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Disclosure Issues in SEC Enforcement Actions and Investigations

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Because of the potential impact of an SEC investigation and the outcome of such an investigation on the operations, management, financial performance and reputation of an organization, it is crucial to consider and analyze regularly both the need for and strategic benefit of publicly disclosing information about the investigation. For public companies, there are regulatory and accounting requirements governing such disclosures, but no rule explicitly mandating or addressing disclosure of an SEC investigation. For regulated individuals and entities, such as broker-dealers, investment companies

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and investment advisers, there are additional regulatory requirements to be considered. Even absent a disclosure requirement, however, there are several strategic factors to be considered in determining whether an investigation nonetheless should be communicated publicly. This chapter addresses these complex issues and the framework for analyzing them.

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Disclosure by the SEC

Q 9.1 Will the SEC disclose the existence of an investigation?

The Staff takes very seriously its confidentiality policies and obligations. Section 203.5 of Title 17 of the Code of Federal Regulations, which governs SEC investigations, provides that all formal investigative proceedings are non-public, and the rules of the Exchange Act provide that information obtained by the Staff in an investigation is confidential and may not be disclosed outside of the Commission absent a determination by the Commission or the Commission’s General Counsel that such disclosure would be in the public interest.¹ Accordingly, the SEC Staff goes to great lengths not to reveal publicly information about its investigations and entities that might be under investigation unless and until a determination is made to commence an enforcement proceeding.

This general rule, however, does not prohibit the SEC from sharing information privately or with other governmental or regulatory bodies.² Indeed, each time a party is asked to produce documents or

provide testimony, Enforcement's policy is to advise that party of the "Routine Uses of Information," such as coordinating regulatory or law enforcement activities with other federal, state, local or foreign agencies, referring suspected misconduct to professional licensing associations and SROs for possible disciplinary action and many other purposes.³

Although the Staff has the freedom to share information with others, it also has strict rules and procedures governing such sharing. Section 24(c) of the Exchange Act and Rule 24c-1 specify the procedure by which other law enforcement authorities, SROs, bankruptcy trustees, professional licensing associations and others may request access to nonpublic information in the Staff's files.⁴ In addition, the Staff may informally refer matters under investigation to criminal authorities, state agencies, SROs and others.⁵ Once information is shared outside of the agency, it may become subject to less restrictive policies regarding confidentiality.

It is also possible that information submitted to the Staff could be the subject of a FOIA request, and persons and companies submitting information to the SEC should be careful to request confidential treatment for that information when appropriate.⁶

Q 9.2 Even if the SEC does not disclose the existence of an investigation, are there other ways in which the investigation may become public or disclosed to others?

There are many ways in which the existence of an SEC investigation may become public even though it is highly unlikely that the Staff would intentionally disclose the existence of a pending investigation. For example, if the investigation involves a whistleblower, the whistleblower may believe that it is in his or her best interest to generate media coverage of the investigation.⁷ Additionally, in the course of the investigation, the Staff may alert analysts, investors, auditors, consultants, customers, suppliers and other business partners to the investigation by issuing to them requests or subpoenas for information, documents or testimony. Whether this occurs depends entirely on the nature of the investigation, but it is important to be mindful of the

likelihood that third parties will learn of the investigation and to have a plan in place for responding to questions that may arise. This is addressed further below in the discussion of the need for disclosure in order to comply with Regulation Fair Disclosure (“Regulation FD”).

Disclosure by Public Companies

Q 9.3 When is a public company required to disclose a government investigation in a public filing?

There is no specific requirement under the federal securities laws or U.S. Generally Accepted Accounting Principles (GAAP) that a public company disclose the existence of a government investigation. There are, however, two general situations when it must make such a disclosure: (1) when the investigation gives rise to other events that specifically require disclosure under the federal securities laws; and (2) when failing to disclose the investigation would make other disclosures or communications materially misleading. Among the most common events that arise during government investigations that cause companies to consider disclosure are when:

- The investigation evolves from an informal to a formal investigation.
- The company makes a determination after receiving a subpoena or learning of widespread misconduct that the SEC investigation is likely to continue for an extended period of time.
- The company learns through the issuance of a Wells notice that the SEC is contemplating an enforcement action.
- An officer or director is deemed to have engaged in misconduct.
- The company determines that there is a material error in its financial statements.

None of these events alone necessarily requires disclosure of the investigation; they are, however, the events that most frequently prompt an analysis of whether disclosure is warranted.

Q 9.4 For public companies, what statutory and regulatory authority should be considered in evaluating whether a disclosure is necessary in a registration statement or periodic report?

Regulation S-K, promulgated pursuant to the Securities Act, sets forth the rules addressing disclosure requirements in the non-financial statement portions of registration statements and periodic filings. There are several sections of Regulation S-K that are relevant in the context of an SEC investigation and should be considered in evaluating disclosure decisions.

For example, Item 103 of Regulation S-K (“Legal Proceedings”) requires disclosure of any “material pending legal proceedings,” including “any such proceedings known to be contemplated by governmental authorities.”⁸ Item 103 does not require the disclosure of an SEC investigation because an investigation, without more, is not a “pending legal proceeding.”⁹ Item 103 does, however, require disclosure of enforcement actions filed by the SEC (a “governmental” authority) and, moreover, requires disclosure whenever such an enforcement action is “known to be contemplated” by the SEC. As discussed more fully in chapter 6 (“The Wells Process”), the Staff ordinarily uses a Wells notice to make it known that the Staff is contemplating recommending that the SEC file an enforcement action. Approval by the SEC Commissioners is not required for the Staff to issue a Wells notice.¹⁰ Accordingly, the prevailing view—consistent with the only court decision addressing this issue, *Richman v. Goldman Sachs*—is that Item 103 does not require disclosure of receipt of a Wells notice. Nevertheless, many practitioners would consider it prudent to disclose receipt of a Wells notice.

**CASE STUDY: *Richman v. Goldman Sachs***

Richman was a class action against Goldman Sachs alleging violations of section 10(b) of the Exchange Act and corresponding Rule 10b-5. This was the first case in which a court addressed the disclosure obligations of a public company that has received a Wells notice.

In August 2008, the SEC informed Goldman that it was investigating Goldman's involvement in a collateralized debt obligation (CDO) named Abacus and, pursuant to the investigation, served Goldman with a subpoena. Goldman subsequently disclosed in its SEC filings that it had received requests from "various governmental agencies" relating to CDOs and was cooperating with those requests.

In July 2009, Goldman received a Wells notice from the SEC stating that the Staff intended to recommend to the Commission that it proceed with enforcement action against Goldman. Goldman filed a Wells submission and followed up with the Staff regarding the matter. Goldman never disclosed in its subsequent SEC filings, however, that it had received a Wells notice.

The plaintiffs alleged that Goldman had an affirmative duty to disclose the receipt of the Wells notice (1) to ensure that the prior disclosure about governmental investigations was not materially misleading; and (2) to comply with Item 103 of Regulation S-K, FINRA Rule 2010 and NASD Conduct Rule 3010.

Plaintiffs' first argument was that Goldman's failure to disclose the Wells notice had misled investors into believing that "no significant developments had occurred which made the investigation more likely to result in formal charges." The court disagreed, noting that, although a company has a duty to be "accurate" and

“complete” when it speaks, it is not required to disclose every fact that would be of interest to a reasonable investor. Accordingly, a company need not predict the outcome of a pending investigation unless it has evidence that litigation is “substantially certain to occur.” Because a Wells notice only represents a non-binding intention of the Staff to recommend Commission action, the court concluded that Goldman could not have been “substantially certain” that litigation would result from the Wells notice and thus did not need to disclose it.

As to the plaintiffs’ regulatory arguments, the court expressed doubt about whether the disclosure duties arising from Regulation S-K, FINRA and NASD could support a Rule 10b-5 action at all. Nevertheless, the court examined Regulation S-K’s requirement that companies disclose “material pending legal proceedings . . . known to be contemplated by governmental authorities,” and concluded that Goldman did not violate the provision because the Wells notice merely represented “an indication that the staff of [the SEC] [was] considering making a recommendation [to bring an enforcement action]”—not an indication that the Commission was contemplating such an action.

Item 303 of Regulation S-K (“Management’s Discussion and Analysis of Financial Condition and Results of Operations” (MD&A)) requires disclosure of “changes in [a company’s] financial condition and results of operations,” either of which could be materially affected by an SEC investigation. For example, the costs of the investigation may have a material impact on results of operations.¹¹ Or an investigation may uncover an improper practice that, when stopped, will materially affect the reported or actual financial performance of the company.¹² In addition, Item 303 provides explicit disclosure requirements for off-balance sheet arrangements and known events or uncertainties that are reasonably likely to result in the termination of an off-balance sheet arrangement or materially affect the company’s liquidity or access to capital.

Item 503(c) of Regulation S-K (“Risk Factors”) requires disclosure of the most significant risk factors that a company faces. If the subject matter of an investigation could materially impact the company’s business, it may be sufficiently serious to warrant disclosure.¹³ In addition, an investigation may uncover additional risk factors of which management was previously unaware.

Item 401(f) of Regulation S-K (“Involvement [of Directors or Executive Officers] in Certain Legal Proceedings”) requires disclosure of certain legal proceedings involving directors or officers “that are material to an evaluation of the ability or integrity” of a company’s directors and executive officers. Specifically, disclosure is required when a director or officer is “a named subject of a pending criminal proceeding.”¹⁴ This provision should generally lead prudent counsel to advise that disclosure be made when an indictment is imminent. In addition, although Item 401(f) does not explicitly require it, companies will often disclose the receipt of a Wells notice by any company director or executive officer.

Q 9.5 For public companies, what rules govern whether a disclosure is required before the next periodic filing?

While Regulation S-K addresses disclosures to be made in registration statements and periodic filings, there are certain events that may arise in an SEC investigation that require a company to file a “Current Report” on Form 8-K rather than waiting to disclose such events in the next periodic filing. Such filings generally must be made “within four business days after occurrence of the event.”¹⁵ Some examples of events that may arise during an SEC investigation that could require disclosure in a Current Report include:

“Changes in Registrant’s Certifying Accountant.” Item 4.01 of Form 8-K requires disclosure when the principal auditor of a company’s financial statements, or “an independent accountant upon whom the principal accountant expressed reliance in its report regarding a significant subsidiary, resigns (or indicates that it declines to stand for re-appointment after completion of the current audit) or is dismissed.”¹⁶ An auditor change can be the result of something as innocuous as a merger of accounting firms or a desire to reduce auditor fees, or it may reflect

something much more serious, such as a disagreement between the company and the auditor on a significant accounting or reporting issue or even an auditor's inability to rely on management.¹⁷

“Non-Reliance on Previously Issued Financial Statements or a Related Audit Report.” Item 4.02 of Form 8-K requires disclosure when a company determines that its previously issued financial statements have significant errors and can therefore no longer be relied upon.¹⁸ This situation often occurs in the context of an accounting investigation.

“Departure of Directors or Certain Officers.” Item 5.02 of Form 8-K requires disclosure whenever a director or certain officer has resigned or left the company.¹⁹ In the event that a director has “resigned or refuses to stand for re-election to the board of directors . . . because of a disagreement with the registrant . . . on any matter relating to the registrant’s operations, policies or practices, or if a director has been removed for cause from the board of directors,” Item 5.02(a)(1) requires disclosure of a “brief description of the circumstances representing the disagreement that the registrant believes caused, in whole or in part, the director’s resignation, refusal to stand for re-election or removal.”²⁰

Similarly, if the “principal executive officer, president, principal financial officer, principal accounting officer, principal operating officer, or any person performing similar functions, or any named executive officer, retires, resigns or is terminated from that position,” Item 5.02(b) requires the company to disclose such departure.²¹ Although 5.02(b) does not require—as 5.02(a)(1) does—disclosure of the specific reasons for the departure, companies often make such disclosure to avoid unwarranted speculation or because the reasons relate to a prior public filing, such as receipt of a Wells notice.²²

“Waiver of a Provision of the Code of Ethics.” Item 405 of Regulation S-K requires a company to disclose whether or not it has adopted a written code of ethics—including provisions for promoting “[a]ccountability for adherence to the code”—that applies to its senior officers.²³ If the company has adopted a code of ethics for these officers, it must file a copy with the SEC.²⁴ If the company has not adopted such a code of ethics, it must “explain why it has not done so.”²⁵ For this reason, most public companies have adopted a code of ethics for their senior officers.²⁶

Item 5.05 of Form 8-K requires disclosure of any “waiver, including an implicit waiver, from a provision of the code of ethics” provided to “the registrant’s principal executive officer, principal financial officer, principal accounting officer or controller or persons performing similar functions.”²⁷ An “implicit waiver” occurs whenever one of these members of management is found to have engaged in conduct that constitutes a “material departure” from a provision of the company’s code of ethics and the company fails to “take action within a reasonable period of time.”²⁸ In those circumstances, the company must disclose “the nature of the waiver, the name of the person to whom the waiver was granted, and the date of the waiver.”²⁹

“Regulation FD Disclosure.” Item 7.01 of Form 8-K provides a location for a company to make a disclosure in order to comply with Regulation FD (addressed in detail below) in the event that the company chooses to use Form 8-K for that purpose.³⁰

“Other Events.” Item 8.01 of Form 8-K *permits* (but does not require) a company to disclose any information “not otherwise called for” by Form 8-K if the company “deems [the information] of importance to security holders.”³¹ One common use for Item 8.01 in the context of an SEC investigation is to inform investors immediately when the company resolves the investigation, without waiting for the next periodic filing or some other event triggering a required disclosure.

Q 9.6 What if a company determines that there are no events requiring disclosure, but wishes, nonetheless, to speak about the investigation?

Regulation FD requires a public company to disclose material information simultaneously to the public when it chooses to disclose that information to certain individuals and entities—such as securities market professionals and holders of the company’s securities who may well trade on the basis of the information.³² Accordingly, if a company chooses to address rumors or respond to questions from analysts about the pendency of an SEC investigation, Regulation FD may require that the company issue a public statement so that the company cannot be accused of selectively providing material information only to the analyst who inquired.

Q 9.7 What factors should be considered in determining whether the investigation is material?

Information is material when there is a substantial likelihood that its disclosure “would [be] viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”³³ Although the materiality of information is a mixed question of law and fact,³⁴ the mere existence of an SEC investigation, without more, often is not material as a matter of law.³⁵ The more important question is whether the investigation has resulted in the discovery of any material information.

Determining materiality requires the assessment of both qualitative and quantitative factors. Even when an investigation uncovers wrongdoing that involves comparatively small amounts of money and has no impact on the company’s financial statements, the seriousness and pervasiveness of the wrongdoing and the seniority of those involved may cause a company to conclude that the investigation has uncovered material information. In general, the following questions should be considered when assessing whether an investigation or information discovered in an investigation are material:

- Will the investigation have an impact on current or future operations? Or has the investigation uncovered an improper practice that, when stopped, will impact the company’s future performance? For example, if a company learns that it derives substantial business from improper payments, then the company’s future performance may be affected once the payments stop.³⁶
- Is a member of senior management involved in the subject matter of the investigation? The involvement of senior management does not necessarily mean that an investigation is material. Nevertheless, wrongdoing by senior management is more likely to be material than wrongdoing by a junior employee, and is likely to increase the severity of the sanction ultimately sought by the SEC.³⁷ Moreover, in the event that members of senior management have engaged in conduct

that constitutes a “material departure” from a provision of the company’s code of ethics, Item 5.05 of Form 8-K and the relevant exchange rules may require disclosure.³⁸

- How serious is the conduct at issue? For example, is it ongoing or historical only?³⁹ Is it isolated or widespread?⁴⁰ Does it involve intentional conduct designed to deceive the company’s board, auditors, investors or the SEC?⁴¹ Do the employees responsible still work at the company?⁴²
- Will the investigation impact the company’s ability to file financial statements on time?⁴³

Q 9.8 Are there any special disclosure requirements when doing a private placement?

Pursuant to the Jumpstart Our Business Startups Act of 2012, the SEC modified Rule 506 of Regulation D to allow issuers to engage in general solicitation and general advertising in connection with private placements, provided certain conditions are met.⁴⁴ One such condition is that so-called “bad actors” are disqualified from relying on Rule 506 if the disqualifying event occurred on or after September 23, 2013, the effective date of the rule change.⁴⁵ Bad actors include, among others, “the issuer; . . . any director, executive officer, other officer participating in the offering, general partner or managing member of the issuer; [or] any beneficial owner of 20% or more of the issuer’s outstanding voting equity” if, generally speaking, they have been found to have engaged in any misconduct in connection with the purchase or sale of any security.⁴⁶

This prohibition (codified in Rule 506(d) and 506(e)), however, does not apply if the disqualifying event occurred prior to September 23, 2013, and the issuer discloses to each purchaser the event that otherwise would have disqualified it from issuing securities in a private placement under Rule 506. Such a disclosure must be provided “in writing” to each purchaser at “a reasonable time prior to sale.”⁴⁷

Q 9.9 What disclosure obligations are imposed by the securities exchanges in their listing requirements?

In addition to the rules imposed on public companies by the SEC, the exchanges on which the company's securities trade have rules addressing circumstances that may arise in an SEC investigation. For example, Rules 202.05 and 202.06 of the New York Stock Exchange (NYSE) require disclosure of "news or information which might reasonably be expected to materially affect the market for [the listed company's] securities."⁴⁸ Similarly, NASDAQ Rule 5250(b)(1) requires its listed companies to make "prompt disclosure to the public . . . of any material information that would reasonably be expected to affect the value of its securities or influence investors' decisions."⁴⁹

In addition, NYSE Rule 303A.10 states:

A listed company must disclose in its annual proxy statement or, if it does not file an annual proxy statement, in its annual report on Form 10-K filed with the SEC that its code of business conduct and ethics is available on or through its website and provide the website address. To the extent that a listed company's board or a board committee determines to grant any waiver of the code of business conduct and ethics for an executive officer or director, the waiver must be disclosed to shareholders within four business days of such determination. Disclosure must be made by distributing a press release, providing website disclosure, or by filing a current report on Form 8-K with the SEC.⁵⁰

NASDAQ has a similar rule.⁵¹

In the event that a previously undisclosed investigation is leaked to the public, NYSE Rules 202.03 and 202.05 may require disclosure to dispel false rumors or confirm accurate ones.⁵² Here, too, NASDAQ has a similar rule.⁵³

Q 9.10 Are there circumstances when a public company may be required to disclose issues related to an SEC investigation in its financial statements?

Regulation S-X, promulgated under the Exchange Act, addresses the format and content of financial reports required to be filed as part of registration statements, periodic reports and proxy statements. Rule 4-01 of Regulation S-X generally provides that all financial statements are to be prepared in accordance with GAAP, and Financial Accounting Standards Board (FASB) Accounting Standards Codification Topic 450 (“ASC 450”) (formerly Financial Accounting Standards No. 5) addresses circumstances under which a public company may need to accrue for a potential loss contingency associated with an SEC investigation or litigation. ASC 450 provides that if a material loss is probable, the company must accrue the amount that is reasonably estimable.⁵⁴ If the amount is not reasonably estimable but is at least “reasonably possible,” no accrual is required; the company is, however, required to disclose the nature of the contingency and include either an estimate of the possible range of loss or a statement that such an estimate cannot be made.⁵⁵

Disclosure of contingencies related to an SEC investigation will most often arise in the context of settlement negotiations involving a financial penalty or disgorgement because prior to that time, it is generally too uncertain what the reasonably possible loss will be. Once settlement discussions have commenced and throughout the settlement process, it is important to assess regularly whether negotiations have progressed to the point where a loss is (1) reasonably possible or even probable; and (2) reasonably estimable. Factors that will affect this analysis include the company’s desire (considering input from both management and the board of directors) to settle, how likely based on past experience the company is to settle by paying a financial penalty or disgorgement and the difference between the government’s demand and the company’s offer.

Q 9.11 When a public company is considering disclosure, what is the significance of the fact that an investigation is “informal”?

The fact that an SEC investigation may be in the “informal” stage (that is, there is no formal order of investigation and the Staff does not have the authority to issue subpoenas) is relevant to the disclosure decision to the extent that the nature, subject and direction of the investigation remains uncertain. The fact that an investigation is informal, however, is not necessarily a sign that the Staff regards the matter as less serious, and all of the factors related to materiality still require analysis regardless of the label attached to the investigation.

Q 9.12 What is the significance of the fact that an investigation is “formal”?

As with informal investigations, the existence of a formal investigation or the conversion of an informal investigation to a formal investigation may be relevant to a decision to disclose the investigation. It does not alone, however, require disclosure.

The question one must ask is *why* the investigation has become formal. If it is an indication that the SEC Staff believes that it needs to issue broad-based subpoenas to the company or third parties or that it needs to issue subpoenas for testimony, it may be an indication that the investigation is going to continue for some time and may be expanding. Depending on the situation, such information may result in a conclusion that the investigation has become a material event. Under these circumstances, it may be appropriate to disclose the existence of the investigation before it progresses too far.

Q 9.13 Are public companies required to disclose a Wells notice?

Although there is no specific requirement that public companies disclose Wells notices,⁵⁶ most issuers consider notice of potential charges as sufficiently important to warrant disclosure. Prior to the 2012 decision in *Richman v. Goldman Sachs*, no court had ever been asked to consider disclosure obligations with respect to Wells notices.

Richman was a class action based on Goldman's failure to disclose it had received Wells notices from the SEC in connection with the SEC's investigation of Goldman's role in marketing synthetic CDOs.

In January 2009, Goldman's SEC filings disclosed ongoing governmental investigations. Between July 2009 and January 2010, the SEC issued Wells notices to Goldman and two Goldman employees. The SEC filed a complaint against Goldman and one of its employees in April 2010, which Goldman settled for \$550 million in July 2010. Plaintiffs alleged that Goldman's failure to disclose its receipt of the Wells notices was an actionable omission under section 10(b) and Rule 10b-5 of the Exchange Act, and that Goldman had an affirmative legal obligation to disclose its receipt of the Wells notices under applicable regulations.

Ruling on Goldman's motion to dismiss, Judge Crotty held that Goldman did not have a duty under section 10(b) or applicable SEC regulations to disclose its receipt of the Wells notices and dismissed plaintiffs' claims.⁵⁷

Q 9.14 Even if there is no requirement to disclose an investigation, are there strategic reasons for doing so?

Often there are good reasons to disclose the existence of an investigation even if the securities laws do not require it.

First, companies often decide to disclose the existence of an investigation early in the process to avoid shocking or surprising investors with bad news should the investigation takes an adverse turn. On this theory, investors have an opportunity to absorb the information before circumstances become dire, which can often control volatility in the stock price. Once the disclosure is made, however, the company has a duty to update that disclosure with additional material developments. Therefore, the company must consider very carefully whether the ability to mitigate market volatility justifies the burden of having to update the disclosure as the investigation proceeds and the company ought to carefully draft the disclosure so as not to require updates too frequently.

Second, a company may choose to disclose an investigation when there is speculation or rumors in the market that are hurting the price

of the stock. Not only can the disclosure correct the public record, but it can also enable company personnel to speak with the media or analysts without jeopardizing compliance with Regulation FD.

Q 9.15 What considerations should be made regarding the content of the disclosure?

Good disclosure will provide enough information to (1) minimize speculation about the investigation; and (2) avoid the need for supplemental disclosures in the near future. Questions to consider when drafting the disclosure include:

- Who or what appears to be the focus of the investigation? Is it the company or an employee acting on behalf of the company?⁵⁸ Or is it an employee acting in their personal capacity (for example, as an insider trader) or even a third party?⁵⁹
- What is the nature of the investigation? Is it an informal request for information or a subpoena pursuant to a formal order of investigation?⁶⁰ If known, what caused the SEC to initiate its investigation?⁶¹
- What is the subject matter of the investigation? Does it relate to current or historical activity?⁶² Does it involve the conduct of senior management?⁶³
- If the company is supplementing a prior disclosure, what is the content of the prior disclosure?⁶⁴
- If applicable, what have other parties to the investigation, such as competitors, disclosed?

Although the disclosure should provide sufficient information to inform (and minimize uninformed speculation by) investors and others, companies should be careful to avoid drawing premature conclusions about the investigation's outcome.⁶⁵ Such predictions, if they later turn out to be wrong, might form basis of private litigation or even an enforcement action.⁶⁶ In particular, companies should exercise caution once settlement negotiations with the Staff have begun. Only the Commission, and not its Staff, can authorize a settlement that includes the filing of a court or administrative order,⁶⁷ and the common past practice of disclosing settlements "in principle" with the SEC is disfavored.⁶⁸

These principles apply both to the initial disclosure of an investigation, as well as to later, supplemental disclosures regarding the investigation. It is critical that a company under ongoing investigation revisit these questions regularly to ensure that the sum of its disclosures give an accurate and up-to-date portrayal of what the company knows about the state of the SEC's investigation.⁶⁹

Q 9.16 Should disclosure of an investigation be pre-cleared with the Enforcement Staff?

This largely depends on the nature of the relationship between counsel and the Staff. Although the Staff likely will not comment on the content of the disclosure, providing notice is a professional courtesy that can engender goodwill and demonstrate the company's good faith to the government. If the company has any concerns about the content or positions it may be attributing to the Staff, it gives at least the opportunity for the Staff to comment. On the other hand, it is not required.

Q 9.17 What are the potential adverse consequences of a disclosure?

Disclosure of an investigation often has adverse consequences for a company, and, although many of these consequences are inevitable, well-advised companies will be prepared to manage any fallout to the extent possible. Some possible consequences to consider are:

- Investors and analysts may overreact to the news.⁷⁰ In addition, press coverage may fuel ongoing speculation about the nature or direction of the investigation.⁷¹
- Relationships with customers, suppliers, creditors and business partners may suffer. These consequences can range from mere questions about the investigation to outright termination of the relationship.⁷²
- Depending on the subject matter of the investigation and the location of the suspected misconduct, other regulatory agencies, including foreign government regulators, may decide to open independent investigations.⁷³

- The news may concern or distract company employees. This is true both with respect to employees who are involved in the investigation—whether because they are suspected of being involved in the subject matter of the investigation or because they are asked by company counsel or the SEC Staff to provide documents or information—as well as with respect to employees who are not involved in the investigation. As a result, morale and productivity can suffer.⁷⁴
- The disclosure may irritate the Staff. Although the Staff understands and is sensitive to the need for companies to make public disclosures of investigations, a disclosure that is poorly or too strongly worded, or that makes unwarranted predictions about the outcome of the investigation, may risk irritating the Staff. In addition, companies that are close to reaching a proposed resolution with the Staff should be mindful that only the Commission can authorize a settlement that includes the filing of a court or administrative order.⁷⁵ Accordingly, the common past practice of disclosing settlements “in principle” with the SEC is disfavored.⁷⁶

Q 9.18 How should a company prepare for the potential adverse consequences of a disclosure?

Before disclosing an investigation, a company should prepare its spokespersons and investor relations personnel for the questions that are likely to come from investors, analysts and the press. In addition, depending on the subject matter of the investigation, there may be important customers, suppliers or other business contacts who may be concerned about the investigation. A company should consider instructing the employees responsible for these relationships on how to address the subject should it come up. Generally, all of these employees should be advised not to discuss details of the investigation that have not already been part of the company’s disclosure and should be cautioned not to speculate on the outcome of the investigation.

In some circumstances, it may also be appropriate to make a press release clarifying the information contained in the company's disclosure. In particular, if it appears that the market or the press may be misconstruing the company's disclosure, a clarifying press release may correct unwarranted or incorrect speculation about the investigation.⁷⁷

Q 9.19 What are the potential adverse consequences of not disclosing an investigation?

Companies that choose not to disclose pending SEC investigations run the obvious risk that the investigation will later become public, either through an avenue beyond the company's control⁷⁸ or because a development in the investigation requires disclosure by the company. In either case, the lack of an up-front disclosure by the company can be more harmful than the initial disclosure might have been.

For one thing, investors who first learn of an investigation from a source other than the company are likely to be more surprised by the news and may react more negatively.⁷⁹ In addition, they may become skeptical of management's later disclosures either about the investigation in particular or even in general. This is particularly true given the propensity of most companies to disclose investigations at an early stage. Making an early disclosure tells investors, as well as other stakeholders, such as employees and business partners, that the company is handling the investigation in a serious way and with transparency, whatever the merit of the concerns on which the investigation is based.

Furthermore, disclosures that are made later in the course of an investigation are likely to contain significantly worse news than an early disclosure of the investigation's mere existence.⁸⁰ Accordingly, the market reaction is likely to be more extreme.⁸¹ In these circumstances, there is a heightened risk of private litigation by investors⁸² and even the possibility that the SEC will second-guess the company's decision not to disclose earlier.⁸³

Q 9.20 How should a public company respond to press or analyst inquiries once an investigation is disclosed?

Once a public company has disclosed an investigation, it should generally refer any press or analyst inquiries back to the prior disclosure. Ideally, the form and content of that disclosure will have been selected carefully with the assistance of counsel, with input from knowledgeable persons and with adequate time for reflection—each of which tends to improve the quality of the disclosure. Further remarks by the company, particularly those made in response to specific inquiries, are unlikely to be made in similarly favorable circumstances, and come with the risk of being incomplete, incorrect or inappropriately speculative. Moreover, a response to a specific inquiry about an ongoing investigation might be considered a “selective disclosure,” which, even if made unintentionally, could create an obligation to disclose the same information “promptly” to the public.⁸⁴ An intentional selective disclosure of material information to certain parties violates Regulation FD.⁸⁵

If, following the company’s first disclosure of the investigation, there is a further development that warrants either new disclosure or updating the prior disclosure, the company should make such additional disclosures as part of its regular process.

Q 9.21 What special considerations are there for foreign private issuers?

In general, the SEC filing requirements for foreign private issuers are less burdensome than those for domestic issuers. Foreign private issuers are, however, required to file (in most cases, on a Form 20-F) an annual report that discloses, among other things, the company’s risk factors, the resignation or dismissal of the company’s auditor and any governmental proceedings “pending or known to be contemplated.”⁸⁶ In addition, a foreign private issuer is required to disclose on a Form 6-K any material information that the issuer “(i) makes or is required to make public pursuant to the law of the jurisdiction of its domicile or in which it is incorporated or organized, or (ii) files or is required to file with a stock exchange on which its securities are traded and which

was made public by that exchange, or (iii) distributes or is required to distribute to its security holders.”⁸⁷ Such a filing must be made “promptly” after the public disclosure described above.⁸⁸ Because the requirements for Form 6-K depend in large part on the disclosure requirements of the foreign country in which the foreign private issuer is domiciled, incorporated or organized, it is necessary to be familiar with those requirements when considering whether to make public disclosure of an investigation on a Form 6-K.

Disclosure by Regulated Entities

Q 9.22 Are there special disclosure requirements for regulated entities?

Regulated entities, such as broker-dealers, investment advisors and investment companies have special disclosure obligations. These obligations arise primarily from FINRA and SEC regulations.

Under FINRA rules, a broker-dealer whose registered representative broker receives a Wells notice is required to update its regulatory record of the registered representative by including that fact on the broker’s Uniform Application for Securities Industry Registration or Transfer (“Form U4”) within thirty days.⁸⁹ The consequences of violating this rule can be severe. For example, in 2010 Goldman Sachs was fined \$650,000 for failing to disclose that two of its registered representatives had received Wells notices.⁹⁰

In contrast, investment advisors are required to file a Form ADV and update their Form ADV disclosures annually. Form ADV requires disclosure of “legal or disciplinary events that are material to a client’s or prospective client’s evaluation of [the advisor’s] advisory business or the integrity of [its] management.” Although receipt of a Wells notice may not fall squarely within this disclosure requirement, investment advisors often choose to disclose the receipt of a Wells notice by themselves or an affiliate on Form ADV.⁹¹

Investment companies are required to complete Form N-1A under the Investment Company Act. Under Item 10, the investment company must describe “any legal proceedings . . . known to be contemplated, by a governmental authority.”⁹² Although there is no case law interpreting

this requirement in Form N-1A, the language is identical to that in Item 103 of Regulation S-K, which the court in *Richman v. Goldman Sachs* concluded did not require disclosure of receipt of a Wells notice.⁹³

Disclosure by Individuals

Q 9.23 What disclosure requirements exist for individuals?

Q 9.23.1 ... for accountants?

There is no requirement for accountants to disclose that they are subject to investigation by the SEC. They must, however, consider whether to disclose investigations by the PCAOB, which also has authority to conduct investigations into wrongdoing at registered public accounting firms.⁹⁴ Because investigations by the PCAOB are confidential by statute,⁹⁵ the PCAOB may not require that registered public accounting firms report the content of an investigation to the Audit Committee of a company's Board of Directors. The PCAOB has, however, encouraged such reporting.

In a recent policy release, the PCAOB suggested that its investigations unit will consider "extraordinary cooperation" by accounting firms during the course of an investigation in making disciplinary recommendations to the Board.⁹⁶ Included in the definition of "extraordinary cooperation" is the accounting firm "promptly notifying its audit client or its audit committee (as appropriate) of the violative conduct and cooperating with the client, so that the client can (if necessary) take steps to comply with the federal securities laws and regulations . . ."⁹⁷

The PCAOB has also adopted a policy of encouraging Audit Committees of companies to inquire with their audit firms as to the results of periodic PCAOB inspections. To this end, the PCAOB has published a document detailing the nature of a PCAOB inspection with the view that "an audit firm's candid discussion of its PCAOB inspection results with an audit committee can have value for an audit committee not only in relation to the audit committee's oversight and evaluation of the audit engagement generally, but also in relation to the audit committee's role in the oversight of the company's financial reporting process."⁹⁸

Q 9.23.2 ... for attorneys?

Attorneys who are not employees of public companies generally are not subject to a public company's disclosure requirements or code of ethics. Rather, any disclosure obligation that exists for an attorney would require reporting to the attorney's state bar association or courts to which he or she is admitted.

Generally, state bar associations and courts do not mandate self-reporting for attorneys who are the subject of a government investigation. Rather, attorneys are often required to self-report only convictions, sanctions and, in some circumstances, indictments and civil judgments.⁹⁹ Thus, absent a special rule mandating reporting, an attorney need not disclose that he or she is the subject of an investigation or has received a Wells notice until at least such time as charges are filed against the attorney.

Q 9.23.3 ... for financial professionals?

Although financial institutions are required to ensure that their representatives register with FINRA by filing a Form U4,¹⁰⁰ it is the responsibility of the individual financial professional to ensure that the financial institution is fully informed in order to make appropriate disclosure.¹⁰¹ The U4 does not require disclosure of regulatory inquiries directed at financial professionals. It requires disclosure only when the registered representative is the "subject of [an] investigation" that could result in a finding that the representative violated the securities laws.¹⁰² "Investigation" includes SEC investigations after a Wells notice has been received.¹⁰³ It does not include "subpoenas, preliminary or routine regulatory inquiries or requests for information, deficiency letters, 'blue sheet' requests or other trading questionnaires, or examinations."¹⁰⁴

Q 9.23.4 ... for officers and directors of public companies?

The disclosure obligations of company officers and directors are set forth in the proxy content rules in Schedule 14A. Item 7 requires each director, director nominee and executive officer to disclose the information required by Item 401(f) of Regulation S-K, including whether he or she is "a named subject of a pending criminal proceeding."¹⁰⁵ As noted above, this requirement generally should lead prudent counsel

to advise that disclosure be made when an indictment is imminent. Beyond this disclosure requirement, however, officers and directors do not have a duty to disclose “uncharged criminal conduct.”¹⁰⁶

It is also important to note that officers and directors of a public company are almost invariably subject to the company’s code of ethics. Therefore, unless the officer or director has been granted an explicit or implicit waiver from compliance, he or she may have a duty under the code to report to the company any definite violations of the law or the code. He or she may also be required to report to the company any potential violations of the securities laws as many codes of ethics contain a provision requiring reporting when the officer or director knows of a violation of the securities laws that “may be occurring.”¹⁰⁷

Enforcement of Non-Disclosure

Q 9.24 Has the SEC brought enforcement actions based on a failure to disclose adequately an investigation?

The authors are unaware of any enforcement actions brought by the SEC against a company for failing to disclose adequately an SEC investigation. Nevertheless, the SEC may bring an enforcement action if (1) undisclosed developments in the SEC investigation give rise to other events that specifically required disclosure under the federal securities laws; or (2) failing to disclose developments in the SEC investigation would make other disclosures or communications materially misleading.

The SEC has brought enforcement actions based on a failure to disclose other, non-SEC investigations. For example, in *SEC v. Scott*, the Commission brought an enforcement action against the CFO of a public company for fraudulently omitting the existence of an internal investigation.¹⁰⁸ The CFO had caused the company to file notices of late filing (Form 12b-25) with the SEC indicating that the company’s periodic filing would be delayed.¹⁰⁹ But the company did not disclose that the reason for the delay was an internal investigation into accounting irregularities.¹¹⁰ The SEC alleged that the failure to disclose the internal investigation rendered the late filing notices misleading.

In addition, the SEC has brought enforcement actions for making inadequate or misleading disclosures about pending government investigations. For example, the SEC brought an enforcement action against Occidental Petroleum for failing to disclose adequately various government investigations.¹¹¹ The Commission alleged that Occidental's disclosure in its 10-K that "[i]n light of the expansion of corporate liability in the environmental area in recent years . . . there can be no assurance that Occidental will not incur material liabilities in the future as a consequence of the impact of its operations upon the environment" was insufficient where Occidental faced "90 pending or contemplated proceedings relating to discharge of waste into the environment."¹¹²

Moreover, incomplete or misleading disclosures about pending investigations may become fodder for private litigation. For example, investors brought a lawsuit against Wilfred American for allegedly misleading disclosures about a DOJ investigation into its financial aid programs.¹¹³ Wilfred American had expressed the opinion in its filings that any noncompliance with government regulations was not widespread.¹¹⁴ A federal grand jury, however, subsequently indicted the company and eighteen then-current and former employees for violating government regulations.¹¹⁵ The court denied Wilfred's motion to dismiss for failure to state a claim, allowing the investors' lawsuit to proceed.¹¹⁶

Notes

1. See 17 C.F.R. § 203.5 (2014) (“Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public.”); *id.* § 202.5(a) (“Unless otherwise ordered by the Commission, the investigation or examination is non-public and the reports thereon are for staff and Commission use only.”).

2. See David M. Stuart & David A. Wilson, *Disclosure Obligations Under the Federal Securities Laws in Government Investigations*, 64 BUS. LAW. 973, 975–77 (2009) (discussing the presumption of confidentiality in SEC investigations and the ways in which the existence of an investigation could nonetheless become public). This and other portions of this chapter draw on the author’s prior article with David A. Wilson on disclosure obligations in government investigations published in Volume 64 of *The Business Lawyer*.

3. See SEC, *Form 1661—Supplemental Information for Entities Directed to Supply Information to the Commission Other Than Pursuant to Commission Subpoena*, at 3-4 (2014), available at <http://www.sec.gov/about/forms/sec1661.pdf> (for regulated entities); SEC, *Form 1662—Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena*, at 3-5 (2014), available at <http://www.sec.gov/about/forms/sec1662.pdf> (for all others).

4. See SEC, DIV. OF ENFORCEMENT, SEC ENFORCEMENT MANUAL § 5, at 102–117 (2013) [hereinafter SEC ENFORCEMENT MANUAL], available at <http://www.sec.gov/divisions/enforce/enforcementmanual.pdf>.

5. See *id.* § 5.6, at 109–117.

6. Under FOIA, any person has a right to request the disclosure of federal government agency records and information. 5 U.S.C. § 552(a) (2012). Such a request might seek, for example, Wells submissions and documents produced in response to a subpoena, and might seek these documents either during or after an investigation. During an investigation, it is likely that the SEC will deny such a request under FOIA’s exemption for records that, if disclosed, “could reasonably be expected to interfere with enforcement proceedings.” *Id.* § 552(b)(7)(A).

Anyone who submits documents to the SEC can request confidential treatment of those documents. See 17 C.F.R. § 200.83 (2014). A confidential treatment request is not a guarantee that the documents will not be released in response to a FOIA request, but it does ensure that the SEC will consider whether confidential treatment is appropriate. A confidential treatment request must be made within thirty days of the date the documents subject to the request are submitted to the SEC, *id.* § 200.83(c)(4), and the requester must provide a basis for the request. Possible bases include: (1) personal privacy; (2) business confidentiality; or (3) “any other reason permitted by Federal law,” *id.* § 200.83(c)(1), including the nine statutory exemptions set forth in FOIA, see 5 U.S.C. § 552(b) (2012).

7. See, e.g., James Bandler & John Hechinger, *Fired Executive Questioned Xerox's Accounting Practices*, WALL ST. J. (Feb. 6, 2001), <http://online.wsj.com/articles/SB981411058880071857> (whistleblower brought wrongful termination lawsuit and made public statements regarding the matters under SEC investigation).

8. See Regulation S-K, Item 103, 17 C.F.R. § 229.103 (2014) (“Describe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.”).

9. See Stuart & Wilson, *supra* note 2, at 982–83.

10. The Staff may issue a Wells notice with the approval of a Deputy Director of Enforcement; approval by the SEC Commissioners is not required. SEC ENFORCEMENT MANUAL, *supra* note 4, § 2.4, at 23.

11. See, e.g., SciClone Pharm., Inc., Annual Report (Form 10-K), at 54 (Mar. 17, 2014) (“Additional increases in general and administrative expenses for the year ended December 31, 2013, included higher professional expenses of approximately \$5.3 million related to legal matters associated with the ongoing government investigation . . .”); Ambassadors Grp., Inc., Annual Report (Form 10-K), at 23 (Mar. 11, 2011) (“General and administrative expenses increased 16 percent primarily as a result of \$1.6 million increase in legal and professional fees, of which \$1.1 million is attributable to a shareholder class action suit and an investigation by the SEC . . .”).

12. See, e.g., Pride Int'l, Inc., Annual Report (Form 10-K), at 31–32 (Feb. 25, 2009) (identifying as a risk factor the discovery of improper customs payments in an amount “less than \$2.5 million” and noting that “dispositions for these types of matters [often] result in modifications to business practices”).

13. See Stuart & Wilson, *supra* note 2, at 984–85.

14. Regulation S-K, Item 401, 17 C.F.R. § 229.401(f)(2) (2014); see, e.g., San Lotus Holdings Inc., Quarterly Report (Form 10-Q), at 18 (Aug. 5, 2014) (“Yu Chien-Yang, our vice president and a member of our board of directors, was indicted by the Taichung District Prosecutor’s Office of Taichung County, Taiwan (R.O.C.) on May 17, 2013.”).

15. SEC Form 8-K, § B.1, <http://www.sec.gov/about/forms/form8-k.pdf> (last visited Sept. 19, 2014) [hereinafter SEC Form 8-K]. Note that in the event the company chooses to use a Form 8-K to publicly disclose an inadvertently made selective disclosure, then it must do so “[p]romptly”. 17 C.F.R. § 243.100(a)(2); see also *id.* § 243.101(d) (“promptly” means “as soon as reasonably practicable . . . after a senior official of the issuer . . . learns that there has been a non-intentional disclosure by the issuer or person acting on behalf of the issuer.”).

16. SEC Form 8-K, *supra* note 15, Item 4.01(a).

17. *Compare* SQN AIF IV, L.P., Current Report (Form 8-K), at 1 (June 4, 2013) (resignation of the company's independent registered public accounting firm due to its merger with another accounting firm), *with* Overstock.com, Inc., Amendment to Current Report (Form 8-K/A), at 2-3 (Nov. 23, 2009) (dismissal of the company's independent registered public accounting firm due to a disagreement over the proper accounting treatment of certain overpayments and underbillings).

18. SEC Form 8-K, *supra* note 15, Item 4.02(a); *see, e.g.*, Source Financial, Inc., Current Report (Form 8-K), at 1 (Feb. 27, 2014) (non-reliance due to an overstatement of revenue).

19. SEC Form 8-K, *supra* note 15, Item 5.02; *see, e.g.*, Euramax Holdings, Inc., Current Report (Form 8-K), at 1 (Mar. 7, 2013) (departure of Senior Vice President—Human Resources).

20. The SEC has construed Item 5.02(a) broadly. For example, in 2007 the SEC brought an enforcement action against HP alleging that HP should have disclosed a director's disagreement with the HP Board's treatment of the results of an investigation into boardroom leaks. *See In re Hewlett-Packard Co.*, Exchange Act Release No. 34-55801, at 3 (May 23, 2007), *available at* <http://www.sec.gov/litigation/admin/2007/34-55801.pdf>. The director had resigned over the disagreements and HP—concluding that the disagreement was merely between the departing director and the Chairman of HP's Board—did not disclose it. *Id.* at 4. The SEC alleged, however, that the disagreement was with HP itself because the disagreement “related to important corporate governance matters and HP policies regarding handling sensitive information, and thus constituted a disagreement over HP's operations, policies or practices.” *Id.*

In contrast, a disclosure by Telos Corporation that fully explained the reasons for multiple directors' departures illustrates a more cautious approach to Item 5.02's disclosure requirement. *See Telos Corp.*, Current Report (Form 8-K), at 1 (Aug. 17, 2006) (“Mr. Baker, Mr. Sterrett and Mr. Byers . . . stated they were each resigning because of a disagreement with the Registrant on a matter relating to the Registrant's operations, policies or practices The Registrant . . . believes that they may have disagreed with Mr. John R.C. Porter, the owner of a majority of the Registrant's Class A Common Stock, over the extent of any asset sale or other strategic transaction that the Registrant might conduct, over their rights and responsibilities to Mr. Porter as the owner of a majority of the Registrant's Class A Common Stock, and, in the case of Mr. Byers, with regard to his obligations as set forth in the proxy agreement.”).

In order to avoid any risk of an Item 5.02 disclosure violation, many companies now also attach to the Form 8-K announcing a director's resignation a letter from the resigning director reciting that his or her resignation is “not the result of any disagreement with the Company on any matter relating to the Company's operations, policies or practices.” *See, e.g.*, Sports Fields Holdings, Inc., Current Report (Form 8-K), Ex. 17.1 (Sept. 23, 2014).

21. SEC Form 8-K, *supra* note 15, Item 5.02(b).

22. See, e.g., Advanced Cell Tech., Inc., Annual Report (Form 10-K), at 21 (Apr. 1, 2014) (“We entered a separation agreement with Mr. Rabin, as previously disclosed in our Current Report on Form 8-K filed on January 22, 2014. In connection with this investigation, Mr. Rabin received a Wells notice from the SEC in January 2014, which indicates that the SEC may bring a civil action against Mr. Rabin, and gave Mr. Rabin an opportunity to provide the SEC with information as to why such action should not be brought.”).

23. Regulation S-K, Item 405, 17 C.F.R. § 229.406(a)–(c) (2014).

24. *Id.* § 229.406(c).

25. *Id.* § 229.406(a).

26. See ERNST & YOUNG, 13TH GLOBAL FRAUD SURVEY 14 (2014) (“Over 80% of [senior decision-makers surveyed] said that their companies have [anti-corruption] policies and codes of conduct.”).

27. SEC Form 8-K, *supra* note 15, Item 5.05(a)–(b); see also, e.g., Bacterin Int’l Holdings, Inc., Current Report (Form 8-K), at 1 (July 3, 2012) (“On June 27, 2012, the Board of Directors granted a waiver of certain provisions of the Company’s Code of Conduct to allow an entity controlled by two of Guy Cook’s adult children to become a distributor of the Company’s products.”); Capitalsource Inc., Current Report (Form 8-K), at 1 (Oct. 27, 2011) (“The Company Board has approved Mr. Delaney’s serving as an officer and director of Alliance Partners and BancAlliance and, on October 26, 2011, granted a Code of Conduct waiver to Mr. Delaney with respect to any of his current activities in connection with Alliance Partners, BancAlliance or their affiliates that are, or could be deemed to be, or result in an appearance of conflict with any provision of, or under, our Code of Conduct.”).

28. SEC Form 8-K, *supra* note 15, Item 5.05.

29. *Id.*, Item 5.05(b).

30. Regulation FD, 17 C.F.R. § 243.101(e)(1) (2014). Companies alternatively have the option to “disseminate[] the information through another method (or combination of methods) of disclosure that is reasonably designed to provide broad, non-exclusionary distribution of information to the public.” *Id.* § 243.101(e)(2).

31. SEC Form 8-K, *supra* note 15, Item 8.01.

32. Regulation FD, 17 C.F.R. § 243.100 (2014).

33. *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)).

34. *TSC*, 426 U.S. at 450.

35. See, e.g., *Gallagher v. Abbott Labs.*, 269 F.3d 806, 808–09 (7th Cir. 2001) (affirming the dismissal of a securities class action based on the defendant’s non-disclosure of a Food and Drug Administration investigation); see also *Stuart & Wilson*, *supra* note 2, at 980–82 (explaining that the existence of an investigation may not be a material fact if the investigation has not yet yielded any “substantially certain” information).

36. See *supra* note 12.

37. See, e.g., Press Release, SEC, SEC Charges Dell and Senior Executives with Disclosure and Accounting Fraud (July 22, 2010), available at <http://www.sec.gov/news/press/2010/2010-131.htm> (“The SEC charged Dell Chairman and CEO Michael

Dell, former CEO Kevin Rollins, and former CFO James Schneider for their roles in the disclosure violations. The SEC charged Schneider, former regional Vice President of Finance Nicholas Dunning, and former Assistant Controller Leslie Jackson for their roles in the improper accounting. Dell Inc. agreed to pay a \$100 million penalty to settle the SEC's charges. Michael Dell and Rollins each agreed to pay a \$4 million penalty, and Schneider agreed to pay \$3 million, to settle the SEC's charges against them. Dunning and Jackson also agreed to settle the SEC's charges.").

38. *See supra* notes 28–29 and accompanying text; NASDAQ, Listing Rule 5610, <http://nasdaq.cchwallstreet.com> (last visited Sept. 20, 2014) ("Any waivers of the code for directors or Executive Officers must be approved by the Board. Companies, other than Foreign Private Issuers, shall disclose such waivers within four business days by filing a current report on Form 8-K with the Commission or, in cases where a Form 8-K is not required, by distributing a press release."); NYSE, INC., NYSE LISTED COMPANY MANUAL Rule 303.A10 (2009), *available at* <http://nysemanual.nyse.com/LCM/> [hereinafter NYSE LCM] ("To the extent that a listed company's board or a board committee determines to grant any waiver of the code of business conduct and ethics for an executive officer or director, the waiver must be disclosed to shareholders within four business days of such determination.").

39. *See, e.g.*, F5 Networks, Inc., Annual Report (Form 10-K), at 26 (Nov. 23, 2010) ("We previously received notice from both the SEC and the Department of Justice that they were conducting informal inquiries into our historical stock option practices, and we have fully cooperated with both agencies."); Schnitzer Steel Indus., Inc., Current Report (Form 8-K), at 2 (Aug. 24, 2005) ("On August 23, 2005, the Company received from the [SEC] a formal order of investigation relating to the Company's previously announced independent investigation of the past practice of paying improper commissions to purchasing managers of customers in Asia in connection with export sales of recycled ferrous metals."); Vail Resorts, Inc., Quarterly Report (Form 10-Q) (June 13, 2003) ("In February 2003, the SEC informed the Company that it has issued a formal order of investigation with respect to the Company. The inquiry relates to the Company's previous accounting treatment for recognizing revenue on initiation fees related to the sale of memberships in private member clubs."); Hyperdynamics Corp., Annual Report (Form 10-K), at 7 (Sept. 12, 2014) ("In September 2013 we received a subpoena from the DOJ and in January 2014 we received a subpoena from the SEC. Both subpoenas request that the Company produce documents relating to our business in Guinea. We understand that they are investigating whether . . . our relationships with charitable organizations potentially violate the FCPA and U.S. anti-money laundering statutes."); Imperial Holdings, Inc., Quarterly Report (Form 10-Q), at 28 (July 30, 2014) ("[T]he Company . . . received a subpoena issued by the staff of the SEC seeking documents from 2007 through the date of the subpoena, generally related to the Company's premium finance business and corresponding financial reporting.").

40. See, e.g., Johnson Controls, Inc., Quarterly Report (Form 10-Q), at 57 (Aug. 1, 2014) (“In June 2013, the Company self-reported to the [SEC] . . . alleged Foreign Corrupt Practices Act (FCPA) violations related to its Building Efficiency marine business in China dating back to 2007. These allegations were isolated to the Company’s marine business in China which had annual sales ranging from \$20 million to \$50 million during this period.”); Kraft Foods Inc., Quarterly Report (Form 10-Q), at 18 (Aug. 3, 2012) (“As we previously disclosed . . . we received a subpoena from the SEC in connection with an investigation under the FCPA, primarily related to a Cadbury facility in India that we acquired in the Cadbury acquisition. The subpoena primarily requests information regarding dealings with Indian governmental agencies and officials to obtain approvals related to the operation of that facility.”); Nat’l Holdings Corp., Annual Report (Form 10-K), at 18 (Dec. 29, 2010) (“On January 3, 2008, the SEC issued and [sic] Order Instituting Administrative Proceedings against vFinance Investments, Inc. . . . The alleged violations were isolated occurrences related to this registered representative and were limited to the Flemington, New Jersey branch office.”); *SEC Investigating Citigroup over Mexico Fraud: Source*, REUTERS, Mar. 2, 2014, <http://www.cnn.com/id/101458574#> (“Citigroup Chief Executive Officer Michael Corbat . . . said the bank believes [the wrongdoing] was an isolated episode.”); Wal-Mart Stores, Inc., Annual Report (Form 10-K), at 21 (Mar. 21, 2014) (“Inquiries or investigations regarding allegations of potential FCPA violations have been commenced in a number of foreign markets in which we operate, including, but not limited to, Brazil, China and India. In November 2011, we voluntarily disclosed our investigative activity to the [DOJ] and the SEC, and we have been informed by the DOJ and the SEC that we are the subject of their respective investigations.”); Andrew Witty, *Glaxo Is Probed by the FBI and the SEC over China Bribery Scandal*, WALL ST. J. (July 28, 2014), <http://blogs.wsj.com/pharmalot/2014/07/28/glaxo-is-probed-by-the-fbi-and-the-sec-over-china-bribery-scandal/> (reporting on bribery allegations against Glaxo SmithKline that extend to at least six countries).

41. See, e.g., Press Release, SEC, SEC Charges Weatherford International with FCPA Violations (Nov. 26, 2013), available at <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540415694> (“Weatherford employees created false accounting and inventory records from 2002 to 2007 to hide the illegal commercial sales to Cuba, Syria, Sudan, and Iran.”); Press Release, SEC, SEC Charges AXA Rosenberg Entities for Concealing Error in Quantitative Investment Model (Feb. 3, 2011), available at <http://www.sec.gov/news/press/2011/2011-37.htm> (“The SEC’s order instituting administrative proceedings against the firms found that senior management at BRRC and ARG learned in June 2009 of a material error in the model’s code that disabled one of the key components for managing risk. Instead of disclosing and fixing the error immediately, a senior ARG and BRRC official directed others to keep quiet about the error and declined to fix the error at that time.”).

42. See, e.g., Computer Scis. Corp., Quarterly Report (Form 10-Q), at 12 (Aug. 12, 2014) (“In the course of the Audit Committee’s expanded investigation,

accounting errors and irregularities were identified. As a result, certain personnel have been reprimanded, suspended, terminated and/or have resigned The Company and the Audit Committee and its independent counsel are continuing to respond to SEC questions and to cooperate with the SEC's Division of Enforcement in its investigation"); Active Power, Inc., Current Report (Form 8-K), at 1 (Nov. 7, 2013) ("Management subsequently discovered that the Company employee in China intentionally misrepresented the relationship between Qiyuan and Digital China. Qiyuan has no affiliation with Digital China. The employee is no longer with the Company."); Systemax Inc., Quarterly Report (Form 10-Q), at 10 (Nov. 10, 2011) ("On June 21, 2011 Systemax Inc. received notice that the [SEC] has initiated a formal investigation into certain matters discovered by the Company during its internal investigation of its Miami Florida operations. That internal investigation resulted in the resignation of Gilbert Fiorentino (the former Chief Executive of the Technology Products Group and a director of the Company) on May 9, 2011").

43. See, e.g., News Release, Logitech Int'l, Logitech Announces Delay in Form 10-K Filing (May 21, 2014), available at <http://www.logitech.com/en-us/press/press-releases/11555> (announcing that Logitech's Form 10-K will be delayed due, in part, to an SEC investigation of accounting issues at the company).

44. Regulation D, 17 C.F.R. § 230.506 (2014).

45. *Id.* § 230.506(d)(1), (d)(2)(i).

46. *Id.* § 230.506(d)(1).

47. *Id.* § 230.506(e).

48. NYSE LCM, *supra* note 38, Rules 202.05–06.

49. NASDAQ, *supra* note 38, Listing Rule 5250(b)(1).

50. NYSE LCM, *supra* note 38, Rule 303A.10.

51. NASDAQ, *supra* note 38, Listing Rule 5610.

52. See NYSE LCM, *supra* note 38, Rule 202.03, 202.05 ("If rumors or unusual market activity indicate that information on impending developments has leaked out, a frank and explicit announcement is clearly required A listed company should also act promptly to dispel unfounded rumors which result in unusually market activity or price variations").

53. See NASDAQ, *supra* note 38, Listing Rule IM-5250-1 ("Whenever unusual market activity takes place in a Nasdaq Company's securities, the Company normally should determine whether there is material information or news which should be disclosed. If rumors or unusual market activity indicate that information on impending developments has become known to the investing public, or if information from a source other than the Company becomes known to the investing public, a clear public announcement may be required as to the state of negotiations or development of Company plans.").

54. See, e.g., Metro. Life Ins. Co., Quarterly Report (Form 10-Q), at 89 (Aug. 13, 2014) ("Regulatory authorities in a small number of states and FINRA, and occasionally the SEC, have had investigations or inquiries relating to sales of individual life insurance policies or annuities or other products by Metropolitan Life Insurance Company The Company may continue to resolve investigations

. . . . The Company believes adequate provision has been made in its consolidated financial statements for all probable and reasonably estimable losses for these sales practices-related investigations”); Tenet Healthcare Corp., Quarterly Report (Form 10-Q), at 13–14 (Aug. 4, 2014) (“We record accruals for estimated losses relating to claims and lawsuits when available information indicates that a loss is probable and we can reasonably estimate the amount of the loss or a range of loss From March 2009 through July 2010, seven of our hospitals became the subject of a review by the [DOJ] and certain other federal agencies regarding the appropriateness of inpatient treatment for Medicare patients receiving kyphoplasty Based on currently available information, we increased our reserves by approximately \$10 million in the three months ended June 30, 2014, resulting in recorded reserves of approximately \$38 million in the aggregate for our potential reimbursement obligations with respect to all of the hospitals under review for their billing practices for kyphoplasty and [other matters]”).

55. See, e.g., Target Corp., Annual Report (Form 10-K), at 47 (Mar. 14, 2014) (“Although we are cooperating in [the SEC] investigation[], we may be subject to fines or other obligations. While a loss from these matters is reasonably possible, we cannot reasonably estimate a range of possible losses because our investigation into the matter is ongoing, the proceedings remain in the early stages, alleged damages have not been specified, there is uncertainty as to the likelihood of a class or classes being certified or the ultimate size of any class if certified, and there are significant factual and legal issues to be resolved. Further, we do not believe that a loss from these matters is probable; therefore, we have not recorded a loss contingency liability for . . . governmental investigations in 2013.”).

56. See *Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 274–75 (S.D.N.Y. 2012) (no affirmative duty under relevant securities regulations to disclose receipt of a Wells notice and no duty to update prior disclosure of the existence of the investigation).

57. *Id.*

58. See, e.g., Broadwind Energy, Inc., Quarterly Report (Form 10-Q), at 13-14 (July 31, 2014) (“The Company understands that the [Wells] Notices to the CFO and [Director] related . . . to an intangible valuation issue relating to events in 2009 and the 2010 Stock Offering”); Active Power, Inc., Current Report (Form 8-K), at 1 (Nov. 7, 2013) (“The [SEC] Division of Enforcement has notified the Company that it is conducting an investigation regarding Active Power, including matters relating to the Company’s public statements regarding Digital China”).

59. See, e.g., Park-Ohio Indus., Inc., Quarterly Report (Form 10-Q), at 16 (Aug. 14, 2014) (“In August 2013, the Company received a subpoena from the staff of the [SEC] in connection with the staff’s investigation of a third party In connection with responding to the staff’s subpoena, the Company disclosed to the staff of the SEC that . . . the third party participated in a payment on behalf of the Company to a foreign tax official that implicates the Foreign Corrupt Practices Act.”); Ceco Envtl. Grp., Annual Report (Form 10-K), at F-26 (Mar. 15, 2011) (“[T]he SEC initiated a non-public formal investigation relating to possible insider trading by affiliates of the Company. We have been cooperating with and intend to continue to cooperate

with the SEC. We have been informed by our Chairman of the Board that he has received a subpoena in connection with such inquiry.”).

60. *See, e.g.*, Lime Energy Co., Quarterly Report (Form 10-Q), at 18 (Aug. 14, 2014) (“The SEC is conducting an investigation of our revenue recognition practices and financial reporting. On September 11, 2012, the Commission issued a subpoena for documents.”); Apollo Group, Inc., Current Report (Form 8-K), at 1 (Oct. 26, 2010) (“[Apollo Group] has received from the Enforcement Division of the Securities and Exchange Commission a request for additional information in connection with the Division’s ongoing informal inquiry regarding Apollo Group.”).

61. *See, e.g.*, Broadwind Energy, Inc., Quarterly Report (Form 10-Q), at 13 (July 31, 2014) (“In August 2011, the Company received a subpoena from the [SEC] seeking documents related to certain accounting practices at Brad Foote. The subpoena was issued following an informal inquiry that the Company received from the SEC in November 2010, which likely arose out of a whistleblower complaint that the SEC received related to revenue recognition, cost accounting and intangible and fixed asset valuations at Brad Foote.”); Quicksilver Resources Corp., Amendment to Annual Report (Form 10-K/A), at 95 (Mar. 18, 2014) (“The SEC has informed us that their investigation arose out of press releases in 2011 questioning the projected decline curves and economics of shale gas wells.”); Church & Dwight Co., Inc., Current Report (Form 8-K), at 1 (Jan. 10, 2012) (“The FTC investigation arose out of allegations raised by . . . [a] competitor . . .”).

62. *See supra* note 39.

63. *See, e.g.*, Stec, Inc., Quarterly Report (Form 10-Q), at 9 (May 8, 2012) (“[T]he Company received a ‘Wells Notice’ from the SEC, stating that the Staff of the SEC . . . is considering recommending that the SEC initiate a civil injunctive action against the Company, its CEO and President, charging them with violations of the antifraud and reporting provisions of the federal securities laws.”).

64. *See, e.g.*, Houston American Energy Corp., Quarterly Report (Form 10-Q), at 10 (Aug. 13, 2014) (providing detailed overview of prior disclosures related to an ongoing SEC investigation before supplementing with new disclosures).

65. *See, e.g.*, United Technologies Corp., Quarterly Report (Form 10-Q), at 39 (Apr. 25, 2014) (“Because the [SEC] investigation is at an early stage, we cannot predict its outcome or the consequences thereof at this time.”); Spectrum Pharmaceuticals, Inc., Quarterly Report (Form 10-Q), at 27 (May 9, 2013) (“The Company cannot predict when the SEC will conclude its investigation or the outcome of the investigation.”).

66. *See, e.g.*, *In re Nat’l Health Labs. Sec. Litig.*, No. CV 92-1949 H(CM), 1993 U.S. Dist. LEXIS 21476, at *6–7 (S.D. Cal. July 2, 1993) (question of fact existed as to whether disclosures were adequate where a company stated it was “confident” of its compliance with the law and “believe[d]” a grand jury investigation would “not result in a material adverse effect”); *Ballan v. Wilfred Am. Educ. Corp.*, 720 F. Supp. 241, 244–46 (E.D.N.Y. 1989) (denying motion to dismiss an investor lawsuit where the company and eighteen employees were indicted for wrongdoing after the company stated in an Annual Report that noncompliance with government regulations was not widespread).

67. See 17 C.F.R. § 201.240(c)(7) (2014).

68. See Paul S. Atkins, Comm’r, SEC, Remarks Before the U.S. Chamber Institute for Legal Reform (Feb. 16, 2006), *available at* <http://sec.gov/news/speech/spch021606psa.htm> (“When public companies determine that disclosure of a “settlement in principle” with the SEC is appropriate, and when they then make such a disclosure, they assume a risk. There is the possibility that the statement will, in hindsight, appear inaccurate or misleading if the Commission disapproves or requires a material modification of the terms of the settlement. The trouble is that the public does not typically understand the nuances, and the press does not always sufficiently convey them. Thus, the disclosure that is disseminated to the public can be materially misleading.”); see also Stuart & Wilson, *supra* note 2, at 995–96 (describing the risks involved in disclosing that a settlement “in principle” has been reached with the Staff).

69. See, e.g., AgFeed Industries, Inc., Current Report (Form 8-K), at 2 (Sept. 5, 2013) (“AgFeed Industries, Inc. . . . was notified by the [SEC] that the Staff had made a preliminary determination (a ‘Wells notice’) to recommend that the Commission file an enforcement action against the Company alleging that the Company violated the antifraud, reporting, books and records and internal controls provisions of the federal securities laws. The Wells notice was issued in connection with the previously disclosed Commission investigation into issues arising out of accounting errors and irregularities in the Company’s feed mill and legacy farms businesses in China”); Parker Drilling Co., Quarterly Report (Form 10-Q), at 15 (Nov. 2, 2012) (“As previously disclosed, we received requests from the [DOJ and SEC] in January 2008 relating to our utilization of the services of a customs agent. The DOJ and the SEC are conducting parallel investigations into possible violations of U.S. law, including the FCPA, by us. In particular, the DOJ and the SEC are investigating certain of our operations relating to countries in which we currently operate or formerly operated, including Kazakhstan and Nigeria.”); Bradley Johnson, *SEC Widens Investigation of IPG*, ADVERTISING AGE, June 28, 2005, <http://adage.com/article/news/sec-widens-investigation-ipg/46156/> (reporting on a press release by Interpublic Group which disclosed that the SEC had widened the scope of an ongoing investigation of the company to include potential restatement items).

70. See, e.g., Jesse Solomon, *Herbalife Tumbles on FTC Probe*, CNN MONEY (Mar. 12, 2014), <http://buzz.money.cnn.com/2014/03/12/herbalife-stock-ftc-probe/> (shares dropped 8% following disclosure of investigation by the Federal Trade Commission).

71. See, e.g., Aram Roston, *Former Cisco Execs Allege Vast Kickback Scheme in Russia*, BUZZFEED (Mar. 30, 2014), <http://www.buzzfeed.com/aramroston/cisco-kickbacks-russia#59fs1g> (speculating as to the nature and scope of a federal bribery investigation into Cisco Systems); Jessica Silver-Greenberg, Ben Protess & David Barboza, *Hiring in China by JPMorgan Under Scrutiny*, N.Y. TIMES (Aug. 17, 2013), <http://dealbook.nytimes.com/2013/08/17/hiring-in-china-by-jpmorgan-under-scrutiny/> (speculating as to the nature and scope of a federal bribery investigation into JPMorgan).

72. See, e.g., Net 1UEPS Technologies, Inc., Annual Report (Form 10-K), at 14 (Aug. 28, 2014) (“The investigations have negatively impacted our ability to maintain our existing business relationships and to obtain new business, as our business reputation has already suffered significant damage due to the perceptions created by an investigation of this nature. We believe that this damage to our reputation has, and will continue, to have a significant impact on our ability to execute certain aspects of our business strategy effectively.”); Chris Dieterich & Corrie Driebusch, *F-Squared Investments Receive Wells Notice from SEC, and Brokers Back Away*, WALL ST. J. (Sept. 3, 2014), <http://online.wsj.com/articles/f-squared-investments-received-wells-notice-from-sec-1409768768> (reporting that several brokerages limited the amount of new business its advisers could conduct with F-Squared Investments after it disclosed the SEC had sent it a Wells notice).

73. See, e.g., *Serious Fraud Office to Investigate Autonomy, Says HP*, BBC NEWS (Mar. 12, 2013), <http://www.bbc.com/news/business-21752081> (reporting on UK authorities opening an investigation into HP on the same subject matter at issue in an ongoing Department of Justice investigation).

74. See, e.g., Press Release, Delaware Invs., Delaware Asset Advisers Agrees to a Settlement with SEC (July 18, 2012), available at <https://www.delawareinvestments.com/~media/pdf/press-releases/2012/071812-delphinus-settlement-sttmt.ashx> (settling with the SEC “to avoid any potential for disruption or distraction to [the company]” and “to ensure that our employees continue to focus their efforts on providing superior investment returns”); *Monster CEO and Founder McKelvey Quits CEO Job, COO Is Promoted*, USA TODAY, Oct. 9, 2006, http://usatoday30.usatoday.com/money/industries/technology/2006-10-09-monster-ceo-quits_x.htm (founder and CEO quitting because of the demands of an ongoing SEC investigation).

75. See *supra* note 67.

76. See *supra* note 68.

77. See, e.g., News Release, Berkshire Hathaway, Inc. (Aug. 8, 2005), available at <http://www.berkshirehathaway.com/news/aug0805.pdf> (clarifying that an earlier 10-Q statement disclosing a new line of government inquiry was related to a previously disclosed ongoing investigation rather than a new investigation).

78. See *supra* Q 9.3.

79. See, e.g., Press Release, Robbins Geller Rudman & Dowd LLP, Robbins Geller Rudman & Dowd LLP Files Class Action Suit Against Lions Gate Entertainment Corp. (July 11, 2014) (announcing the commencement of a class action suit against Lions Gate Entertainment for failing to disclose an SEC investigation until an SEC cease-and-desist order was filed).

80. See, e.g., Moody’s Corp., Quarterly Report (Form 10-Q), at 20 (May 7, 2010) (disclosing the existence of an SEC investigation for the first time after the receipt of a Wells notice).

81. See, e.g., *Moody’s Stock Still Pressured by S.E.C. Inquiry Disclosure*, N.Y. TIMES (May 10, 2010), <http://dealbook.nytimes.com/2010/05/10/moodys-stock-still-pressured-by-s-e-c-inquiry-disclosure/> (“Moody’s shares fell as much as 12 percent on Monday, the first day of trading after the firm disclosed receiving a Wells notice from the S.E.C.”).

82. See, e.g., *In re Houston Am. Energy Corp. Sec. Litig.*, 970 F. Supp. 2d 613, 637, 654 (S.D. Tex. 2013) (granting a motion to dismiss a lawsuit in which investors had alleged Houston American Energy should have disclosed an SEC investigation of the company earlier); *In re Am. Int'l Grp., Inc. Sec. Litig.*, No. 04 Civ. 8481 (DAB), 2010 U.S. Dist. LEXIS 15453, at *15 (S.D.N.Y. Feb. 22, 2010) (granting class certification, in part, to investors who alleged that AIG failed to disclose that the company was under SEC investigation until the SEC filed a civil action against the company); *supra* note 79.

83. See *infra* Q 9.24.

84. 17 C.F.R. § 243.100 (2014).

85. See *id.* § 243.100(a)(1).

86. SEC Form 20-F, Item 3.D, 16F, 8.A.7, <http://www.sec.gov/about/forms/form20-f.pdf> (last visited Sept. 20, 2014).

87. SEC Form 6-K, § B, <https://www.sec.gov/about/forms/form6-k.pdf> (last visited Sept. 20, 2014).

88. *Id.*

89. For a more detailed discussion of this requirement, see *infra* Q 9.23.3.

90. See News Release, Financial Industry Regulatory Authority, Goldman Sachs to Pay \$650,000 for Failing to Disclose Wells Notices, *available at* <http://www.finra.org/Newsroom/NewsReleases/2010/P122416>.

91. See F-Square Investments, Inc., Firm Brochure (Form ADV Part 2A), at 9 (Aug. 2014) (“On August 13, 2014, F-Squared Investments, Inc., F-Squared Investment Management, LLC, and their Chief Executive Officer (collectively, ‘F-Squared’) received notice from the Staff, called a ‘Wells’ notice, that the Staff has made a preliminary determination to recommend that the [SEC] file an action or institute a proceeding against F-Squared alleging violations of certain provisions of the Federal securities laws.”); First Allied Advisory Services, Inc., Firm Brochure (Form ADV Part 2A), at 13 (Oct. 7, 2013) (“The SEC also issued a ‘Wells Notice’ to First Allied Securities which alleged that First Allied Securities violated certain SEC rules and that it failed to reasonably supervise this registered representative.”).

92. SEC Form N-1A, Item 10, <http://www.sec.gov/about/forms/formn-1a.pdf> (last visited Sept. 24, 2014).

93. See *supra* note 56.

94. See Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7211(c)(4) (2012).

95. See *id.* § 7215(b)(5).

96. See Public Company Accounting Oversight Board, Release No. 2013-003, Policy Statement Regarding Credit for Extraordinary Cooperation in Connection with Board Investigations, at 3 (Apr. 24, 2013).

97. *Id.* at 4.

98. See Public Company Accounting Oversight Board, Release No. 2012-003, Information for Audit Committees about the PCAOB Inspection Process, at 9 (Aug. 1, 2012).

99. See, e.g., *California Attorney Mandatory Reporting Requirements*, STATE BAR OF CAL., <http://www.calbar.ca.gov/Attorneys/MemberServices/ReportingRequirements.aspx> (last visited Sept. 24, 2014) (“Attorneys must self-report an entry of judgment in a civil action for fraud, misrepresentation, breach of fiduciary duty or gross negligence committed in a professional capacity. . . . Attorneys are required to self-report the imposition of judicial sanctions (\$1,000 or more). . . . Attorneys are required to self-report felony charges by indictment or information, as well as all felony convictions and certain misdemeanor convictions as specified in the statute.”); *Professional Guidelines*, VA. STATE BAR, <http://www.vsb.org/pro-guidelines/index.php/rules/maintaining-the-integrity-of-the-profession/rule8-3/> (last visited Sept. 24, 2014) (“A lawyer shall inform the Virginia State Bar if the lawyer has been disciplined by a state or federal disciplinary authority, agency or court in any state, U.S. territory, or the District of Columbia, for a violation of rules of professional conduct in that jurisdiction; the lawyer has been convicted of a felony in a state, U.S. territory, District of Columbia, or federal court”); The United States District Courts for the Southern and Eastern Districts of New York, Local Rules of the United States District Courts for the Southern and Eastern Districts of New York, <http://nysd.uscourts.gov/rules/rules.pdf> (last visited Sept. 24, 2014) (“In all cases in which any federal, state or territorial court, agency or tribunal has entered an order disbarring or censuring an attorney admitted to the bar of this Court, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order to the Clerk of this Court within fourteen days after the entry of the order.”); The United States District Court for the Northern District of California, Civil Local Rules, <http://www.cand.uscourts.gov/localrules/civil#ATTORNEYS> (last visited Sept. 24, 2014) (“Any attorney admitted to practice in this Court or any attorney appearing pro hac vice who is convicted of a felony, suspended, disbarred or placed on disciplinary probation by any court, or who resigns from the bar of any court with an investigation into allegations of unprofessional conduct pending, must give notice to the Clerk and the Clerk of the Bankruptcy Court in writing within 14 days of such event.”).

100. FINRA, What to Expect from the U4 and U5 Filing Process, at 2 (2010).

101. FINRA, Form U4 General Instructions, at 1 (May 2009).

102. FINRA Form U4, Question 14G, <https://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf> (last visited Sept. 24, 2014).

103. FINRA, Form U4 Explanation of Terms, at 2 (Apr. 2014).

104. *Id.*

105. 17 C.F.R. § 240.14a-101, Item 7 (2014); Regulation S-K, Item 401, 17 C.F.R. § 229.401(f)(2) (2014); see also *supra* note 14 and accompanying text.

106. See *United States v. Matthews*, 787 F.2d 38, 49 (2d Cir. 1986) (prospective director not required to disclose in a proxy statement that he was the subject of a grand jury investigation).

107. See, e.g., Elizabeth Arden, Inc., Supplemental Code of Ethics for the Directors, Executive and Finance Officers, <https://corporate.elizabetharden.com/governance-code-of-ethics/> (last visited Sept. 24, 2014) (“You are required to promptly bring to the attention of the Chairman of the Audit Committee or the General Counsel (or such other person as may be designated by the Board from time to time) any credible information you may receive or become aware of indicating . . . that any violation of the U.S. federal securities laws or any rule or regulation thereunder by a Covered Person has occurred, may be occurring, or is imminent.”).

108. See Complaint at 3-4, SEC v. Scott, No. 3-05CV0302P (N.D. Tex. Feb. 14, 2005).

109. *Id.* at 3.

110. *Id.* at 4.

111. See *In re* Occidental Petroleum Corp., Exchange Act Release No. 16,950, 47 SEC Docket 330, 333 (July 2, 1980).

112. *Id.* at 333, 338.

113. See *Ballan v. Wilfred Am. Educ. Corp.*, 720 F. Supp. 241, 244-46 (E.D.N.Y. 1989).

114. *Id.* at 245.

115. *Id.* at 246.

116. *Id.* at 254.