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# Must the Health Problems of a Key Executive be Publicly Disclosed?

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Is a public company obligated to disclose the health problems of its CEO or other key officers? Does the executive have any say on preserving his or her medical privacy?

These questions arise frequently and sometimes suddenly, but there is surprisingly little guidance as to what public disclosures, if any, are required. The topic has been the subject of some recent debate, however, with speculation surrounding the health of Steve Jobs, the CEO of Apple Inc.

Jobs was diagnosed in 2004 with pancreatic cancer, which thereafter seemed to go into remission. Last year, however, Jobs appeared gaunt, raising questions about his condition and causing Apple's stock price to decline significantly. In January of this year, Jobs attributed his health condition to a "hormone imbalance" that was treatable with a "relatively simple and straightforward" remedy. Subsequently, Jobs indicated that there was something "more complex" and announced that he would be taking a medical leave of absence, again resulting in Apple's stock price declining significantly. News reports indicate that the Securities and Exchange Commission (SEC) has launched an investigation into the disclosures relating to Jobs' health.

As a general rule, company information that is "material" must be disclosed in relevant SEC reports under federal securities laws. The New York Stock Exchange and Nasdaq Stock Market have similar rules. We know that "materiality" depends on whether there is a substantial likelihood a reasonable investor would consider the information important in making an investment decision. The U.S. Supreme Court, in *Basic v. Levinson* and quoting from *SEC v. Texas Gulf Sulphur*, also indicated that whether a contingent or speculative event is material requires "a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."

The SEC has made clear in detailed regulations that each perquisite of a well-compensated Vice President must be spelled out by category if his or her total perquisites exceed $10,000. And amendments to the CEO's standard indemnification agreement must be disclosed in four business days. Given that these topics focus on executive compensation and benefits, a public company is surely unwise in cutting a disclosure corner.

We live, however, in a seemingly Orwellian world. While the SEC makes very clear its focus on executive perquisites, wouldn't an investor find the health issues of an iconic CEO far more "material"? As Barron's noted in its March 23, 2009 article on CEOs, "As goes Jobs, so goes Apple's stock." And yet, as noted, we have no specific guidance and the past disclosure practices of public companies have been all over the map on this issue.

Complicating the analysis are employment and other laws providing individuals with privacy rights. California law, for example, prohibits disclosure of an employee's medical information without the employee's prior authorization.

Where does all of this leave us?

Many securities law experts contend that the required disclosures about compensation, perquisites, conflicts of interest, family relationships and even small environmental lawsuits are driven more by public policy and less as a result of deemed "materiality" to the company. And many also forcefully argue that while the potential loss of an iconic CEO may be material, that is not the case for the bulk of the executive universe. Until the courts or the SEC decides differently, this bifurcated standard may well be defensible.

Hopefully, the company choosing not to make a disclosure about its CEO has not claimed that he or she is "irreplaceable" in the company's Proxy Statement and its Risk Factors do not state that loss of the CEO would clearly result in a material adverse change. For those companies choosing more transparency and those with "iconic" CEOs, a few guidelines may be helpful:

First, the public company should close its trading window for insiders when a CEO or other key individual has serious, but undisclosed health problems that will likely make it impossible for the individual to work in the near future.

Second, the Board and the executive should map out a constructive disclosure strategy that provides transparency while avoiding investor expectations of hourly or daily updates. The disclosable fact is that the company is at risk of losing the services of a key person, not who the doctor is or other personal information.

Third, consideration should be given to the requirements of Forms 10-Q and 10-K when the serious health problems of a key person have not been previously disclosed. Even if the executive refuses to allow disclosure of the medical conditions, a Risk Factor may be appropriate to the effect that the Board is actively addressing CEO succession planning since there is a reasonable possibility a successor may be selected in the near term. Such a disclosure is less than ideal and will undoubtedly start the rumor mill, but it does put the market on some notice.

And fourth, public disclosures must be true and accurate, for otherwise they can be viewed on a plaintiff lawyer's exhibit prominently displayed before the jury in a securities class action.

In summary, there is little specific guidance on when, how and whether to disclose the health problems of key executives. And the nature of what may or should be disclosed varies widely from case to case. But in those cases where there is a known and significant possibility the company may lose the services of a truly iconic executive, long-standing though generalized disclosure requirements in the federal securities laws may mandate some form of accurate public disclosure.