO.[58]

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47. *Id.* at [27], [31].

48. Burns, *supra* note 8.

49. *Mosley*, [2008] EWHC 1777, [40].

50. O'Connor & Gorman, *supra* note 13.

51. *Mosley's Fight to Clear His Famous Name*, BBC NEWS, July 9, 2008, http://news.bbc.co.uk/2/hi/uk_news/7497790.stm.

52. *See Ferrari Boss Makes Mosley U-Turn*, BBC SPORT, June 5, 2008, http://news.bbc.co.uk/sport2/low/motorsport/formula_one/7437083.stm (noting that F1 president Bernie Ecclestone feared the scandal could "destabilise sponsors and the constructors").

53. *Id.*

54. *Mosley*, [2008] EWHC 1777, [236]. Mosley subsequently sued for libel, a case which was pending as of the date of this publication. *Mosley 'to Launch Libel Action*,*'* BBC NEWS, July 27, 2008, http://news.bbc.co.uk/2/hi/uk_news/7527319.stm.

55. Phil Rosenthal, *HBO Plot Twist: Executive Quits After Alleged Assault*, CHI. TRIB., May 10, 2007, at 2.

56. Jacques Steinberg, *After Arrest, HBO Chief Takes Leave of Absence*, N.Y. TIMES, May 9, 2007, at C3.

57. Claudia Eller, *HBO Chief Accused of Assault in 1991*, L.A. TIMES, May 9, 2007, at C1.

58. Time Warner stock remained consistently between $42.21 and $45.23 during

Similarly, Lord John Browne of Madingley, longtime CEO of British Petroleum (BP), was forced to resign after a tabloid revealed him to be engaged in a homosexual relationship and accused him of misusing corporate resources (such as a company laptop and secretarial assistance) to support his ex-partner.[59] The scorned ex-partner alleged that Lord Browne had shared confidential BP information with him, including business plans and strategy.[60] Tipped to the damaging nature of the article, the fiercely private Lord Browne sought an injunction to prevent its publication.[61] At a hearing on the injunction, he gave a false account of how he met the former partner.[62] Almost immediately, Lord Browne revealed that he committed perjury out of embarrassment.[63] He had not met his former partner "while exercising in Battersea Park,"[64] as he claimed on the stand, but under more salacious circumstances.[65] The injunction was denied in part and the court chastised Lord Browne for lying on the stand, but refused to prosecute.[66] An internal review at BP almost immediately cleared Lord Browne of any improper conduct relating to misuse of corporate funds and resources.[67] Nevertheless, Browne immediately left the company, expressing his regret in a penitent statement published in Britain's largest newspapers.[68] His resignation marked the nadir of a one-month decline in BP's stock price.[69]

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the time of Albrecht's arrest, leave of absence, and ultimate resignation. MSN Money, Time Warner Inc (TWX) – Stock Chart, Index Chart, May 5, 2007–June 8, 2007, http://moneycentral.msn.com/investor/charts/chartdl.aspx?symbol=TWX (last visited Jan. 29, 2010).

59. Fiona Barton, *Hubris, Lies and the Gay Affair That Brought Down BP Boss*, DAILY MAIL ONLINE (U.K.), May 2, 2007, http://www.dailymail.co.uk/news/article-451984/Hubris-lies-gay-affair-brought-BP-boss.html; Alan Cowell, *BP's Chief Quits over Revelations About Private Life*, N.Y. TIMES, May 2, 2007, at C1.

60. Browne v. Associated Newspapers Ltd., [2007] EWHC (QB) 202, [21].

61. *See* Cowell, *supra* note 59.

62. *Id.*

63. *Id.*

64. *Browne*, [2007] EWHC 202, [13].

65. Posting of Robert Peston, *Browne's Tragic Lie*, to Peston's Picks (May 1, 2007, 17:45 GMT), http://www.bbc.co.uk/blogs/thereorters/robertpeston/2007/05/brownes_tragic_lie.html.

66. *Browne*, [2007] EWHC 202, [12]. Despite accusing Lord Browne of lying under oath, Mr. Justice Eady refused to refer the matter for further criminal prosecution for perjury. *Id.* at [68].

67. Peston, *supra* note 65.

68. Barton, *supra* note 59.

69. Big Charts, Historical Quotes: BP PLC (BP), http://bigcharts.marketwatch.com/historical/default.asp?detect=1&symbol=BP&close_date=5%2F1%2F07&x=0&y=0 (last visited Jan. 16, 2010); *see also BP Chief Executive Browne Resigns*, BBC NEWS, May 1, 2007, http://news.bbc.co.uk/2/hi/6612703.stm (breaking the news of Lord Browne's

Not all reported romantic imbroglios are so melodramatic.[70] Often, even the more unremarkable breakup of a CEO's marriage is cause for comment and curiosity. This is especially true when the event has potential repercussions for the firm involved. For example, Steve Wynn, the very public CEO of Wynn Resorts, recently filed for divorce from his wife, who sits on the company's board.[71] News of the pending divorce has attracted a considerable amount of media attention, with rumors swirling around reports that the separation was caused by Wynn's affair with a much younger British woman.[72]

B. Unlawful Activity

Leo Dennis Kozlowski was the CEO of Tyco whose once-lauded "willingness to test the limits of acceptable accounting and tax strategies"[73] resulted in financial scandal. In 2002, numerous accounts of Kozlowski's lavish lifestyle surfaced in the media. Kozlowski's holdings reportedly included a $16.8 million apartment on Fifth Avenue (plus $3 million in renovations and $11 million in furnishings), a $7 million apartment on Park

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resignation and explaining the controversy surrounding his departure).

70. Nor is adulterous drama limited to those in the top corporate spot. Take, for example, David Colby, the CFO of WellPoint, America's largest health insurer. Colby was fired in 2007 for violating the "company code of conduct" in ways not directly related to the company's business or attributable to any illegal conduct. *Offering Few Specifics, WellPoint Forces out Its Financial Chief*, N.Y. TIMES, June 1, 2007, at C6. His ouster caused WellPoint's shares to fall 3.5%. *Id.* Even worse for Colby, news of his numerous romantic entanglements soon surfaced. His first wife told the press their divorce was caused by his involvement in two simultaneous extramarital relationships. Lisa Girion, *Women Claim Lives with WellPoint Exec*, L.A. TIMES, June 14, 2007, at C1. Colby wooed many women on an Internet dating site, where he misleadingly advertised himself as a divorced CFO, and he frequently told these women he was looking for a "committed monogamous relationship." Lisa Girion, *WellPoint Is Named in Sexual-Battery Suit*, L.A. TIMES, June 29, 2007, at C1. At the time, Colby was pending divorce from his second wife, living with another woman, and courting several others. *Id.*

Colby has been named in various lawsuits springing from his womanizing. One of the plaintiffs, a WellPoint employee, also joined WellPoint based on a theory of negligence, alleging the company was aware of its CFO's "concurrent relationships" and did nothing to protect her. *Id.* Another plaintiff claimed Colby infected her with sexually transmitted diseases. Posting of Tom Murphy, *Ex-WellPoint Exec Accused of Womanizing*, to Huffington Post, (Jan. 26, 2008, 5:29 EST), http://www.huffingtonpost.com/2008/01/27/exwellpoing-exec-accused_n_83502.html.

71. Richard Slusser, *Taking Names*, WASH. TIMES, Mar. 12, 2009, at B8.

72. *See, e.g.*, Paul Thompson, *Las Vegas Casino Tycoon Steve Wynn Linked to British Divorcee*, DAILY MAIL ONLINE (U.K.), Feb. 17, 2009, http://www.dailymail.co.uk/news/worldnews/article-1148183/Las-Vegas-casino-tycoon-Steve-Wynn-linked-British-divorcee.html; Barbara E. Hernandez, *Wynn Divorce Settlement Could Split Company*, BNET, Mar. 12, 2009, http://industry.bnet.com/travel/10001153/wynn-divorce-settlement-could-split-company.

73. Symonds & Moore, *supra* note 33, at 72.

Avenue,[74] and "palatial homes" in Florida, Nantucket, and Colorado.[75] The CEO also had an extensive art collection, including a $3.95 million Monet and $5.5 million Renoir.[76] As the media dug deeper, the revelations of decadence became more dramatic. Kozlowski's purchases that were not part of the public record (as real estate is) were scrutinized: beyond the famous $6,000 shower curtain, among the many examples of excess were a $15,000 umbrella stand, a $17,100 traveling toilet box, and a $2,200 set of coat hangers.[77] In 2001, the public learned Kozlowski had spent $2.1 million on his wife's fortieth birthday party on the island of Sardinia.[78] Private video of the party revealed a bountiful bacchanal with an ice sculpture of Michelangelo's David that "urinated" expensive vodka.[79]

As it turned out, Kozlowski's posh lifestyle was the product of theft and tax evasion.[80] Kozlowski resigned on June 3, 2002, the day before his indictment on charges of evading New York sales tax on $13.2 million in art.[81] Tyco's stock price fell more than 8% the day of Kozlowski's indictment.[82] In 2005, Kozlowski was convicted of grand larceny, conspiracy, and fraud, having been found to have stolen approximately $150 million from Tyco and to have covertly sold over $400 million worth of stock while improperly reporting his income from those sales.[83]

Like Kozlowski, Henry T. Nicholas III, co-founder and CEO of Broadcom Corporation, enjoyed living large. During his tenure as CEO, he prided himself on his "party animal" reputation. According to a 2003 *New York Times* article, during the height of the dot-com boom, he "bragged about all-night drinking binges, had a 15,000-square-foot house, a Lamborghini Diablo Roadster and a personal trainer on 24-hour call."[84] In 2003, he unexpectedly

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74. Sorkin, *supra* note 9.

75. Anthony Bianco, William Symonds & Nanette Byrnes, *The Rise and Fall of Dennis Kozlowski*, BUS. WK., Dec. 23, 2002, at 64, 72.

76. James B. Stewart, *Spend! Spend! Spend!*, NEW YORKER, Feb. 17, 2003, at 132, 132.

77. Sorkin, *supra* note 9.

78. Bianco, Symonds & Byrnes, *supra* note 75, at 74.

79. Sorkin, *supra* note 32.

80. Bianco, Symonds & Byrnes, *supra* note 75, at 65.

81. *Kozlowski Indicted Again*, CNNMONEY.COM, June 26, 2002, http://money.cnn.com/2002/06/26/news/tyco/index.htm.

82. *Id.* Between December of 2001 and June of 2002, Tyco lost more than $86 million in market capitalization. *Id.*

83. Andrew Ross Sorkin, *Ex-Chief and Aide Guilty of Looting Millions at Tyco*, N.Y. TIMES, June 18, 2005, at A1.

84. Matt Richtel, *Head of Broadcom Quits to Tend to Divorce*, N.Y. TIMES, Jan. 24, 2003, at C2.

resigned citing the need to deal with his impending divorce.[85] Nicholas's sudden resignation and the company's large financial loss in the fourth quarter sent Broadcom stock down 15.22%.[86] At the time, industry analysts commented that Nicholas "was synonymous with the company and that creates an image issue" for Broadcom.[87]

Matters only got worse. Several years later, Nicholas's former office assistant sued him for payment of back wages.[88] In the lawsuit, the ex-employee referred to Nicholas's drug use, questionable stock dealings, hiring of prostitutes, and other illegal and questionable activity.[89] The press quickly uncovered a previously settled 2002 complaint in which a contractor sued Nicholas for payment on the construction of what court documents described as a "secret and convenient lair" with hidden entryways, built to indulge Nicholas's "manic obsession with prostitutes" and drug addictions.[90] Thereafter, Nicholas was indicted on charges of securities fraud, hiring prostitutes, and the use and distribution of cocaine, ecstasy, and methamphetamines.[91] The indictment alleged, among other juicy details, that Nicholas provided drugs to Broadcom executives (sometimes without their knowledge or consent), and hired prostitutes for customers and associates of Broadcom.[92] One witness described an incident in 2001 when Nicholas and his guests smoked so much marijuana on his private jet plane that the pilot had to put on an oxygen mask.[93] After his indictment, a video was posted on YouTube that purportedly depicted Nicholas nasally ingesting a powdery substance.[94] YouTube promptly disabled the video when Nicholas's attorneys complained it was unduly invasive of his privacy.[95]

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85. *Id.*

86. Jeff Baumgartner, *Broadcom CEO Resigns; Company Posts Big Loss*, CEDMAGAZINE.COM, Jan. 24, 2003, http://www.cedmagazine.com/broadcom-ceo-resigns-company.aspx.

87. Richtel, *supra* note 84 (quoting Kalpesh Kapadia, a semiconductor analyst at an investment bank).

88. E. Scott Reckard & Kim Christensen, *Billionaire Sought Secret Lair for Sex, Drugs, Complaint Says*, L.A. TIMES, July 18, 2007, at C1.

89. *Id.*

90. *Id.*

91. Laura M. Holson, *Former Chief of Broadcom Is Indicted*, N.Y. TIMES, June 6, 2008, at C5. The fraud charges arise from Nicholas's alleged backdating of executive stock options. *Id.*

92. *Id.*

93. *Id.*

94. Jackson West, *Henry Nicholas Used Drugs While Under Indictment, According to YouTube Video*, GAWKER, June 10, 2008, http://gawker.com/5015085/henry-nicholas-used-drugs-while-under-indictment-according-to-youtube-video.

95. *Id.*

The Nicholas-type "image issue" can become particularly acute when the CEO is so closely identified with the company that the public can hardly tell the two apart. Such was the case with Martha Stewart. In addition to being its public face, Martha Stewart was CEO and chairman of the board of Martha Stewart Living Omnimedia, Inc. (MSLO), as well as its majority shareholder, holding 53.9% of its outstanding common stock and 100% of its class B shares.[96] On December 27, 2001, Stewart sold her 3,928 shares in ImClone Systems, Inc., just one day before the pharmaceutical company announced that its FDA application for the colorectal drug Erbitux had been rejected.[97] In June 2003, the SEC filed a federal court complaint against Stewart, alleging that she sold her ImClone stock after learning material nonpublic information communicated by way of her Merrill Lynch broker, Peter Bacanovic, who was also the broker of Sam Waksal, CEO of ImClone.[98] The putative tip was that Waksal had instructed Merrill Lynch to sell all of his ImClone stock, as well as those of his daughter, which the SEC claimed conveyed pessimism about ImClone's pending FDA drug application.[99] Stewart was also indicted on charges of criminal insider trading and other charges arising out of her attempts to cover up her actions.[100] In the two months following commencement of the investigation into Stewart's ImClone trade, MSLO stock declined by 65%.[101] Ultimately, in 2004, Stewart was convicted of conspiracy to obstruct justice, to make false statements, and to commit perjury, and she was sentenced to five months' incarceration, two years' supervised release, of which five months were to be served under house arrest, and payment of a $30,000 criminal fine.[102] She settled the SEC's administrative charges against her in 2006.[103]

96. Christine Hurt, *The Undercivilization of Corporate Law*, 33 J. CORP. L. 361, 417 (2008).

97. *Id.* at 417–18; *see also* SEC, *supra* note 7 (detailing the allegations contained in the SEC's complaint against Martha Stewart and her broker, Peter Bacanovic, for insider trading).

98. SEC, *supra* note 7.

99. *Id.*

100. *See* United States v. Stewart, 305 F. Supp. 2d 368, 370–71 (S.D.N.Y. 2004).

101. Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 833 A.2d 961, 969 (Del. Ch. 2003).

102. United States v. Stewart, 433 F.3d 273, 280 (2d Cir. 2006).

103. To settle the administrative case against her, among other penalties Stewart consented to pay disgorgement of her losses avoided in the amount of $45,673, prejudgment interest on that sum of $12,389, a civil penalty of $137,019, and entry of an order banning her for five years from serving as a director of a publicly traded company. SEC, Litigation Release No. 19,794 (Aug. 7, 2006), http://www.sec.gov/litigation/litreleases/2006/lr19794.htm.

C. Health

Criminal investigations and convictions are a matter of public record. Arguments can be made that lifestyles and romantic lives are lived out in public, and therefore are deserving of less privacy. However, most agree that an individual's health is in the inner sanctum of what is considered private in Western cultures. For this reason, disclosures regarding the health of top executives are particularly delicate, as they pin the CEO's personal privacy rights directly against investors' rights to information affecting the company. And yet, as to the iconic CEO, the public is both surprised that he is subject to human frailties and intrigued by his condition.

Consider the case of Apple co-founder Steve Jobs, whose name is synonymous with the industry giant.[104] In 2004, Jobs revealed that he had undergone a successful surgery for pancreatic cancer.[105] Thereafter, in a commencement speech at Stanford University, Jobs divulged more: he had been diagnosed with a "very rare form of pancreatic cancer," at one point was given "no longer than three to six months" to live, but hoped to live many more years.[106] In 2008, Jobs's haggard appearance and rapid weight loss renewed a speculative frenzy about his health. Media reports of his condition ranged from pancreatic cancer[107] to heart attack,[108] and reports of the gravity of his condition ranged from terminal to already dead.[109] The uncertainty caused Apple's stock to sink in late 2008.[110] To quiet rumors, Jobs wrote an open letter to the Apple community, published on the *New York Times* website on January 5, 2009, to inform that he had a treatable "hormone imbalance" that prevented him from gaining weight.[111] Apple stock rose 4%.[112] Eight days later, however, the Apple community received a second, more pessimistic letter announcing

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104. *See* Stone, *supra* note 13.

105. Joe Nocera, *Apple's Culture of Secrecy*, N.Y TIMES, July 26, 2008, at C1.

106. Steve Jobs, Address at Stanford University Commencement (June 12, 2005), *available at* http://news.stanford.edu/news/2005/june15/jobs-061505.html.

107. Blodget, *supra* note 5.

108. Slash Lane, *Apple Denies CNN iReport of Steve Jobs Heart Attack*, APPLE INSIDER, Oct. 3, 2008, http://www.appleinsider.com/articles/08/10/03/apple_denies_cnn_ireport_of_steve_jobs_heart_attack.html.

109. John C. Abell, *Steve Jobs Is Not — Repeat, Not — Dead*, WIRED, Aug. 28, 2008, http://www.wired.com/epicenter/2008/08/steve-jobs-is-n/#previouspost.

110. *See* Stone, *supra* note 13.

111. Letter from Steven P. Jobs to Apple Community (Jan. 5, 2009), *available at* www.nytimes.com/2009/01/06/technology/companies/jobsletter.html?scp=22&sq=Steve%20Jobs&st=cse.

112. Stone, *supra* note 13.

Jobs's five-month leave of absence. In that letter, Jobs stated that he "learned that [his] health-related issues [were] more complex than [he] originally thought."[113] Jobs wrote that he planned to "remain involved in major strategic decisions while [he was] out,"[114] but investors were not comforted by his statements, and Apple stock dropped again after his announcement.[115]

Corresponding with the conclusion of the projected five-month leave, it was revealed Jobs had received a liver transplant.[116] His doctors announced that the CEO was "recovering well" and had "an excellent prognosis."[117] They also offered that Jobs had received the liver because he had "the most urgent need" on the list.[118] This statement was clearly inconsistent with prior Apple disclosures and prompted skepticism and considerable comment.[119] Apple's stock dropped $2.11 after the announcement of Jobs's transplant.[120] Jobs's erratic disclosures prompted an SEC investigation into the veracity and adequacy of the company's statements about Jobs's health.[121] Although Steve Jobs made his scheduled return, the company's and CEO's past secrecy have called into question the CEO's future and the company's forthrightness.[122]

The extent to which a company should disclose its CEO's condition is a contentious issue. Even companies that are transparent about their CEO's illnesses are not immune from public criticism, speculation, and even attribution of the CEO's

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113. Letter from Steven P. Jobs to Apple Employees (Jan. 14, 2009), *available at* http://bits.blogs.nytimes.com/2009/01/14/text-of-jobss-letter-to-apple-employees.

114. *Id.*

115. Jordan Golson, *Apple Stock Drops to 52-Week Low*, INDUSTRY STANDARD, Jan. 14, 2009, http://www.thestandard.com/news/2009/01/14/apple-stock-rocked-steve-jobs-medical-leave.

116. Kane & Lublin, *supra* note 5.

117. Barry Meier, *Hospital in Memphis Says It Did Jobs's Liver Surgery*, N.Y. TIMES, June 24, 2009, at B3.

118. *Id.*

119. *See, e.g.*, Denise Grady & Barry Meier, *A Transplant That Is Raising Many Questions*, N.Y. TIMES, June 23, 2009, at B1; David Sarno & Walter Hamilton, *Apple Takes Flak on Jobs Disclosure*, L.A. TIMES, June 25, 2009, at B1; Posting of Ashby Jones, *The Steve Jobs/SEC Question, Take II: Did Apple Say Enough?*, to WSJ Law Blog (June 25, 2009, 10:48 EST), http://blogs.wsj.com/law/2009/06/25/the-steve-jobssec-question-take-ii-did-apple-say-enough.

120. Brad Stone & Ashlee Vance, *Apple Obsessed with Secrecy on Products and Top Executives*, N.Y. TIMES, June 23, 2009, at B1.

121. Parloff, *supra* note 6.

122. Posting of Joe Nocera, *It's Time for Apple to Come Clean*, to Executive Suite, (Jan. 15, 2009, 10:10 EST), http://executivesuite.blogs.nytimes.com/2009/01/15/its-time-for-apple-to-come-clean/?hp.

illness to the company. Take the McDonald's example. In 2004, James R. Cantalupo, CEO of McDonald's, died of a massive heart attack hours before giving a presentation at the company's annual Worldwide Owner/Operator Convention.[123] The sixty-year-old CEO was known for his struggle with obesity throughout the 1990s but had recently lost weight.[124] As if to avoid the association with its product's alleged health risks, a McDonald's consultant insisted the heart attack was most likely caused by his extremely "stressful" schedule and extensive amount of international travel.[125] Reports of Cantalupo's sudden death caused McDonald's stock to drop 2.6%.[126] Hours after Cantalupo's death, McDonald's announced the appointment of his successor, Charles H. Bell, who, at age forty-three, would become the youngest CEO in company history.[127] Only two weeks after his appointment, Bell was diagnosed with colon cancer.[128] The company released news of his diagnosis a week later, along with news of his successful surgery.[129] Bell underwent treatment by surgery and chemotherapy,[130] causing him to miss important public corporate events, such as the 2004 Olympics and several critical conferences.[131] His poor health and inability to act as CEO forced him to resign in November 2004,[132] only two months before his death.[133]

The tragedy of the deaths of two consecutive McDonald's CEOs did not escape public scrutiny, nor did the irony that they both died of ailments associated with high-calorie and fatty diets. Company critics rushed to blame the CEOs' deaths on McDonald's products in what became a public relations nightmare for the company.[134]

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123. Margaret Webb Pressler, *McDonald's CEO Dies at 60*, WASH. POST, Apr. 20, 2004, at E1.

124. *McDonald's Chairman, CEO Dies Unexpectedly*, MSNBC, Apr. 19, 2004, http://www.msnbc.msn.com/id/4778305.

125. *Id.*

126. Pressler, *supra* note 123.

127. Sherri Day, *McDonald's Plans Slowed by New Chief's Surgery*, N.Y. TIMES, May 11, 2004, at C2.

128. *Id.*

129. *Id.*

130. Leslie Wayne & Eric Dash, *Citing Cancer, Chief Resigns at McDonald's*, N.Y. TIMES, Nov. 23, 2004, at C1.

131. Melanie Warner & Patrick McGeehan, *Change at Helm, but a Steady Course at McDonald's*, N.Y. TIMES, Nov. 24, 2004, at C1.

132. Wayne & Dash, *supra* note 130.

133. Melanie Warner, *Charles Bell, 44, Dies; Headed McDonald's*, N.Y. TIMES, Jan. 17, 2005, at B6.

134. *E.g.*, *McDonald's CEO Charlie Bell Dies from 'McDonald's' Diet*, INFOSHOP NEWS, Jan. 18, 2005, http://news.infoshop.org/article.php?story=20050118091515191;

These and other recent media circuses around CEOs have raised compelling questions as to where to draw the line between morbid curiosity and consumer entitlement regarding the private lives of business leaders. The next Part analyzes the contours of CEO privacy in the United States.

IV. PRIVACY LAW: WHERE DOES THE CEO BEGIN AND THE PRIVATE INDIVIDUAL END?

To what extent can a corporate executive keep certain matters from his employer and out of the public spotlight? Privacy rights, although popularly conceived as a universal entitlement, are highly contextual and contingent on the role and identity of their seeker. The subparts that follow serve as a primer on relevant U.S. privacy law, which is governed by a patchwork of federal and state statutes on the one hand, and the common law on the other.

A. *Statutory Law*

Before the privacy rights of CEOs can be properly balanced against the right of investors to information, we must undertake a comprehensive analysis of the statutory privacy landscape. Privacy statutes are generally organized thematically by the behavior they attempt to redress (e.g., polygraph testing of employees) and the subject of the protected information (e.g., health and financial information). They are narrowly tailored to govern particular intruding or disclosing parties and most often address disclosure to the government, not to individuals, businesses, or private-sector organizations. Viewing these rights through the prism of a CEO attempting to prevent disclosure of her private facts, we can classify the relevant statutes as either employment-related or springing from confidentiality usually attendant to divorce proceedings.

1. Employment-Related Privacy Statutes. As private-sector employees, chief executives are covered by a variety of federal statutes prohibiting specific types of intrusive behavior in the workplace. Private-sector employees are protected from employer intrusion by the Employee Polygraph Protection Act of 1988,[135]

Danielle Sacks, *McDonald's Death: Eating Away at the Brand?*, FASTCOMPANY, Feb. 8, 2008, http://www.fastcompany.com/blog/danielle-sacks/culture-vulturist/mcdonalds-death-eating-away-brand.

135. Employee Polygraph Protection Act of 1988, Pub. L. No. 100-347, 102 Stat. 646 (codified as amended at 29 U.S.C. §§ 2001–2009 (2006)).

the Fair Credit Reporting Act,[136] the Electronic Communications Privacy Act of 1986,[137] and the Americans with Disabilities Act of 1990,[138] among other state-specific laws. Although it may seem incongruous to discuss CEOs in the context of statutes enacted to protect those "relegated to a position of political powerlessness,"[139] high-level executives receive the same protections granted to other less influential employees.

Many of these statutory protections apply only to very narrow situations. So, for example, despite its comprehensive name, the Right to Financial Privacy Act of 1978 does not render all financial information private.[140] Instead, it prevents banks or other financial institutions from disclosing an individual's financial information to the government without a subpoena or a search warrant.[141] While this statute would prohibit an employer that is a financial institution from disclosing certain financial data about its CEO employee to the government, it would not govern the company's disclosure of its CEO's compensation, which is mandated by the SEC's periodic disclosure regulations.[142]

Other statutes have similarly idiosyncratic application. For instance, the Health Insurance Portability and Accountability Act's (HIPAA) health record confidentiality[143] protects health information in the hands of a covered entity such as a health care provider.[144] As such, HIPAA would not cover a patient who

136. Fair Credit Reporting Act, Pub. L. No. 91-508, §§ 601–622, 84 Stat. 1114, 1128–36 (1970) (codified as amended at 15 U.S.C. §§ 1681–1681x (2006)) (regulating the use of credit reports in employment).

137. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (codified as amended in scattered sections of 18 U.S.C.).

138. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

139. 42 U.S.C. § 12101(a)(7) (2006).

140. Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, 92 Stat. 3697 (codified as amended in scatted sections of 12 U.S.C.) (providing exceptions to the right to financial privacy for law enforcement purposes or those of other government agencies).

141. 12 U.S.C. §§ 3403–3407 (2006).

142. *See* 17 C.F.R. § 229.402 (2008).

143. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 26 and 42 U.S.C.).

144. 45 C.F.R. §§ 160.103, 164.502 (2008). Notably, some state laws expand federal health privacy rights. Texas's medical records privacy law, for example, defines "covered entity" as any person who has a role in the "assembling, collecting, analyzing, using, evaluating, storing, or transmitting" of personal health information for any reason, as well as anyone who comes into possession of such information. TEX. HEALTH & SAFETY CODE ANN. § 181.001(b)(2)(A)–(B) (Vernon Supp. 2009). This expansive definition presumptively includes employers, who would be prohibited from using or disclosing any employee health information in all but very limited circumstances. *See* TEX. HEALTH & SAFETY CODE ANN. § 181.001(b)(2)(D) (Vernon Supp. 2009) (including employees of such persons within the definition of "covered entity").

discloses his ward-mate's condition, a hospital visitor's discovery of a celebrity in the emergency room, or a paparazzo photographing someone being wheeled into a hospital on a stretcher. Speculation about Jobs's sickly appearance at a conference and rumors about Bell's prognosis are thus entirely outside the scope of HIPAA, so long as the health information was not leaked by a covered entity.

Similarly, the Fair Credit Reporting Act governs an employer's use of information collected as part of a "consumer report" on an employee or employment applicant.[145] The Employee Polygraph Protection Act of 1988 (EPPA) makes it unlawful for private-sector employers "directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test"[146] or "to use . . . the results of any lie detector test of any employee or prospective employee."[147] Only in the unlikely scenario where an employer learns personal information by way of a polygraph test or through the compilation of a consumer report on the CEO would the latter two statutes operate to prevent the employer from disclosing such information.

Thus far, the statutes discussed have had a fairly limited impact on a CEO's right to keep certain information private. Two other employment-related statutes have broader application to the specific question of CEO privacy. These are the Electronic Communications Privacy Act and the Americans with Disabilities Act.

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145. The broad definition of a "consumer report" encompasses "communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." 15 U.S.C. § 1681a(d) (2006) (footnote omitted). The FCRA limits the redisclosure of medical information contained in such reports, but is silent as to the employer's duty of confidentiality regarding financial and other private information gathered through permissible access to employee consumer reports. 15 U.S.C. § 1681b(g)(4) (2006).

146. 29 U.S.C. § 2002(1) (2006).

147. 29 U.S.C. § 2002(2) (2006). The Act does permit limited exemptions for ongoing investigations, allowing an employer to request an employee to submit to a polygraph test if the employer provides a written statement establishing the reasons for examination and if:

> (1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business . . . ;
>
> (2) the employee had access to the property that is the subject of the investigation;
>
> (3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation . . . .

29 U.S.C. § 2006(d) (2006). Significantly, the private-sector employer may not disclose the information obtained during a polygraph test to the public. 29 U.S.C. § 2008(c) (2006).

2. Electronic Communications Privacy Act of 1986. The Electronic Communications Privacy Act of 1986 (ECPA) prohibits the unauthorized access, interception, and disclosure of wire, oral, and electronic communications.[148] The statute governs issues such as wiretapping and electronic surveillance both in and beyond the workplace.[149]

The wiretap provisions of the ECPA bar the intentional use, interception, or disclosure of electronic or wire communication without an applicable exception.[150] This statute allows companies to monitor employee communications so as to "combat fraud and theft of service."[151] Courts have routinely held that the disclosure of communications gathered through lawful interceptions is permissible.[152] Employers and employees may, therefore, legally disclose to a third party any electronic communication intercepted in a manner not in violation of the ECPA.[153]

There are a number of exemptions to the ECPA that act to limit a snooping employer's liability. First, an employer's liability is determined by the degree to which employees are accurately apprised of the nature and extent of monitoring practices.[154] Company e-mail or Internet usage policies generally constitute express or implied consent by employees to allow the employer to intercept electronic communications.[155] Second, the ECPA does not protect communications that are "readily accessible to the general public"[156] or that occur "in the ordinary course of business."[157]

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148. 18 U.S.C. § 2511 (2006).

149. *Id.*

150. 18 U.S.C. § 2511(1) (2006).

151. United States v. Villanueva, 32 F. Supp. 2d 635, 639 (S.D.N.Y. 1998).

152. *E.g.*, Smith v. Cincinnati Post & Times-Star, 475 F.2d 740, 741 (6th Cir. 1973); *see also* Ferrara v. Detroit Free Press, Inc., 52 F. App'x 229, 231–32 (6th Cir. 2002) (finding no liability for third-party disclosure where recording was not made with a criminal, tortious, or improper purpose).

153. *See, e.g.*, 18 U.S.C. § 2511(2)(a)(i) (2006).

154. *See* Deal v. Spears, 980 F.2d 1153, 1157 (8th Cir. 1992) (finding that employee did not impliedly consent to employer's taping of her personal phone calls made over her employer's phone line); Watkins v. L.M. Berry & Co., 704 F.2d 577, 581–82 (11th Cir. 1983) (recognizing that acceptance of employment upon knowledge that employer can monitor sales calls does not constitute employee's implied consent for employer to monitor her personal calls).

155. 18 U.S.C. § 2511(2)(d) (2006) (creating exception to liability where one party has consented to interception); Sporer v. UAL Corp., No. 08-02835, 2009 WL 2761329, at *5–6 (N.D. Cal. Aug. 27, 2009) (finding employee impliedly consented to interception of his e-mails where he was reminded of the company's monitoring policy each time he logged onto his computer).

156. 18 U.S.C. § 2511(2)(g)(i) (2006).

157. 18 U.S.C. § 2510(5)(a) (2006).

The stored communication provisions of the ECPA regulate the storage of electronic data and communications, such as e-mails between private parties.[158] If employers are providers of internal workplace e-mail systems, they may access employees' e-mail messages from post-transmission storage (regardless of designation as personal or professional) and are exempt from liability under the ECPA.[159] Consequently, an employer may divulge the contents of any employee e-mail it stores.[160]

3. The Americans with Disabilities Act. Enacted in 1990, the Americans with Disabilities Act (ADA)[161] is designed to protect those with "a physical or mental impairment that substantially limits one or more of the major life activities" in the workplace and in other settings.[162] One of the ways the ADA protects the disabled is by prohibiting employers from obtaining medical information about employees via medical examinations and inquiries under certain circumstances.[163] The ADA lists acceptable examinations and inquiries and clearly outlines the corresponding confidentiality requirements.[164] An employer may conduct voluntary medical examinations as part of an employee health program and "make inquiries into the ability of an employee to perform job-related functions."[165] Any health information acquired by employers through these acceptable means is then confidential. According to the ADA, employers must not disclose this information to anyone except the employee's supervisors, first aid personnel, and government officials investigating ADA compliance.[166]

Employers may learn of an employee's condition impacting his ability to perform job-related functions from one of four different sources: (1) the employee's voluntary disclosure pursuant to employer-mandated examinations and inquiries;

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158. 18 U.S.C. § 2701(a) (2006).

159. *See* Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 114–15 (3d Cir. 2003).

160. Like other statutes discussed herein, the ECPA sets a minimum floor for privacy protection. State wiretapping statutes may grant individuals more extensive privacy rights. For example, Florida's wiretapping statute prohibits the interception and disclosure of the contents of any electronic communication without obtaining the consent of both the sender and the recipient. FLA. STAT. ANN. § 943.03(2)(d) (West 2001).

161. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101–12213 (2006)).

162. 42 U.S.C. § 12102(2)(A) (2006).

163. 42 U.S.C. § 12112(d)(4)(A) (2006) (prohibiting medical examinations and inquiries unless "shown to be job-related and consistent with business necessity").

164. 42 U.S.C. § 12112(d)(4)(B)–(C) (2006).

165. 42 U.S.C. § 12112(d)(4)(B) (2006).

166. 42 U.S.C. § 12112(d)(3)(B), (4)(C) (2006).

(2) the employee's involuntary or forced disclosure pursuant to employer-mandated examinations and inquiries; (3) the employee's self-initiated disclosure; or (4) third-party disclosure.[167] The employer's duty of confidentiality as to that employee's health information depends on the source of such disclosure. The ADA's confidentiality requirements apply to that limited category of information gathered through permissible examinations and job-related inquiries.[168]

A board may legally ask a sick-looking CEO about her condition as it relates to her ability to do her job, but disclosing the fruit of that particular inquiry to the investing public would technically be in contravention of the ADA.[169] This may be true whether the disclosure is involuntary or voluntary. If the executive's response to an employer-initiated inquiry regarding her health is involuntary, the information in question would be subject to the ADA's confidentiality rules. When the executive's response is voluntary, her willingness may constitute an implicit waiver of ADA confidentiality rights. However, "[t]he ADA does not explicitly preclude or permit an employee to waive rights of confidentiality for medical information."[170] For this reason, some have argued that the ADA may conflict with the mandatory disclosure requirement of executive illnesses for purposes of securities laws.[171]

Although the ADA is silent on the employer's duty of confidentiality in regards to information voluntarily offered by the employee, case law suggests that when an executive voluntarily shares her health information, the ADA's confidentiality requirements do not apply.[172] In *Cash v. Smith*, an employee divulged her diabetes diagnosis to her superior in confidence.[173] When the superior shared the information with others, the employee sued under the ADA and lost.[174] The Eleventh Circuit held that a voluntary disclosure to an employer not pursuant to an employer-initiated inquiry was not subject to

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167. *See* EEOC, ADA ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS 17, 20–21 (1995), *available at* http://www.eeoc.gov/policy/docs/medfin5.pdf.

168. 42 U.S.C. § 12112(d)(4)(B) (2006); EEOC, *supra* note 167, at 20.

169. *See* EEOC, *supra* note 167, at 20 (noting employers must keep all medical information learned about an employee confidential).

170. Andrew K. Glenn, Note, *Disclosure of Executive Illnesses Under Federal Securities Law and the Americans with Disabilities Act of 1990: Hobson's Choice or Business Necessity?*, 16 CARDOZO L. REV. 537, 578–79 (1994).

171. *Id.* at 581–82.

172. *See, e.g.*, Cash v. Smith, 231 F.3d 1301, 1307–08 (11th Cir. 2000).

173. *Id.* at 1303.

174. *Id.* at 1303–04, 1308.

the ADA's confidentiality requirement, even when the disclosure was made in confidence.[175]

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. Whether it be for purposes of transparency, succession planning, image control, or a request for time off,[176] a high-ranking executive is likely to voluntarily share her health situation with her company or colleagues rather than wait until the board is compelled to ask whether she is able to serve as CEO. Executives would likely feel morally or legally obligated to share their health status for the sake of the company.[177] Such voluntary disclosure would not be subject to the ADA's confidentiality requirement.

In the event that the board was to learn about its CEO's illness from a third-party source, such as a newspaper or the office busybody, the company would have no duty to keep the now-public information confidential. In fact, as soon as the CEO shares her information with a third party who is not bound by a duty of confidentiality, such information is likely to be deemed public.

4. State Statutes Limiting Access to Divorce Records. Divorcing parties often seek to restrict access to their divorce records to prevent the embarrassment that may accompany disclosure of financial and marital details. To varying degrees, states have allowed divorcing parties some degree of confidentiality.[178] In many states, parties seeking to seal proceedings are required to prove "good cause" overriding the public's right to access otherwise open court records.[179] In *Katz v. Katz*, a 1986 Pennsylvania case involving the founder of Nutri/System Inc. and then-owner of the Philadelphia 76ers, the court agreed to seal the divorce proceedings on the basis that not

175. *Id.* at 1307–08.

176. The D.C. Circuit has held that if the employee divulges his health status in connection with a Family and Medical Leave Act request required by the employer, the employer request amounts to an inquiry and thus triggers the ADA confidentiality requirements. *See* Doe v. USPS, 317 F.3d 339, 344–45 (D.C. Cir. 2003).

177. In fact, the CEO who conceals his illness from his firm may be in breach of a contractual or other duty.

178. *E.g.*, CAL. FAM. CODE § 2024.6(a) (West 2004) (providing a right to petition to seal record of financial assets following dissolution of marriage, nullity of marriage, or legal separation); N.H. REV. STAT. ANN. § 458:15-b(I) (LexisNexis 2007) (requiring all financial affidavits to be kept confidential upon their filing); VA. CODE ANN. §§ 20-121.03, 20-124 (2008) (sealing all financial documents required by law to be filed and providing a right for either party to seal the court record or any settlement agreement).

179. KAN STAT. ANN. § 60-2617 (Supp. 2008); DEL. R. CIV. P. 5(g) (2008).

doing so would harm the businessman's privacy interest and put investors in danger of being misled by the acrimonious testimony.[180]

Other states automatically grant sealing requests, forgoing the requirement that the moving party prove "good cause."[181] The divorce case of hotel mogul Steve Wynn is one such case. The CEO was concerned about the negative effect of such disclosure on his business interests and the publicly traded company.[182] A Nevada court granted Wynn's request to seal his divorce,[183] pursuant to a Nevada statute.[184] Such "automatic" divorce sealing statutes have been challenged on First Amendment grounds. In 2006, a California appeals court struck down California's divorce sealing statute as unconstitutional in the context of a high-profile businessman's divorce.[185] The year before, New Hampshire's counterpart partially survived a First Amendment challenge.[186]

With state records now accessible online in most states, concern about public exposure is magnified. In fact, an increasing number of companies are petitioning courts to seal the divorce records of top executives, arguing that the proceedings may disclose trade secrets, assets, executive compensation, and other sensitive corporate information that may be detrimental to business interests.[187]

* * *

Analysis of the foregoing statutes highlights some legal and practical realities regarding CEO privacy. A CEO's ability to shield divorce records may provide powerful protection for certain personal matters, but it is limited by statute and at best protects only documents filed with the court. Much of the information gathered there may be available via other sources that are not similarly bound by confidentiality.

Our review of the privacy rights of CEOs as employees reveals several basic principles at work. First is the simple

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180. Katz v. Katz, 514 A.2d 1374, 1375, 1380 (Pa. Super. Ct. 1986).

181. *E.g.*, NEV. REV. STAT. ANN. § 125.110(2) (LexisNexis 2004); VA. CODE ANN. § 20-124 (2008).

182. Jeff German, *How Much Privacy Is Due Public Figures in Divorce?*, LAS VEGAS SUN, Mar. 27, 2009, http://www.lasvegassun.com/news/2009/mar/27/how-much-privacy-due-public-figures; Liz Benston & Jeff German, *Wynns' Breakup Won't Break Up Company*, LAS VEGAS SUN, Mar. 18, 2009, http://www.lasvegassun.com/news/2009/mar/18/breakup-wont-break-company.

183. German, *supra* note 182.

184. NEV. REV. STAT. ANN. § 125.110(2) (LexisNexis 2004).

185. Burkle v. Burkle, 37 Cal. Rptr. 3d 805 (Cal. Ct. App. 2006).

186. Associated Press v. State, 888 A.2d 1236, 1257–58 (N.H. 2005).

187. Tresa Baldas, *Divorces Sealed as Business Priority*, NAT'L L.J., Nov. 14, 2005, at 1.

assertion that the chief executive is a protected employee entitled to the same workplace privacy safeguards as other corporate workers, even though in practice these rights may seem awkward when applied to the top managers who ultimately call the shots. Second, it is not the nature of the information, but rather the capacity in which it was generated or received by the corporation, that determines whether certain privacy laws apply. Information gathered through employer-initiated polygraph tests, impermissible wiretapping, and health inquiries cannot be re-disclosed by the employer pursuant to the EPPA, ECPA, and ADA, respectively. Medical information gleaned through a credit report or as a covered entity under HIPAA is equally banned from disclosure to third parties. None of these statutes includes a "public interest" exception. Thus any new regulation proposing to compel disclosure of such information—to investors for example—would be in contravention of multiple federal and state privacy statutes.[188]

B. The Reasonable Expectation of Privacy Circumscribed by Tort Jurisprudence

A 1995 *New Yorker* article chronicles the life of Neil Cargile, a prominent businessman who secretly dressed as a woman in his private life.[189] During the interview, for which he wore a tight dress, the CEO was interrupted by a business-related call.[190] When the journalist asked what the other caller would have thought had he been able to see as well as hear him, Cargile responded, "He'd have dropped dead."[191]

Aside from shock, the client may have taken his business elsewhere, harming the CEO's company. Indeed, in 2000 a supermarket employee was fired after his superiors learned he was a cross-dresser.[192] Company representatives maintained the employee was terminated because his aberrant behavior would certainly drive customers away.[193] This contention, which links company performance with the personal lives and habits of employees, demonstrates a growing logic in the corporate world:

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188. Finally, we would be remiss not to note the powerful role of consent in this context. It is foreseeable that employment agreements could address some of these privacy-related issues in areas where expressly permitted by statute.

189. John Berendt, *High-Heel Neil*, NEW YORKER, Jan. 16, 1995, at 38.

190. *Id.* at 40–41.

191. *Id.* at 41–42.

192. Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 WL 31098541, at *2 (E.D. La. Sept. 16, 2002).

193. *Id.*

the employee is a company representative in all areas of his life.[194] This is especially true at the upper echelons of the corporate hierarchy.

The pressure to conform private life to the demands of the business blurs the line between the public and private arenas of an executive's life. From a legal standpoint, we must clarify that vague distinction between the executive's individual privacy and the public's interest in the perceived impact of his private behavior on the company. The line is particularly difficult to define when the disclosed information is not subject to privacy statutes. The CEO's privacy rights in such cases find their parameters in tort law, which in turn is bounded by critical First Amendment analyses of the disclosure's social utility. As such, the determination of an individual's privacy often begins and ends with traditional public figure analysis commencing with *New York Times Co. v. Sullivan* and its progeny, which held that the First Amendment requires public officials and public figures to prove actual malice in order to prevail on a defamation claim.[195]

Public figures are defined as those who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large."[196] It is quite clear that some business leaders may meet these criteria. The legal determinants of CEO public figure status include such factors as personal fame, profile of the corporation, participation in public controversies, and relationship with the press. However, mere prominence in business is usually not enough to trigger public figure status.[197]

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194. As some have noted, "as employees move up the organizational hierarchy, so does the expectation of conformity with organizational expectations in one's private life." Rafael Gely & Leonard Bierman, *Workplace Blogs and Workers' Privacy*, 66 LA. L. REV. 1079, 1107 (2006). Accordingly, the lives of employees, particularly those who are publicly associated with their firms, become "penetrable and not very private." ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 121 (1977).

195. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

196. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring).

197. *See, e.g.*, Wilson v. Scripps-Howard Broad. Co., 642 F.2d 371, 374 (6th Cir. 1981) (holding cattleman a private figure despite earlier efforts to promote his business); Dixson v. Newsweek, Inc., 562 F.2d 626, 628 (10th Cir. 1977) (ruling former airline vice president a private figure); Rancho La Costa, Inc. v. Superior Court, 165 Cal. Rptr. 347, 356 (Cal. Ct. App. 1980) ("[M]erely because a corporation sells services to the public . . . and merely because it employs and has access to the media to advertise its services . . . does not . . . give[ ] the corporation the status of one with greater power of persuasion on public issues, controversial or not, or all-pervasive influence."); Taskett v. KING Broad. Co., 546 P.2d 81, 82–83 (Wash. 1976) (holding advertising agency head who was alleged to have appropriated clients' money was a private figure).

Moreover, the fact that a story piques public interest or that its subject is known by a large number of people does not render its subject a public figure.[198] Ultimately, tenuous connections between the personal lives of executives and public controversies are often not sufficient to brand them public figures for purposes of defamation law.[199]

The applicability of the privacy torts is similarly constrained by the First Amendment and reasonableness inquiries. In its modern incarnation, invasion of privacy consists of four separate torts: (1) intrusion upon the plaintiff's seclusion or solitude; (2) public disclosure of private facts; (3) publicity that places the plaintiff in a false light; and (4) appropriation of the plaintiff's name or likeness.[200] The appropriation tort protects the dignitary interests associated with the use of one's identity, name, or likeness.[201] The other three privacy torts are most relevant to a discussion of CEO privacy.

The intrusion tort imposes liability when someone "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" by engaging in invasive activities like peeping into an area where the plaintiff enjoys a reasonable expectation of privacy.[202] Mosley, for example, likely would have had a strong claim against the prostitute and news tabloid for the American intrusion tort based on the tabloid's surreptitious taping of his sexual dalliance with a hidden camera. But no such claim would have arisen against his employer, especially since the conduct in question occurred outside the workplace. To be sure, when the employer is alleged to be the intruder, courts weigh the employee's privacy interests against the employer's need to discover the information. This balancing often tips in favor of the employer, given the limited expectation of privacy afforded in the workplace.[203]

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198. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (finding divorce of high-profile couple not a "public controversy").

199. Patricia Sanchez Abril, The Evolution of Business Celebrity in American Law and Society 27–28 (Dec. 23, 2009) (unpublished manuscript, on file with Houston Law Review).

200. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960) (articulating for the first time this division of the privacy tort). Appropriation would likely apply if a company used the image of a famous business leader in its advertisements without securing consent, a fact pattern not implicated by this inquiry.

201. RESTATEMENT (SECOND) OF TORTS § 652C (1977).

202. *Id.* § 652B.

203. For example, many courts have concluded that employees have no reasonable expectation of privacy in communications over a company's e-mail system. *E.g.*, Smyth v. Pillsbury Co., 914 F. Supp. 97, 101 (E.D. Pa. 1996) ("[T]he company's interest in preventing inappropriate and unprofessional comments or even illegal activity over its

The tort of false light applies when someone gives publicity to another that places her in a false light.[204] According to the *Restatement*, the false light must be "highly offensive to a reasonable person" and the publication must have been done with knowledge or in "reckless disregard as to the falsity of the publicized matter."[205] Because of this tort claim's similarity to defamation, public figures asserting false light actions must prove actual malice, as contemplated by traditional First Amendment analysis.[206]

The public disclosure tort ascribes liability to publicizing the private matters of another.[207] The private matter must have been a closely guarded secret not available publicly, and to succeed on the tort, the plaintiff must demonstrate that its dissemination was widely published.[208] Given this definition of the tort, any information placed into the public domain by the government is outside the reach of privacy actions.[209] These include facts revealed at a public hearing,[210] in a police report,[211] or in a broadcast over police radio.[212] Any public record is fair game, no matter the identity or notoriety of its subject.[213] It stands to reason then that Lord Browne's legal attempts to stop publication of the intrusive tabloid article, Wynn's divorce filing, Albrecht's police report, and the indictments of Kozlowski, Nicholas, and Stewart became free fodder for media frenzies.

Further, to assert a successful privacy claim based on the disclosure tort, the private information also must be the kind of disclosure that would be highly offensive to a reasonable

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e-mail system outweighs any privacy interest the employee may have in those comments.").

204. RESTATEMENT (SECOND) OF TORTS § 652E (1977).

205. *Id.*

206. Time, Inc. v. Hill, 385 U.S. 374, 387–88 (1967).

207. *See* Cordts v. Chi. Tribune Co., 860 N.E.2d 444, 450 (Ill. App. Ct. 2006).

208. *See, e.g.*, Gonnering v. Blue Cross & Blue Shield of Tex., 420 F. Supp. 2d 660, 667 (W.D. Tex. 2006) (finding no liability where disclosure of plaintiff's sexual orientation involved only limited dissemination to an employer and a personnel placement service); *Cordts*, 860 N.E.2d at 450–53 (finding no liability where disclosure of plaintiff's treatment for depression was made only to his ex-wife, who had a "natural and proper interest" in the information).

209. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491 (1975) (holding that a state cannot impose sanctions on media for accurate publication of a rape victim's name acquired through public records).

210. *E.g.*, Okla. Publ'g Co. v. Dist. Court, 430 U.S. 308, 311–12 (1977) (per curiam).

211. *E.g.*, Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989).

212. *E.g.*, Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 99, 106–07 (1979).

213. *See Cox*, 420 U.S. at 495 ("States may not impose sanctions for the publication of truthful information contained in official court records open to public inspection.").

person.[214] Courts have interpreted this to require the information to be shameful, often sexual or excretory in nature.[215] Today, disclosure of a person's decadent lifestyle, divorce, or even adultery may not rise to the level of shame necessary to overcome this hurdle, even if such information about them may result in shame in certain contexts. Even most health conditions are probably not shameful enough to be labeled highly offensive if disclosed.

The public disclosure tort's First Amendment clincher is the common law newsworthiness test, which limits liability for public disclosure to statements that are not of legitimate concern to the public.[216] The *Restatement* delineates "legitimate public interest" as contingent on the "customs and conventions of the community" and ceasing at the point it becomes a "morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern."[217] In other words, unlike defamation's public figure analysis, newsworthiness is a conclusion reached by weighing the competing interests of the public's "right to know" against the plaintiff's right to keep private facts from the public.[218]

A finding of newsworthiness is a complete defense to the public disclosure tort.[219] Most public disclosure cases involving CEOs and other high-profile businesspeople are fatally interrupted by the newsworthiness test, which is much more permissive than the public figure test. A quintessential example concerned the case of John Peckham, a Boston real estate professional and philanthropist involved in a private dispute with a coworker claiming Peckham was the father of her child.[220] A gossip columnist detailed the paternity controversy in a local newspaper.[221] Peckham sued for the public disclosure, but lost

214. RESTATEMENT (SECOND) OF TORTS § 652D (1977).

215. *See* Nelson v. Glynn-Brunswick Hosp. Auth., 571 S.E.2d 557, 563 (Ga. Ct. App. 2002) (finding disclosure of physician's diagnosis with hepatitis C to hospital administrators was not offensive to the reasonable health care professional and thus insufficient to state a claim).

216. *See* RESTATEMENT (SECOND) OF TORTS § 652D cmt. d (1977) ("When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.").

217. *Id.* § 652D cmt. h.

218. Diaz v. Oakland Tribune, Inc., 188 Cal. Rptr. 762, 771 (Cal. Ct. App. 1983).

219. Romaine v. Kallinger, 537 A.2d 284, 293 (N.J. 1988). A judge may determine as a matter of law that a statement does not constitute "morbid and sensational prying" and thus is newsworthy under the *Restatement* standard. If so, the defendant will prevail. Otherwise, the jury (or other finder of fact) will determine newsworthiness.

220. Peckham v. Boston Herald, Inc., 719 N.E.2d 888, 890 (Mass. App. Ct. 1999).

221. *Id.*

when the court found he was "a prominent real estate professional" and that the paternity claim had a "nexus" to his roles as a community businessman and leader.[222] The court also held that a "workplace liaison between an employee and her superior" was a matter of "general modern public interest,"[223] even when the company was not publicly traded, received no public funding, and did not have a connection to the public other than that it sold real estate.[224]

Following this reasoning, Albrecht could not have successfully asserted any right to privacy with respect to his abuse of two different girlfriends. Because the first woman he choked was a coworker, case law seems to suggest that matter was newsworthy, even though it had lain under wraps for some sixteen years before the *L.A. Times* unearthed it. The second choking incident provoked an arrest, as to which the public record obviates any privacy right.

Of especial interest here, while the bare fact of an embarrassing event may be found newsworthy, the more painful minutiae may be legally protected. Both British and U.S. courts have attempted to draw the line between free speech and public curiosity that goes too far. The British court's analysis in *Mosley v. News Group Newspapers Ltd.* is particularly instructive.[225] In Mosley's breach of privacy suit, the tabloid argued that his sexual antics were newsworthy for three main reasons: (1) the alleged Nazi-themed role-play; (2) the intimation that illegal acts may have occurred, such as prostitution and assault; and (3) the position of power Mosley occupied.[226] The U.K. High Court concluded that the only tenable argument in favor of a public interest defense was the Nazi theme, if present. Justice Eady wrote,

> [I]f it really were the case, as the newspaper alleged, that the Claimant had for entertainment and sexual gratification been "mocking the humiliating way the Jews were treated", or "parodying Holocaust horrors", there could

222. *Id.* at 893–94.

223. *Id.* at 894.

224. *Cf. id.* at 890 (noting it was Peckham himself who had a relationship with the public as a civic leader, not the companies of which he was president).

225. Mosley v. News Group Newspapers Ltd., [2008] EWHC (QB) 1777. Recent common law has solidified the arrival of a "public disclosure"-type privacy protection to English law. In the absence of an applicable privacy tort, the English courts have used the existing tort of breach of confidence to enforce the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms, specifically Article 8, which protects an individual's right to a private life. Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Sept. 21, 1970, 213 U.N.T.S. 222.

226. *Mosley*, [2008] EWHC 1777, [25].

> be a public interest in that being revealed at least to those in the FIA [the motorsports organization Mosley headed] to whom he is accountable. He has to deal with many people of all races and religions, and has spoken out against racism in the sport. If he really were behaving in the way I just described, that would, for many people, call seriously into question his suitability for his FIA role. It would be information which people arguably should have the opportunity to know and evaluate.[227]

Ultimately, the judge found no support for the claim that there was a Nazi motif to the orgy, and so concluded there was no legitimate public interest in Mr. Mosley's adultery or sexual activities, however unconventional.[228] "[D]istaste and moral disapproval," the High Court judge was quick to point out, "does not provide any justification for the intrusion on the personal privacy of the Claimant."[229] Some American courts have engaged in similar parsing of information, albeit not in the context of CEOs.[230]

Considering the quite limited application of privacy statutes to situations involving disclosure of private facts about CEOs, and the breadth of the newsworthiness standard, high-profile executives enjoy an extremely limited private sphere. When the disclosed facts are true, but nonetheless embarrassing and private, the law provides little protection, especially to high-profile executives. The potentially terminal illness of an undisputed public figure like Steve Jobs is obviously newsworthy. Moreover, especially in the post-Enron era, strong arguments can be made that any information bearing on the honesty, integrity, or ability of the head of a publicly traded corporation is legitimately newsworthy. Consequently, there is very little about the private affairs of a CEO that would be protected by tort law. As such, they can expect little assistance from privacy law in an effort to stave off additional mandatory disclosures.

V. OBLIGATIONS AND CONSTRAINTS ON DISCLOSURE POSED BY THE FEDERAL SECURITIES LAWS

> *An insider of a corporation that is asking the public for funds must, in return, relinquish various areas of privacy*

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227. *Id.* at [122].

228. *Id.* at [232].

229. *Id.* at [233].

230. *See* Michaels v. Internet Entm't Group, Inc., 5 F. Supp. 2d 823, 840 (C.D. Cal. 1998) (holding that the "visual and aural details" of a sex tape involving two celebrities were beyond the scope of First Amendment protection).

> *with respect to his financial affairs which impinge significantly upon the affairs of the company. That determination was made by the Congress over 30 years ago when it expressly provided in the Securities Act for disclosure of such matters as remuneration of insiders and the extent of their shareholdings in and the nature of their other material transactions with the company.*[231]

Not much has changed at the intersection of privacy law and the federal securities disclosure regime since SEC Chair William L. Cary penned those words in 1964. Though investors evidently have become increasingly interested in personal information about CEOs, neither the SEC nor any court—with very few exceptions, always related to unlawful activity—has held a publicly traded company liable for failure to report private matters beyond those required in the SEC regulations. Those regulations compel line-item disclosures related primarily to the matters outlined in SEC chief Cary's 1964 decision: CEO remuneration, details of CEO share holdings, and the CEO's other material transactions with the company.[232]

Indeed, perhaps contrary to popular belief, the system of disclosure driving the U.S. capital markets is not founded on a mandate to disclose all material facts.[233] Instead, it is based on mandatory disclosure of specified information and events on an episodic basis ("mandatory" disclosure) supplemented by the overarching antifraud rubric established by the 1933 and 1934 Acts ("antifraud" laws), which can provide for liability based on errors or omissions in other public communications by registered companies.[234] This Part outlines the binary disclosure system

231. Franchard Corp., Securities Act Release No. 4710, 42 SEC Docket 163 (July 31, 1964).

232. *Id.*; *see also In re* Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319, 337 (S.D.N.Y. 2004) (holding that an outside auditor could be liable for failure to disclose accounting irregularities).

233. Throughout the years, journalists and others have somewhat inaccurately portrayed the federal securities laws as requiring publicly traded companies to disclose any and all material information. *E.g.*, Susan Antilla, *To Shareholders, Death Is 'Material,'* N.Y. TIMES, June 26, 1994, § 3, at 13 ("[P]ublicly held companies . . . have an obligation to inform investors of material facts that could have an impact on a company's performance."); Connie Guglielmo & Joseph Galante, *Apple Should Have Disclosed Jobs's Transplant, Buffett Says*, BLOOMBERG, June 24, 2009, http://www.bloomberg.com/apps/news?pid=20601087&sid=ahB_YmpWUynA.

234. These disclosure requirements obligate companies to release (1) initial disclosure information in connection with the registration and offering of securities under section 5 of the Exchange Act, 15 U.S.C. § 77f(a), (d) (2006); (2) periodic reporting thereafter under the Exchange Act; (3) disclosures in connection with proxy solicitation and election of directors under section 14(a) of the Exchange Act, 15 U.S.C. § 78n(a) (2006); and (4) disclosure of extraordinary corporate events such as tender offers, mergers, or sales of the business under sections 13 and 14 of the Exchange Act, 15 U.S.C.

with which public companies must comply as they relate to an obligation to disclose personal facts about their top executive officers. First, we analyze the relevant line-item disclosures specifically mandated by the SEC. We then discuss the disclosure obligations imposed more "peripherally"[235] by fraud liability under Section 10(b), Sections 11 or 17a, or Section 14, again as they relate to revelation of personal information about public company executives.

A. Disclosure Obligations Imposed Directly by SEC Regulation

> *"The [periodic disclosure] system was founded not on disclosure of 'all material facts' but on disclosure of events in the past which the Commission could objectively verify."*[236]

As we know, a panoply of SEC regulations promulgated under authority of the 1933 and 1934 Acts require publicly traded companies to disclose matters—primarily related to their financial condition and performance—on a periodic and continuing basis.[237] None of these demands revelation of private matters pertaining to the CEO, such as sexual orientation or relationship status (marital or otherwise), spending habits or private asset ownership unrelated to remuneration from the company,[238] or health-related information.[239] Instead, there are only two line-item disclosures that implicate the types of private information about CEOs that may now be the subject of public curiosity. These are the CEO's age and his personal involvement in certain types of legal proceedings. The details of these line-item disclosures, and the extent to which they reflect on revelation of private CEO facts, are discussed below.

1. The CEO's Age. First, the CEO's age must be disclosed as part of the general biographical detail required in Item 401 of

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§§ 78m(d)(1), 78n(d)(1) (2006).

235. A.A. Sommer, Jr., The Disclosure Study: What Is It?, Address to the Midwest Securities Administrators 9 (Feb. 17, 1976), *available at* http://www.sechistorical.org/collection/papers/1970/1976_0217_SommerMidwest.pdf.

236. Homer Kripke, *Fifty Years of Securities Regulation in Search of a Purpose*, 21 SAN DIEGO L. REV. 257, 276 (1984).

237. *See* Heminway, *supra* note 11, at 752–56.

238. Regulation S-K, Item 402 requires very detailed disclosure of the nature and extent of the CEO's compensation, in tabular form and also in a narrative known as Compensation Disclosure and Analysis. 17 C.F.R. § 229.402 (2008).

239. For a more detailed discussion of all line-item disclosures required of public companies that may include or implicate information personal to CEOs, see Heminway, *supra* note 11, at 753–56. To that list, we add Item 103 of Regulation S-K, which requires the company to report any pending litigation against it in which its executive is adverse. 17 C.F.R. § 229.103(4) (2008).

Regulation S-K.[240] Age may seem to be an innocuous datum, but it undoubtedly serves as a proxy for at least some conclusions we may justifiably draw about human beings. There is ample evidence that both the law and business actors make assumptions about a person based on her age. Consider, for example, the constitutionally imposed thirty-five year minimum age to serve as President of the United States;[241] the ongoing practice of age-based stereotyping in employment decisionmaking,[242] despite a decades-old federal statute intended to eliminate it;[243] state statutes restricting the rights to drive and purchase alcohol and establishing crimes known colloquially as "statutory rape";[244] and in business, the use of age-based premium-setting by auto, health, and life insurance carriers.[245]

Indeed, the bare fact of the CEO's age may be sufficient to allow investors to make reasonable assumptions about the corporate officer. Older CEOs are more likely to suffer from serious medical or mental health conditions. Scientific studies correlate advancing age with a host of debilitating medical afflictions, confirming what is an obvious, logical proposition. But beyond that and equally important here, the reasonable investor surely is aware of the possibility that sudden or accidental death could strike any CEO at any age.[246] Given the uncertainties and

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240. 17 C.F.R. § 229.401(b) (2007).

241. U.S. CONST. art. II, § 1, cl. 4.

242. *See, e.g.*, Sprint/United Mgmt. Co. v. Mendelsohn, 128 S. Ct. 1140 (2008).

243. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

244. *See, e.g.*, FLA. STAT. ANN. § 794.05 (West 2007); N.Y. PENAL LAW §§ 130.25, 130.30, 130.35 (McKinney 2009); TEX. PENAL CODE ANN. § 22.011 (Vernon 2003).

245. *See, e.g.*, OHIO INS. INST., FACTORS THAT AFFECT AUTO INSURANCE; AGE AND ITS IMPACT (2003), *available at* http://ohioinsurance.org/factbook/2003-04/chapter1/chapter1_d.shtml; Victoria Colliver, *Insurance Is at a Premium*, S.F. CHRON., Nov. 21, 2007, at C1; Terry Savage, *Life Insurance: Don't Put It Off*, CHI. SUN-TIMES, Aug. 6, 2009, at 17.

246. In addition to the sudden death of McDonald's CEO Jim Cantalupo in 2004 reported in Part III, *supra*, readers are likely to also remember the relatively sudden death of Coca-Cola's CEO Roberto Goizueta in 1997. *Business and Politics Merge to Mourn Coke's Chairman*, N.Y. TIMES, Oct. 22, 1997, at A25. Indeed, company heads die unexpectedly every year and often at strikingly young ages. For example, Jon Pyzyk, CEO of Kohner Properties, died in 2005 following a skiing accident at age fifty-five. Tim McLaughlin, *Jon Pyzyk Recognized the Potential in Everything*, ST. LOUIS POST-DISPATCH, Feb. 25, 2005, at 5. In 2006, Edouard Michelin, the CEO of Michelin & Cie, the world's largest tire maker, died in a boating accident at age forty-three. James Kanter, *Michelin Seeks Continuity After the Death of a Leader*, N.Y. TIMES, May 29, 2006, at C2. That same year, resort tycoon Howard "Butch" Kerzner, CEO of Kerzner International Holdings, Ltd., died in a helicopter crash at age forty-two. Jenny Anderson, *Howard Brent Kerzner, 42*, N.Y. TIMES, Oct. 13, 2006, at A25. In 2007, Michael Corvino, the CEO of JanSport, died in a car crash at age forty-six. Delfin Vigil, *Michael Corvino—JanSport President Killed in Car Crash*, S.F. CHRON., July 16, 2007, at C6. Just in 2008, three accidents claimed the lives of CEOs or former CEOs, all under the age of 60. In July, Robert Bexon,

variability in individual experience with medical conditions, prognoses, and death generally, what does any aspect of the officer's current medical condition tell us for certain about her future ability to lead the company[247] or that is otherwise relevant to the intrinsic value or profitability of a company?

More importantly, perhaps, how would such a disclosure obligation be framed without (1) sliding inevitably down the slippery slope of medical uncertainty; or (2) falling victim to the officer's or board's ad hoc assessment of the condition's relevance to job performance? One commentator proposes a rule requiring disclosure of a CEO's medical problems "within forty-five days of a definitive diagnosis,"[248] based on assumptions that investors have "a right to know" of medical conditions that may interfere substantially with the CEO's job responsibilities, that the board "has a right to request and receive" such information from the CEO, and that the board "may determine at any time that material information concerning the officer's condition . . . should be disclosed to the public forthwith, notwithstanding the objection of the CEO."[249]

Such a proposal poses substantial difficulties. First, medical information inherently suffers a "ripeness" problem: additional information, analysis, or time is needed to ascertain the data's final status or impact.[250] Most medical conditions are somewhat unpredictable over time, and individual outcomes are heavily dependent on a myriad of extremely variable conditions like the stage of the condition when diagnosed, the executive's overall

former CEO of Imperial Tobacco in Canada, was killed while bicycling at age fifty-six. Norris McDonald, *Tracy Mentor Dies in Cycling Accident*, THESTAR.COM (TORONTO), July 17, 2008, http://www.thestar.com/article/462520. In August, Andrea Pininfarina, CEO of the Italian car design and manufacturing firm of the same name, was fatally hit by a car at age fifty-one while riding his motorcycle to work near Turin, Italy. Eric Sylvers, *A. Pininfarina, 51, Chief of Car Designer*, N.Y. TIMES, Aug. 8, 2008, at B6. And in November, Jheryl Busby, former CEO of Motown Records, died suddenly at age fifty-nine in what may have been an accidental drowning. Clair Noland, *Music Executive Led the Revival of Motown Records*, L.A. TIMES, Nov. 6, 2008, at B13.

247. A CEO could also depart unexpectedly. For instance, in 1994 the CEO of Becton, Dickinson and Co. was poached by Merck, another pharmaceutical giant. DENNIS C. CAREY, DAYTON OGDEN & JUDITH A. ROLAND, CEO SUCCESSION 24 (2000).

248. Barnard, *supra* note 11, at 328.

249. *Id.* at 327–28.

250. *See* Mitu Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 UCLA L. REV. 675, 683 (1999). Professor Gulati calls inter-quarter financial information and results "unripe" but argues that even incomplete information about quarters not yet ended might be valuable to shareholders in some contexts. *Id.* His thesis, however, has no application to the instant case because quarterly results are certain within a finite period of time. A medical condition short of death can fluctuate from positive to negative and back over many quarters or years.

physical condition, mental state, and so forth.[251] Further, medical diagnoses are sometimes inconsistent and frequently subject to professional disagreement. Given the uncertainty, such disclosure could only spark intrusive speculation and increased stock price volatility.

Second, the disclosure of such health information would unfairly tax investors with the responsibility of acquiring medical knowledge to be able to interpret corporate disclosures. As Wimsatt and Beardsley argued in their famous treatise against intentional fallacy in literary criticism, forcing critics (here, investors) to make value assessments by way of extraneous information causes unnecessary confusion and burden.[252] Undoubtedly, some amount of investor confusion would be engendered by disclosure of any medical diagnosis.[253] For example, a CEO might have been diagnosed with lymphomatoid granulomatosis, as was Shiloh Corp.'s CEO, Dominick C. Fanello.[254] This diagnosis would likely mean little to lay investors, who would unfairly be placed in the position of acting as doctor and clairvoyant.

Drawing a bright line in the disclosure of medical concerns also poses difficulties in execution. What would be the parameters of a line-item disclosure requiring companies to report on their CEO's health? Would only conditions as opposed to medical procedures be important enough to disclose? If both, what types of medical conditions or procedures would merit disclosure? Assuming that only a serious diagnosis need be reported, at what point in its discovery or progress should it be revealed? Would details beyond the bare fact of the diagnosis need to be disclosed as well? The reputation of the treating physician or hospital? The specifics of the treatment plan? Whether the CEO had signed a "do not resuscitate" order or other advance directive? Merely asking these questions demonstrates the highly intrusive and practically unworkable nature of such a regulation in relation to the value of the information it could provide to shareholders.

Also, requiring disclosure of a CEO's medical condition simply may not be justified where there is a host of other equally important undisclosed matters potentially affecting the CEO's performance. There are other influences on CEOs that a company

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251. *See* Barnard, *supra* note 11, at 326.

252. *See* Wimsatt, Jr. & Beardsley, *supra* note 1, at 3.

253. *See* Barnard, *supra* note 11, at 326.

254. The company disclosed Fanello's condition in a 1993 prospectus. Antilla, *supra* note 233.

need not report, such as "religious, romantic, economic, and peer influences."[255] Requiring disclosure of matters as personal as medical conditions might suggest a level of assurance that the CEO is performing at his top level that is neither accurate nor realistic, given the possibility that any number of other undisclosed yet "similarly disruptive personal traumas" might be afoot, "such as divorce, death of a parent, problems with children, or alcohol or drug abuse."[256] Equally important are the death of a child or spouse;[257] serious illness of a parent, child, or spouse; any number of compulsions like gambling or sex addiction; and even clandestine extramarital affairs.[258] Certainly any of these may be of interest to some investors; they could disrupt a CEO's ability to serve the company, and thus might cause a financial impact on the company, at least indirectly. Yet presumably none of these would be included in a proposal to require disclosure of the CEO's health or medical condition.

Moreover, others have pointed out the cognitive and behavioral factors that might make demanding such disclosures unrealistic.[259] CEOs facing serious medical diagnoses, like other people, may suffer from cognitive dissonance, be prone to "satisficing," and may exhibit the overconfidence, self-interest, and confirmation biases.[260] These very human psychological and behavioral factors suggest that most people, perhaps CEOs (and directors) in particular, have a tendency to underestimate the debilitating effect of a serious medical diagnosis and their personal ability to overcome it. The availability and representativeness heuristics are also likely to affect both executives' and their boards' decisions to disclose. Rather than independently examine the particular facts of the CEO's medical condition, the executive or board may make the disclosure decision based on the experiences of other companies with such disclosures, whether or not those decisions were

255. Barnard, *supra* note 11, at 326.

256. *Id.* at 325.

257. Morten Bennedsen, Francisco Pérez-González & Daniel Wolfenzon, Do CEOs Matter? 1 (Jan. 2008), *available at* http://www.mccombs.utexas.edu/faculty/Francisco.Perez-Gonzalez/valueceo.pdf.

258. *See, e.g.*, Valerie Bauerlein & Alex Roth, *Sanford Odyssey Ends in Tears*, WALL ST. J., June 25, 2009, at A1 (reporting on South Carolina Governor Mark Sanford's six-day unexplained and very public absence from his home and office, which was eventually attributed to a romantic tryst in Argentina).

259. *See* Heminway, *supra* note 11, at 767, 794 (pointing out that disclosure decisions relating to personal facts are "stressful and emotionally charged," yet positing a proposal for "tailored" disclosures of personal facts about CEOs such as contentious divorce, criminal investigation, or serious medical condition, in certain situations).

260. *Id.* at 768 & n.93, 769.

appropriate.[261] The existence of these cognitive and behavioral factors raises the question whether a regulation mandating prompt disclosure of executive health matters would actually result in more disclosure or more timely disclosure in most cases even if we had one.

Finally, we note that the practical drafting and operation of such a rule may militate against the idea. Who would determine exactly what details were to be disclosed, and when and how would such information be reported?[262] As to the first question, ideally the decision to disclose would be wrested from the executive and the board.[263] This likely could only be accomplished if the regulation requiring it left no room for interpretation. The rule would have to list specific diagnoses and statuses triggering disclosure. Such a list would inevitably be both overinclusive and underinclusive, given the variety of pathologies and their manifestations and progressions in different individuals. As to the second question, the manner of reporting should reflect an assessment of how urgent the information is to be perceived. Would such disclosures take the form of a new section in the proxy statement, or annual or quarterly report? Or should even a more chronic, serious, but not immediately life-threatening condition be reported within four days of diagnosis as Item 8.01 of the Form 8-K Current Report?[264] Or should the information occupy an entirely new form with an even shorter deadline similar to Form 4, reporting insiders' transactions in company securities? As a practical matter it would seem that a uniform manner of communication would have to be chosen for this type of corporate disclosure, and its form would inevitably signal too much urgency in some cases and not enough in others.

In the end, given the impracticability associated with fashioning and enforcing a rule requiring disclosures related to a

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261. *Id.* at 770.

262. If the board were to make the determination, presumably, then full and prompt disclosure from the officer would have to be made a contractual condition of employment. *See* Barnard, *supra* note 11, at 327–28. However, laboring such a contractual condition would reduce officer productivity.

263. One commentator suggests disclosure of private CEO matters and events ought to be within the board's business judgment. Lin, *supra* note 11, at 415. Such a proposal probably does not change the current status quo, and in some cases amounts to no disclosure rule at all. Studies show great variability in the disclosure of matters companies are not obligated to disclose. *See* L.L. Eng & Y.T. Mak, *Corporate Governance and Voluntary Disclosure*, 22 J. ACCT. & PUB. POL'Y 325, 335 (2003).

264. SEC Current Report (Form 8-K), at 19, *available at* http://www.sec.gov/about/forms/form8-k.pdf ("The registrant may, at its option, disclose under this Item 8.01 any events, with respect to which information is not otherwise called for by this form, that the registrant deems of importance to security holders.").

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.

2. The CEO's Involvement in Certain Legal Proceedings. The other most relevant piece of personal information a company must report about its CEO on a periodic basis is her "[i]nvolvement in certain legal proceedings."[265] Item 401(f) of Regulation S-K requires the company to disclose, *inter alia*, the CEO's personal bankruptcy filings, any adjudicated violations of the securities or commodities laws, and the fact that she "was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)."[266] Thus, HBO head Chris Albrecht's mere arrest for choking his girlfriend would not qualify. In fact, only final convictions, orders, suspensions, or bars must be disclosed.[267] So investors are not entitled to any advance warning of a criminal investigation into their CEO, such as the SEC's investigation into Martha Stewart's alleged insider trading in ImClone stock, unless and until it has ripened into an indictment or conviction. And there is clearly no obligation under Regulation S-K to report most types of civil litigation in which an executive officer might be involved, like Steve Wynn's divorce case, for example.

Moreover, the requirement to disclose management's involvement in these legal proceedings must be described only to the extent it occurred within the five years preceding the date of disclosure, further limited by a determination that the legal proceeding is "material to an evaluation of the ability or integrity of" the officer.[268] This qualification leaves public companies with

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265. 17 C.F.R. § 229.401(f) (2007).

266. *Id.* § 229.401(f). Regulation S-K's Item 401(f) also requires disclosure of the following: court actions in which he was enjoined from acting in a multitude of securities-related and financial or insurance industry capacities, *id.* § 229.401(f)(3); any federal or state bar or suspension from any of the aforementioned activities, *id.* § 229.401(f)(4); any civil or administrative action in which he was found to be in violation of any federal or state securities laws, *id.* § 229.401(f)(5); and any civil or administrative action in which he was found to be in violation of the federal commodities laws, *id.* § 229.401(f)(6).

267. *See id.* § 229.401(f).

268. *Id.* The original "legal proceedings" requirement as it related to directors involved a ten-year period preceding the proxy solicitation. This was shortened to five years in 1978. Thereafter, the scope of proceedings that are to be disclosed was augmented incrementally, until 1994, when the SEC again proposed to expand slightly the list of offenses and judgments to be disclosed (in ways not relevant to the discussion at hand), but more importantly also sought to lengthen the relevant time period to ten years and to remove the materiality qualification. Disclosure Concerning Legal Proceedings Involving Management, Promoters, Control Persons and Others, Securities Act Release No. 7106, Exchange Act Release No. 34923, Investment Company Act Release No. 20670, 57 SEC Docket 2417 (Nov. 1, 1994). That proposal was quietly tabled three years later.

what appears to be substantial wiggle room to determine whether an executive's personal legal entanglements are relevant to his integrity and therefore must be disclosed. No court has determined that this line-item disclosure requires public companies or their executives to disclose the types of private executive facts here under consideration. Instead, in the main, the reported decisions surrounding this disclosure obligation are cases raising the issue whether a particular legal proceeding, investigation, or administrative sanction was required to be disclosed, typically as part of a larger lawsuit alleging proxy fraud, or a class action asserting securities fraud more generally.[269] Such attempts to enlarge the scope of qualitative disclosure related to management's ability or integrity are part and parcel of the antifraud provisions' indirect power to mandate additional disclosures. That broader question of duty to disclose under the 1933 and 1934 Acts, and proxy or securities fraud liability as indirectly requiring disclosure of private facts about corporate executives, is discussed in the next subpart.

B. Disclosure Obligations Imposed by the 1933 and 1934 Acts' Antifraud Provisions

The question for this subpart is whether there is anything in the other applicable body of securities law, the federal securities statutes' antifraud provisions, that requires disclosure of personal information about CEOs.[270] Is there any relevant precedent

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Disclosure of Legal Proceedings Involving Management, Promoters, Control Persons, and Others, 62 Fed. Reg. 22,746, (Apr. 25, 1997) (reporting the date of withdrawal of the notice of proposed rulemaking as April 1, 1997, and commenting "the Commission does not expect to consider the item within the next 12 months, but the Commission may consider the item further at some subsequent point").

269. *E.g.*, *In re* Browning-Ferris Indus., Inc. S'holder Derivative Litig., 830 F. Supp. 361, 367 (S.D. Tex 1993) (holding that pending lawsuits were not material and thus did not need to be disclosed in proxy fraud lawsuit).

270. Some have speculated that the listing requirements of the New York Stock Exchange or the NASDAQ create a legal mandate to disclose all material facts. *See, e.g.*, Barnard, *supra* note 11, at 324 n.116 (citing the exchanges' listing rules as the source of a legal obligation to reveal all material information to investors). Indeed, the NYSE's Listed Companies Manual purports to require companies to "release quickly to the public any news or information which might reasonably be expected to materially affect the market for its securities." NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL § 202.05, http://nysemanual.nyse.com/LCM/Sections (last visited Jan. 28, 2010); *accord* NASDAQ STOCK MARKET INC., MARKETPLACE RULES 4 (2004), *available at* http://www.nasdaq.com/about/marketplacerules.pdf ("[E]xcept in unusual circumstances, Nasdaq issuers [must] disclose promptly to the public . . . any material information which would reasonably be expected to affect the value of their securities or influence investors' decisions.").

While infraction of these rules could in theory result in a suspension or the delisting of the company from the exchange entirely, the listing rules evidently do not provide for a private right of action. *See* Jeffrey D. Bauman, *Rule 10b-5 and the Corporation's* imposing liability and thereby indirectly establishing such a rule, or is there any other argument that can be constructed based on the history and remedial purpose of the antifraud provisions of the federal securities laws that would support it?

In the following subparts we assess the idea that a corporation or officer has an antifraud-based obligation to speak about private CEO matters. First we consider such an obligation in a setting when the company and officer have remained totally silent on the subject. Then we investigate whether a firm might have a duty to update information in the marketplace that is no longer accurate, or in a related vein, to avoid half-truths relative to personal information. Finally, we establish the differences between duty and materiality and look to the historical purposes of personal disclosures about management in an effort to locate any other firm basis upon which an affirmative duty to disclose private CEO facts might be based. We find none.

1. The Duty to Speak Generally. The federal antifraud laws supplement the mandatory and periodic disclosure apparatus discussed in the previous subpart not by setting out additional obligatory disclosures, but instead by prohibiting materially false or misleading representations: "They do not impose affirmative content-based disclosure obligations, but rather mandate accuracy."[271] Thus, the general rule is that absent a duty to speak, there is no duty to disclose even material information.[272] And that duty to speak arises in only limited circumstances outside the statutory and regulatory scheme discussed thus far, such as when the company is contemporaneously trading in its own stock.[273] Thus it would appear that at least under the general

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Affirmative Duty to Disclose, 67 GEO. L.J. 935, 985 (1979). *But see* Van Gemert v. Boeing Co., 520 F.2d 1373, 1380–81 (2d Cir. 1975) (suggesting investor might have a "colorable" claim where listed company violated NYSE rules). However, this particular exchange rule certainly has never figured prominently in either SEC enforcement actions or class action litigation seeking damages for fraud.

271. Joseph A. Franco, *Why Antifraud Prohibitions Are Not Enough: The Significance of Opportunism, Candor and Signaling in the Economic Case for Mandatory Securities Disclosures*, 2002 COLUM. BUS. L. REV. 223, 231.

272. Chiarella v. United States, 445 U.S. 222, 235 (1980); Gregory S. Porter, *What Did You Know and When Did You Know It?: Public Company Disclosure and the Mythical Duties to Correct and Update*, 68 FORDHAM L. REV. 2199, 2239 (2000) (reiterating the general rule that "there is no duty to disclose all material information, and that there can be no liability for non-disclosure absent a duty to speak").

273. Failure to disclose all material nonpublic information in one's possession when trading in the stock results in liability for insider trading. *See, e.g.*, Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1659, 1676 (2004). Thus the obligation to disclose arises by virtue of the trading but not otherwise. This articulation of the duty emanates from dicta in *Chiarella*. *Chiarella*, 445 U.S. at 228 (stating that the duty to speak arises only when one party has

rule, no public company would be held liable for fraud based on nondisclosure of personal facts about a CEO unless it were trading in its own stock at the time the events in question occurred.[274] Assuming the company is not trading in its own stock, are there other exceptions to the general rule?

2. Silence Is Not Actionable. It is beyond cavil that one who chooses to speak to the market is obliged by law to speak truthfully. The more difficult duty question arises in precisely the type of circumstances at issue here—when no regulatory line-item requires disclosure, and the person or corporation has said nothing at all on the topic.[275] Professors Langevoort and Gulati, citing such ancient works as the Talmud and the writings of Cicero, Pothier, and Aquinas, note that this query at the intersection of contract and torts has proven difficult for centuries—indeed, when *does* silence amount to an affirmative misrepresentation?[276]

Where the corporation and officer have remained silent, no existing judicial precedent favors a general duty to disclose personal facts not already mandated by regulation. A few reported opinions have considered the question in cases involving nondisclosure of facts that could arguably be seen as falling within the spirit of the regulatory disclosure items. They have uniformly rejected any expanded disclosure obligation in cases involving criminal investigations and even civil litigation that ostensibly bears on management's integrity.[277] If even the fact of a criminal investigation need not be disclosed until it solidifies into an indictment (or the formal "naming" of the officer as a subject of criminal proceeding), then why would such matters as a homosexual relationship and *de minimis* waste allegations need to be disclosed,[278] as in the case of BP's Lord Browne?[279]

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information that "the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them" (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977))). There is a substantial question in the courts whether the "fiduciary or other similar relation" arises anywhere but in the insider trading context. Langevoort & Gulati, *supra*, at 1641.

274. At that point, the somewhat muddled law of insider trading, which is outside the scope of this analysis, would come into play.

275. Langevoort & Gulati, *supra* note 273, at 1640.

276. *Id.* at 1642.

277. *See infra* note 307 and accompanying text.

278. The topic of corporate waste in particular raises a jurisdictional issue. Allegations of waste bring into relief the difference between federal corporate disclosure obligations and the manager's breach of fiduciary duty under state corporate law. *See* Ralph C. Ferrara, Richard M. Starr & Marc I. Steinberg, *Disclosure of Information Bearing on Management Integrity and Competency*, 76 NW. U. L. REV. 555, 563 (1981).

279. In what may have been a more egregious example of waste, consider Stephen

The courts that have considered disclosures bearing on the integrity of management have almost reflexively pointed out that the mandates of Regulation S-K (or its predecessors) on the one hand and the duties incumbent on public companies based on the securities statutes on the other are not entirely coextensive.[280] Yet, they have failed to articulate any difference in such duties when it comes to revealing information about executives, perhaps because of the difficulty posed by the courts' requiring, on an ad hoc basis, disclosures beyond those that the SEC has determined to be appropriate and necessary. Indeed, these same courts appear to have been quite happy to defer to the letter of the regulations, satisfied that these represent the SEC's expert opinion as to what is *material* to investors—this in an expanded sense of the word that on the one hand takes into account notions of fairness and efficiency and on the other is sensitive to not overloading investors with so much marginally relevant information as to result in white noise.[281]

3. Effects of the Duty to Update and the Half-Truth Doctrine. A similarly difficult duty question arises when the officer or corporation has spoken on the topic and it is unclear

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Ross of Time Warner, who was overly generous with gifts to friends and business associates, and lived an ultra-extravagant lifestyle—all on the corporate dime. BRUCK, *supra* note 11, at 81–82, 98–99. No matter how outrageous, approval of such expenditures is the responsibility of the board, and those expenses eventually find their way into the financial statements of the company. They are not matters that must to be disclosed separately to shareholders. If executive spending habits when funded by the company do not have to be disclosed to shareholders, by what logic would an officer's extravagant lifestyle not so funded need to be disclosed? Moreover, where to draw the line in terms of what might be considered an excessive expenditure or pattern of expenditures, and the extent to which this could intrude on the privacy of others who are not public figures probably makes this type of disclosure impracticable.

Arguably, notice to shareholders of Kozlowski's lavish spending might have provided an early warning of his massive embezzlement from the company. The SEC has dealt more directly with this problem by implementing more heavily detailed compensation disclosures. Executive Compensation and Related Person Disclosure, Securities Act Release No. 8732A, Exchange Act Release No. 54302A, Investment Company Act Release No. 27444A, 88 SEC Docket 2353 (Aug. 29, 2006). Congress has also addressed the issue by prohibiting loans to corporate officers other than in the ordinary course of business. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 402, 116 Stat. 745, 787 (codified at 15 U.S.C. § 78m(k) (2006)).

280. *E.g.*, Maldonado v. Flynn, 597 F.2d 789, 792–93 (2d Cir. 1979); United States v. Yeaman, 987 F. Supp. 373, 378 (E.D. Pa. 1997).

281. The U.S. Supreme Court has articulated this concern: "Some information is of such dubious significance that insistence on its disclosure may accomplish more harm than good. . . . [M]anagement's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information—a result that is hardly conducive to informed decisionmaking." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 448–49 (1976). *See generally* Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417 (2003).

whether what has been said now amounts to a misrepresentation of fact.[282] This scenario implicates the judicially created concept of a "duty to update"—a duty that is at best elusive—and the related half-truth doctrine.[283] While perhaps appealing at first blush as a source of a duty to disclose personal executive facts, as we discuss below, neither of these theories has much application in the types of disclosure scenarios under consideration.

Some courts have held that there is a duty to update disclosures that are accurate when made but since have become inaccurate, to the extent they are still "live" in the marketplace,[284] but the sentiment is by no means unanimous.[285] Unsurprisingly,

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282. Langevoort & Gulati, *supra* note 273, at 1640 (noting that the lack of clarity in this area of the law is surprising both because the question of duty to disclose "is so central and because the courts (and the SEC) have had so long to work on it").

283. *See generally* Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87 (1999) (examining the securities laws' half-truth doctrine in light of common law fraud's half-truth doctrine). Here we distinguish the "duty to correct," which implies that information originally provided by the company is later found to have been inaccurate. *E.g.*, Backman v. Polaroid Corp., 910 F.2d 10, 16–17 (1st Cir. 1990). This doctrine does not appear to be relevant to the discussion at hand.

284. *See, e.g.*, Weiner v. Quaker Oats Co., 129 F.3d 310, 318 (3d Cir. 1997) (holding that a duty to disclose material change in debt-to-total capitalization ratio arose when prior acquisition statements became unreliable).

285. *See, e.g.*, Stransky v. Cummins Engine Co., 51 F.3d 1329, 1332–33 (7th Cir. 1995) (rejecting the duty). To the extent this notion were to be broadly and uniformly adopted by the courts, we would have then reached what one author calls a state of "continuous disclosure." *See* Dale Arthur Oesterle, *The Inexorable March Toward a Continuous Disclosure Requirement for Publicly Traded Corporations: "Are We There Yet?"*, 20 CARDOZO L. REV. 135 (1998). Evidently, a number of cases already imply that there is a general and continuous duty to disclose. *See* Bauman, *supra* note 270, at 936 ("Although no case has so held, a few courts have suggested that there is a general duty to disclose."). One commentator describes such a rule as a "parade of horribles," decrying a limitless "instantaneous disclosure" requirement. 2 JOSEPH W. BARTLETT, EQUITY FINANCE 236 (2d ed. 1995).

But we are not there yet. Indeed, there is an active body of scholarship debating whether such continuous disclosure is necessary, optimal, or even already mandated by current law. *Compare* Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 411–20 (2004) (refuting traditional economic arguments against mandatory disclosure and arguing that mandatory disclosure is necessary to "eliminate firms' incentive to cheat"), *and* Robert A. Prentice, *The Inevitability of a Strong SEC*, 91 CORNELL L. REV. 775, 804–24 (2006) (using cross-national empirical evidence to show that mandatory disclosures are more efficient than voluntary disclosures), *with* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 288–89 (1991) (arguing that companies should determine for themselves an optimal level of disclosure, free of regulation), Michael D. Guttentag, *An Argument for Imposing Disclosure Requirements on Public Companies*, 32 FLA. ST. U. L. REV. 123, 124–25 (2004) (finding, despite SEC and other academic views, no justification for "federally mandating the information public companies must disclose"), *and* Joel Seligman, *The Obsolescence of Wall Street: A Contextual Approach to the Evolving Structure of Federal Securities Regulation*, 93 MICH. L. REV. 649 (1995) (arguing that the need for mandatory disclosure is not static, but depends on dynamic elements). For citation to a series of more "classic" scholarly works on the topic, see Langevoort & Gulati, *supra* note 273, at 1642 n.9.

on the topic of disclosure of personal facts relating to CEOs, there is no relevant case law based on a duty to update. Presumably if the corporation had disclosed or commented on the CEO's happy marriage at one point, an argument might be fashioned that if he later were to separate from his wife in contemplation of divorce, the duty to update would arise. However, the existing case law articulating the duty appears to restrict its scope to disclosures implicating such fundamental changes as alterations of the corporation's capital structure or capital raising strategy, and to forward-looking statements, not accurate statements of historical fact.[286] In fact, it is hard to imagine how the CEO's divorce, her involvement in a scandalous affair—no matter how tawdry—or even her serious illness, could be seen as on the same level with such fundamental corporate financial matters. More importantly, to trigger the duty to update, a prior contradictory disclosure would have to have been made. It strains the imagination to envision the necessary predicate statement requiring a company now to report, for example, the CEO's serious illness or adulterous affair.[287]

For its part, the half-truth doctrine fills a different gap. Bolstered by the Supreme Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, the half-truth doctrine purports to require speakers in the marketplace to speak the whole truth.[288] Application of the half-truth doctrine implies some prior statement on the subject—one that is presumably a half-falsehood. What kind of statements made by or about a CEO's personal matters might be only half true? An argument for liability could be constructed in a hypothetical case where a CEO had articulated a "total commitment" to some initiative or plan, and later events or disclosures revealed the CEO was not devoting her full attention to company matters (including that initiative or plan) due to a private drama. Assuming such facts, a court would first have to find that the statement about "total" or "wholehearted" commitment implied something other than part-time attention would be given to this one of many important

286. *See Weiner*, 129 F.3d at 317–18; *In re* Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1432 (3d Cir. 1997); *Stransky*, 51 F.3d at 1331–32.

287. "Our CEO is totally 'clean,' determined to remain monogamous and disease-free!"

288. Va. Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1094–95 (1991) (holding literally accurate statements can give rise to liability if they are half-truths). In *Virginia Bankshares*, the Supreme Court held that the board of directors was only half truthful when it characterized its proposed buyout of minority shareholders as "fair" because the board did not also disclose that the company was actually undervalued as compared to its book value and that the market price was based on a thin market dominated by the company's holding company. *Id.*

corporate matters,[289] and second, that the statement was not mere puffery.[290] This is unlikely.

C. Distinguishing Materiality in Search of a Duty to Disclose Private Information About CEOs

In the absence of a pertinent line-item regulatory disclosure requirement and an antifraud duty to disclose, some may argue that personal CEO matters should be disclosed because they are material. In aid of that inquiry, we first distinguish the duty to disclose from the concept of materiality, and then assess whether there is anything intrinsic about disclosures related to executives that requires establishment of a new rule.

According to the Supreme Court in *Basic Inc. v. Levinson*, a number of lower courts have failed to clarify whether their decisions rest on duty or materiality.[291] Perhaps unsurprisingly then, a number of scholars have also collapsed the two, calling for disclosure of nonfinancial information while operating from an assumption that the central query is the materiality of the information.[292] But duty and materiality are definitely distinct.[293] Professors Langevoort and Gulati point out that there are "many facts (such as preliminary merger negotiations) that can fall within the definition of materiality yet do not have to be disclosed."[294] And, as others have noted, there are also a number of facts that may, within the total mix of information available to investors, be quite immaterial (for example in the proxy

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289. One noted scholar has pointed out the danger that reading accurate present statements to imply current trends will extend into the future indefinitely and, by way of the half-truth doctrine, would convert the SEC's specific disclosure system "into a general and vague system in which all material information has to be disclosed." Gulati, *supra* note 250, at 716 (analyzing and intellectually eliminating any purported obligation to disclose inter-quarter results except in very narrow circumstances).

290. *See, e.g.*, *In re Burlington Coat Factory*, 114 F.3d at 1428 n.14 (explaining that "[c]ertain vague and general statements of optimism have been held not actionable as a matter of law because they constitute no more than 'puffery' and are understood by reasonable investors as such").

291. Basic Inc. v. Levinson, 485 U.S. 224, 232 n.10 (1988); *see also* Steven A. Fishman, *Duty to Disclose Under Rule 10b-5 in Face-to-Face Transactions*, 12 J. CORP. L. 251, 281–83 (1987) (observing several cases that do not support their holdings by explaining the source of a purported duty to disclose).

292. *See* Barnard, *supra* note 11, at 327–28; Heminway, *supra* note 11, at 790–93; Lin, *supra* note 11, at 410–13; *cf.* David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVT'L L.J. 137, 195 (2007) (arguing that materiality dictates enhanced disclosures of environmental matters).

293. Certainly, some courts have seen them as inextricably intertwined, and in some instances have allowed heightened materiality to serve as the basis for a finding of duty. *See, e.g.*, *In re Burlington Coat Factory*, 114 F.3d at 1433–34.

294. Langevoort & Gulati, *supra* note 273, at 1644.

statement), yet these nonetheless are required by regulation to be disclosed.[295]

Thus the very ad hoc factual question whether certain personal information relating to a CEO is "material" in a given case is perhaps best assisted by a review and analysis of the history and underlying purpose of any disclosure about executives at all. The origin of these disclosures about management was limited to brief biographical data and disclosure of directors' relevant criminal background.[296] As distinguished from directors, CEOs were not historically a subject the investing public dwelt upon extensively. Even their past adjudicated crimes were not required to be disclosed in line-item fashion until 1973.[297]

The 1970s put a spotlight on qualitatively material disclosures, including a heightened interest in information related to the competency and integrity of management of public companies.[298] But this focus on management's integrity was not a result of the public's or investors' clamoring for private facts about executives. Instead, the movement was the seed of today's social consciousness, centering almost exclusively on the question of whether directors and officers had an obligation to report the corporation's "illegal or antisocial" activities, or their own on behalf of the corporation.[299] Its roots were in early environmentalism, Watergate and its improper corporate campaign contribution scandal, and concern with what the public was then only just discovering were widespread foreign corrupt practices.[300] Each of

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295. *See* Ferrara, Starr & Steinberg, *supra* note 278, at 558–59.

296. The requirement that companies disclose criminal convictions of their *directors* in proxy materials dates at least to 1956. Amendments to Proxy Rules, 21 Fed. Reg. 577, 580 (Jan. 16, 1956) (codified as amended at 17 C.F.R. pt. 240). Thereafter, directors' involvement in legal proceedings was expanded incrementally over the ensuing decades to include, eventually, the laundry list of legal entanglement and sanctions that must be disclosed today by virtue of Regulation S-K Item 401(f). *See* Disclosure Concerning Legal Proceedings Involving Management, Promoters, Control Persons and Others, Securities Act Release No. 7106, Exchange Act Release No. 34923, Investment Company Act Release No. 20670, 57 SEC Docket 2417 (Nov. 1, 1994) (discussing the history of disclosure of management's involvement in legal proceedings).

297. New Ventures; Meaningful Disclosure, 38 Fed. Reg. 17,202, 17,205 (June 29, 1973) (codified at 17 C.F.R. pt. 239).

298. Ferrara, Starr & Steinberg, *supra* note 278, at 564; *see* Redwood, *supra* note 10, at 340 (calling the years when Stanley M. Sporkin was head of SEC enforcement (1973–81) the "zenith of qualitative materiality").

299. Amalgamated Clothing & Textile Workers Union v. J.P. Stevens & Co., 475 F. Supp. 328, 331 (S.D.N.Y. 1979), *vacated per curiam as moot*, 638 F.2d 7 (2d Cir. 1980).

300. *See* SEC v. Joseph Schlitz Brewing Co., 452 F. Supp. 824, 829–33 (E.D. Wis. 1978) (requiring disclosure of such improper payments, prior to the enactment of the Foreign Corrupt Practices Act). Also at that time, the SEC was considering its proper role in encouraging environmental protection under the newly enacted National

these types of corporate conduct clearly reflected the lengths to which management was willing to go to maximize shareholder profits,[301] and indirectly their personal integrity. And each of these was viewed with consternation, whether or not the dollar amounts were quantitatively material to the corporation.[302]

This fresh interest in management's integrity resulted in both litigation and scholarship fleshing out the issues. When Ferrara, Starr, and Steinberg assessed the landscape in 1981, they suggested that the fledgling duty to disclose facts bearing on management's integrity, beyond the regulatory line-items, was largely limited to instances of self-dealing and to cases where a director–nominee's background was "likely to adversely affect a profitable asset."[303] Ferrara, Starr, and Steinberg's more subsidiary findings were, first, that failure to disclose matters required by line-items results in liability, and second, that *incomplete or misleading statements* about a member of management's background will result in liability whether or not such information was the subject of mandatory regulatory disclosure.[304] Both of these are still truisms today.

Finally, Ferrara, Starr, and Steinberg noted a distinction "between information important to a voting decision and economically significant information deemed material to an investment decision."[305] This dichotomy would continue to play out in the private suits litigated and enforcement cases prosecuted in the decades following their work. Suits brought under the proxy rules—either seeking to invalidate or to enjoin shareholder votes—were more likely to see courts sympathizing with investors' desire for qualitative information about directors.[306] On the other hand, suits based on lack of disclosure

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Environmental Policy Act of 1969. Ferrara, Starr & Steinberg, *supra* note 278, at 560–61, 587–90; Redwood, *supra* note 10, at 330–31. Case law from the era reveals the beginning of the so-called "socially responsible investing (SRI)" movement. "Ethical investors," as they were called at the time, were not only becoming interested in environmental disclosures, e.g., Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1036–37 (D.C. Cir. 1979), but they were also concerned about publicly traded companies' labor practices. *E.g.*, *Amalgamated Clothing*, 475 F. Supp. at 330.

301. Ferrara, Starr, and Steinberg note that "a complementary relationship may exist between illegal or socially undesirable conduct by management, and the success of a corporate enterprise." Ferrara, Starr & Steinberg, *supra* note 278, at 562 n.30.

302. *Id.* at 562 & n.30.

303. *Id.* at 566–67 (quoting Kass v. Arden-Mayfair, Inc., 431 F. Supp. 1037, 1046 (C.D. Cal. 1977)).

304. Ferrara, Starr & Steinberg, *supra* note 278, at 565–66; *see, e.g.*, SEC v. Merchant Capital, LLC, 483 F.3d 747, 770 (11th Cir. 2007) (holding that failure to disclose personal bankruptcy as required by Regulation S-K, Item 401(f) gives rise to liability).

305. Ferrara, Starr & Steinberg, *supra* note 278, at 559–60 (emphasis omitted).

306. *See id.* at 601–03.

in contexts other than those involving shareholder suffrage were less likely to be successful.[307]

So the duty to disclose under the broader antifraud regime, to the extent such a duty has been established, appears to be tied exclusively to the usefulness of such information to inform conclusions about management's ability and integrity, especially as it relates to directors (which may include CEOs) and the investors' franchise rights. But the fact remains that not all personal information about executive officers is probative of their ability and integrity. Part VI addresses this in more detail in an effort to illuminate the intrinsic or inferential value, if any, of personal information about executives.

VI. AVOIDING THE INTENTIONAL FALLACY: A DECONSTRUCTION OF THE FAULTY LOGIC OF PERSONAL DISCLOSURES

> *"Kings are not born: they are made by artificial hallucination."*[308]

Thus far we have established several things. Privacy statutes apply to protect a CEO only in narrow circumstances.[309] Privacy torts are equally feeble in view of a strong First Amendment.[310] Thus, generally speaking, privacy law does not prevent disclosure of personal information about CEOs. Similarly, securities law does not operate to require most personal CEO disclosures. Nothing in the securities line-item regulatory disclosure process requires disclosure of private facts about CEOs. Moreover, there is no general antifraud duty to disclose even material personal information about CEOs.[311] Nor do the "loophole-closing doctrines" like the duties to speak the whole truth and to update or correct reveal an obligation to report private CEO information under the antifraud provisions of the securities laws.[312]

307. *See, e.g.*, United States v. Matthews, 787 F.2d 38, 46–47 (2d Cir. 1986) (finding no securities violation for failure to disclose on proxy statement uncharged bribery and tax evasion conspiracy); GAF Corp. v. Heyman, 724 F.2d 727, 732, 740 (2d Cir. 1983) (finding no securities violation for failure to disclose suit against proxy contestant, brought by sister, only technically pending, arising out of "a very human family situation," and not reflecting on contestant's ability or integrity to serve); *see also* United States v. Yeaman, 987 F. Supp. 373, 380 (E.D. Pa. 1997) (rejecting the notion that corporations are required to disclose instances in which they are the subject of non-securities state or federal proceedings).

308. GEORGE BERNARD SHAW, MAN AND SUPERMAN 228 (University Press 1913) (1903).

309. *See supra* Part IV.A.

310. *See supra* Part IV.B.

311. Chiarella v. United States, 445 U.S. 222, 228 (1980).

312. Gulati, *supra* note 250, at 678.

Despite the lack of restriction or compulsion, both popular and scholarly voices have argued that more revelation is warranted at the intersection of privacy and securities laws. This Part deconstructs the underlying reasoning—that personal information about CEOs is probative of their character, that they single-handedly affect corporate performance, and therefore that personal information about them affects corporate performance. Separation of the syllogism into its constituent parts demonstrates that both premises are flawed. Accordingly, the conclusion is false, laden as it is with erroneous assumptions.

A. *First Premise: Anecdotal Evidence Regarding Private Life Activities Sheds Light on Personal Characteristics and Core Values*

The private facts we learn about CEOs are at best anecdotal evidence of their ability and integrity, and some may have no bearing at all. Worse, providing formal disclosure of such information might on balance be more harmful than beneficial to investors.[313] As we have demonstrated, health information suffers from a lack of ripeness. It also requires the untrained investor to interpret its import. The same is true with respect to most information gleaned from the private life of the CEO, which would overtly invite investors to speculate about the fact's relevance to job performance or even about its probative value with respect to his actual attributes.

To better understand how worthless such anecdotes may be to the investor's effort to make an informed investment decision, or otherwise to "get to know" a CEO, let us consider a hypothetical that illustrates the weakness of the available inferences from a private fact about a CEO. Suppose a middle-aged CEO undergoes a facelift while he is purportedly on vacation. Such a cosmetic procedure by definition is not medically necessary. It is undertaken to improve one's appearance, typically to mask the effects of advancing age. While perhaps the clearest conclusion that can be drawn from this is that the CEO is vain or narcissistic, the surgery is also clearly a form of deception, however mild. Does this fact assist investors in drawing any legitimate conclusion about his predisposition to prevaricate generally? If indeed it does prove he is a liar, does he lie only in his personal life (or about his age or appearance), or is he also willing to lie to his employees, to the board of directors, to

313. *See* Heminway, *supra* note 11, at 783–86 (noting that investors react unreasonably to disclosure of private facts about CEOs).

the market? The tenuousness of this inference points out two acknowledged social phenomena: first, situational personality; second, the fundamental attribution error.

The notion of situational personality has long been accepted in the field of social psychology.[314] Individuals often construct different personae, accessible by different constituencies and in different contexts, and each with different attributes the individual considers appropriate and desirable for the relevant constituency.[315] Naturally, a CEO may exhibit one habit or predisposition in her personal life, and yet the opposite may be true about her when she wears her career hat. Moreover, it stands to reason that errors in judgment or choices made in one's personal life are not always made with the same attention to detail, or even the same dispassionate rationality one would employ in the corporate context, where one's decisions are informed by the opinions of numerous experts as well as with an appreciation of how they will affect others.

Social psychology has suggested another theory that is applicable to CEOs and the public's perception of them. Fundamental attribution error encompasses several cognitive propensities.[316] Relevant to this argument, fundamental attribution error describes people's tendency to assume that the conduct of others is indicative of their character or kind of person they are, rather than a product of the situation that caused the behavior.[317] Psychological research also confirms the practice of jumping to conclusions, validating that people automatically make these character assumptions based on anecdotes about someone else.[318]

A host of other cognitive biases can also lead to misinterpretation of anecdotal information.[319] Perhaps these

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314. *E.g.*, ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 17–21 (1959).

315. Avner Levin & Patricia Sánchez Abril, *Two Notions of Privacy Online*, 11 VAND. J. ENT. & TECH. L. 1001, 1013 (2009).

316. *See* ROGER BROWN, SOCIAL PSYCHOLOGY: THE SECOND EDITION 176–82 (1986).

317. *See, e.g.*, *id.* at 133–35. Attributing failures to personality defects rather than situations—which cannot be changed—may allow us to see the world as inherently fair, i.e., we get what we deserve and we deserve what we get. *See generally* Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030 (1978).

318. *See* Donal E. Carlston & John J. Skowronski, *Savings in the Relearning of Trait Information as Evidence for Spontaneous Inference Generation*, 66 J. PERSONALITY & SOC. PSYCHOL. 840, 841 (1994).

319. *See supra* Part V.A.1 (discussing cognitive biases that may affect interpretation of medical diagnoses and any decision to disclose them). Investors also are prone to employ these heuristics in their assessment of a CEO's conduct and its putative effect on the corporation she leads.

considerations alone justify the SEC's trepidation with respect to qualitative disclosure.

B. Second Premise: The CEO Single-Handedly Affects Corporate Performance

An oft-cited idiom of the corporate world is "no one is indispensable." It is curious, then, that a prevailing assumption about CEOs is that the individual at the top of a corporation is indispensable and, in certain cases, synonymous with the company.[320] Professor Rakesh Khurana has described this pervasive fallacy as the "distinctly American cult of the CEO."[321] Extant business scholarship points to an inflated market view of the power of an individual chief executive to sway a company's bottom line. At its extreme, this misconception equates the individual at the helm with the corporation itself, tying together their fates and foibles and imbuing them with each other's characteristics. Such was the tenor of much of the discussion calling for disclosure of Steve Jobs's veiled illness.[322]

The construct of the iconic CEO is the product of corporate, media, and psychological influences at play in modern society. Encouraged by an upswell in investor involvement, corporate boards seeking to woo investors with a "quick fix" have characterized incoming CEOs as saviors, or charismatic leaders whose personal abilities have a direct impact on firm performance. "Star" CEOs are treasured "because a high-profile, high-status appointment is almost certain to inspire public confidence in the company and immediately boost share prices."[323] In fact, academic research studying the performance of so-called "superstar CEOs" has revealed that the elite cadre of celebrity CEOs (as measured by public notoriety and media awards) commonly underperform.[324] This research reinforces what some have called a misguided market focus on CEO charisma and likeability.

As discussed above, the business media and corporate public relations machine has reinforced this phenomenon by aggrandizing CEOs as the all-important personifications of their

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320. *See* Lin, *supra* note 11, at 392–94.

321. KHURANA, *supra* note 12, at 68.

322. *See* Brad Stone, *Apple Chief Temporarily Steps Aside*, N.Y. TIMES, Jan. 15, 2009, at B1.

323. KHURANA, *supra* note 12, at xii.

324. Ulrike Malmendier & Geoffrey Tate, Superstar CEOs 2 (Mar. 15, 2007) (unpublished manuscript), *available at* http://ssrn.com/abstract=972725; *see also* Rakesh Khurana, *The Curse of the Superstar CEO*, *in* HARVARD BUSINESS REVIEW ON LEADERSHIP AT THE TOP 1, 3–4 (2003) (criticizing the focus on superstar quality of CEOs as misguided and harmful to the corporation).

organizations. CEOs themselves underline their importance with best-selling books about their lives, personal philosophies, and "secret" guides to success.[325] While the attention and adulation may cause stock prices to rise in the short term, there is no research suggesting that a popular or admired figurehead can indeed change the fate of a company.

Both social psychologists and psychoanalysts have posited theories on the amplified focus on the CEO. Social psychology suggests that investor capitalism encourages a fundamental attribution error regarding the impact of an iconic personality.[326] In other words, the general public tends to match the personal attributes of CEOs with corporate outcomes, and concomitantly to underestimate the impact of situational factors. As a result, whether positive or negative and whether or not in fact causally connected, corporate results are attributed to business leaders and become determinative of their legacies.

The hypothesis that the CEO as an individual can single-handedly affect the firm's performance is unsubstantiated. This proposition has been repeatedly tested in academic literature, which is divided into two schools of thought: the leadership school and the constraint school. The leadership school concludes that CEOs "play a critical role in affecting firm performance" by means of decisions, adoption of appropriate structures, strategy, and the culture they foster.[327] The constraint school proposes that a range of internal and external constraints hamper the CEO's ability to affect the firm's performance.[328] Despite numerous studies, there is no conclusive evidence linking CEO leadership to organizational performance, much less linking a CEO's personal life to her firm's performance.[329]

It is certainly possible to envision a company whose CEO's pioneering invention or vision laid the foundation for the company. However, considering that the average number of employees among the smallest publicly traded companies is a

325. *E.g.*, ROBERT SLATER, GET BETTER OR GET BEATEN: 29 LEADERSHIP SECRETS FROM GE'S JACK WELCH (2d ed. 2001); ROBERT SLATER, INVEST FIRST, INVESTIGATE LATER: AND 23 OTHER TRADING SECRETS OF GEORGE SOROS, THE LEGENDARY INVESTOR (1996); ROBERT SLATER, OVITZ: THE INSIDE STORY OF HOLLYWOOD'S MOST CONTROVERSIAL POWER BROKER (1997).

326. *See* BROWN, *supra* note 316, at 169.

327. KHURANA, *supra* note 12, at 21.

328. *Id.*

329. Khurana, *supra* note 324, at 7. "In fact, most academic research that has sought to measure the impact of the CEOs confirms Warren Buffett's observation that when you bring good management into a bad business, it's the reputation of the business that remains intact." *Id.*

sizeable 554,[330] 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.

C. Conclusion: Therefore, the Private Lives of CEOs Affect Corporate Performance

Not only are anecdotal facts about CEOs not dispositive of their individual attributes, but CEOs do not determine corporate performance on their own. Because both premises supporting the conclusion that a CEO's private life affects corporate performance are false, the conclusion itself is categorically false.

Indeed, it seems that almost any personal disclosure could be justified as informing either the integrity or ability of a corporate officer, or both. This is an unacceptable principle on which to justify a system of mandatory disclosure.

VII. CONCLUSION

Our conclusion regarding securities law echoes the concerns held by Wimsatt and Beardsley when they posited the literary intentional fallacy critique. Like ours, theirs was a critical reaction to a prevalent interpretive trend they deemed unsound, prejudicial, impracticable, and distracting. They advocated refocusing the critical inquiry away from the often-unknowable personal history and context. Similarly, we argue that securities law would be unduly burdened by further mandatory disclosures regarding the lives and idiosyncrasies of CEOs. Its focus should remain on verifiable facts rather than attenuated inferences.

Chief executive officers, with their bountiful salaries and success at the elusive pinnacle of the corporate ladder, are naturally the subject of the investing public's gaze. In an information-rich era teeming with overexposure, the public's interest in CEOs is ever-present in all of its articulations—from gawking voyeurism (Mosley's sex practices), to natural curiosity (Jobs's wellbeing) and legitimate public concern (Kozlowski's fraud). This interest is the likely product of the convergence of social, psychological, and corporate factors leading to the lionization of business leaders.

In most cases, securities law does not squarely compel, nor does privacy law clearly shield, disclosure of this coveted information. Against a backdrop of repeated calls for more

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330. *See* CNN Money, Fortune Small Business 100, http://money.cnn.com/magazines/fsb/fsb100/full_list (last visited Jan. 18, 2010).

disclosure in securities law, the current legal void pits individual rights against public interest. Should securities law compel publicly traded companies to disclose certain private CEO facts?

Ultimately, we have demonstrated that such mandatory securities disclosure is neither warranted nor desirable. First, the law's status quo adequately regulates information flow. We have set forth the extant legal rubric of privacy and securities laws. At the prohibitive end of the spectrum, privacy law shields the corporate executive from intrusive practices, those which are nonconsensual. On the compulsory side of the spectrum, securities laws mandate disclosure of verifiable facts upon which investors can make reasonable and legitimate assumptions. In the middle, the law allows for the free exchange of information that is publicly available or otherwise volunteered by its subject.

Second, given the impossibility of a bright line rule and the nature of the subject matter, disclosure is not practicable. Disclosure could only be justified based on the legitimacy of the public's interest in the CEO's private life. This legitimacy can only be measured *vis-à-vis* the information's bearing on the executive's integrity and ability to execute his post. However, integrity and ability being the slippery and context-specific concepts they are, it is essential to inform any such analysis with a critical axiom: CEOs are human beings, subject to death, health issues, personal foibles, and relationship turmoil. Efforts to control their misbehavior can be addressed through contract law and codes of ethics. Efforts to control their humanness might better be addressed by a mandatory line-item disclosing whether the corporation has a concrete succession plan in place.

Securities law has to-date been able to avoid the intentional fallacy conundrum by limiting investor scrutiny on CEOs lives to information upon which reasonable inferences can be made. Any regulation requiring companies to divulge private CEO matters would subject CEOs to unnecessary intrusion and securities laws to a muddling intentional fallacy.