Disclosure's Purpose

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The U.S. disclosure regime is premised on the deceptively simple idea that requiring information from issuers will increase accountability and, thereby, help to level the playing field for investors, issuers, and the public. This Article explores that premise in the context of the purposes of disclosure, developing the understanding of the importance of the regime to stakeholders and the public, and situating it in the theory of publicness. The Article also examines the designated-securities-monitor role of directors, deploying case studies of Exxon and Wells Fargo to further develop the purposes of disclosure, the theory of publicness, and the role of directors in ensuring discourse and candor and upholding the securities regulatory regime.

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INTRODUCTION

The U.S. securities regulatory infrastructure requires disclosure of a wide array of information both by and about covered companies. The basic purpose of the disclosures is to level the playing field—for investors, issuers, and the public.[1] Although the structure is complicated, the premise is fairly simple. Corporate insiders know far more about the entity than those buying securities or those impacted by the sale of securities (a group, as we shall see, that is far larger than

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1. *See* Hillary A. Sale, *Disappearing Without a Trace: Sections 11 and 12(a)(2) of the 1933 Securities Act*, 75 WASH. L. REV. 429, 482 (2000).

simply investors), resulting in an information asymmetry. Thus, requiring disclosures before the sale of securities and on an ongoing basis can provide information to diminish those asymmetries.[2] This, in fact, is the choice of the U.S. securities regime—to regulate through disclosures, both in the offering context and on a periodic basis.[3]

Although investor protection is the disclosure goal often touted, this Article develops the purposes of disclosure extending beyond investors to issuers and the public. Indeed, the disclosure system is designed to level the playing field for issuers, for example, by addressing confidentiality concerns. In addition, the system helps to promote confidence in the markets, which, in turn, enables growth and innovation by creating access to capital—goals important to issuers. Yet, importantly, the system also protects the public more broadly. After all, the harms of market crashes and other disruptions are not confined to investors and issuers, despite the fact that writing in this space focuses mostly on those parties.

Disclosure's purpose, then, is to diminish asymmetries and the space for fraud, both for those within the entity and for the public affected by the entity. To achieve these purposes, the system depends on gatekeepers, such as corporate directors who are assigned a role in effectively managing the purpose and consequences of disclosure.[4] The role requires them to take ownership of both the ensuing internal discourse between the entity, its insiders, and its owners, and the external discourse with the entity's public stakeholders and the general public.[5] When directors are effective in this role, the resulting discourse and candor helps to ensure the purposes of disclosure are met.

This Article examines the purpose and regulation of this discourse, emphasizing the role of the board of directors and its attention to stakeholders and the public, with a particular focus on omissions. Omissions occur when disclosures fail to include required information or when, for example, the disclosed information necessitates additional disclosures for completeness. The Article proceeds as follows. Part I explores the purposes of disclosure in corporate discourse as well as how disclosure requirements are designed to transmit information. As we will see, the securities disclosure regime aims to address a broad range of issues from fairness to market competitiveness. Part II develops the omissions theory in the context of the purposes of disclosure and explicates their role in corporate discourse. Part III turns to the board and its responsibilities with respect to the purposes of securities disclosures and corporate discourse, with a particular emphasis on omissions and candor, and deploys case studies to develop the theories further. Part IV analyzes the relationship between directors, disclosure (and its purpose) and omissions, and publicness, tying the information-forcing-

2. *See* Hillary A. Sale & Donald C. Langevoort, *"We Believe":* Omnicare*, Legal Risk Disclosure and Corporate Governance*, 66 DUKE L.J. 763, 768 (2016).

3. Paul G. Mahoney, *Mandatory Disclosure as a Solution to Agency Problems*, 62 U. CHI. L. REV. 1047, 1079 (1995).

4. *See infra* Part III.

5. *See* Sale & Langevoort, *supra* note 2, at 788.

substance theory to director gatekeeping and explicating how it can result in more thorough disclosure outcomes for investors, issuers, and the public—thereby fulfilling disclosure's purpose.

I. DISCLOSURES, DISCOURSE, AND PURPOSE

The U.S. securities regime has a long and complicated history with mandatory disclosure. The regulations require disclosures at the issuance of securities and over time, with a periodic system that addresses secondary markets.[6] The United States' approach to securities regulation focuses on disclosure and is not merits-based.[7] The system is designed to press for information through disclosures that will allow outsiders to develop their own view of the merits of the securities.

In this sense, the regime deploys the information-forcing-substance theory. The premise of this theory, about which I and Professor Langevoort (among others) have written, is that although the drafters of the securities laws chose to focus on disclosure[8] rather than on another goal like fairness, various regulatory provisions create incentives for directors to engage in a dialogue with management about the basis for any disclosures prior to engaging in discourse with shareholders, stakeholders, and the public.[9] Thus, the statute drives behavior toward the collection and development of information, producing substantive behavior—discourse with officers and management and potentially, changes in policies and procedures—on the part of directors.[10] Additionally, requiring specific truthful disclosures forces those who produce them to both ensure accuracy and develop the underlying systems, such as risk management, that allow insiders to avoid admitting that no such system exists. This, in turn, supports the purposes of the disclosure regime. Thus, securities regulatory goals, disclosure regulation, and substantive choices go hand in hand.

The goal of the regulatory approach is to promote strong and healthy markets that enable growth and innovation.[11] To achieve that goal, the regime charges corporate players (for our purposes, directors) with responsibility for both the quality and quantity of disclosures, where quality concerns affirmatively required disclosures and quantity concerns any additional disclosures necessary for completeness.[12] The latter is the home of the half-truth and omissions doctrines.[13]

6. Mahoney, *supra* note 3, at 1051–52; *see, e.g.*, Securities Exchange Act of 1934 § 13, 15 U.S.C. § 78m (2012).

7. *See* Hillary A. Sale & Robert B. Thompson, *Market Intermediation, Publicness, and Securities Class Actions*, 93 WASH. U. L. REV. 487, 538 (2015).

8. *Cf.* SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

9. Sale & Langevoort, *supra* note 2, at 787.

10. *Id.*; *see also, e.g.*, Hillary A. Sale, *J.P. Morgan: An Anatomy of Corporate Publicness*, 79 BROOK. L. REV. 1629 (2014) [hereinafter Sale, *J.P. Morgan*]; Hillary A. Sale, *Independent Directors as Securities Monitors*, 61 BUS. LAW. 1375, 1380 (2006) [hereinafter Sale, *Independent Directors*]; Sale & Langevoort, *supra* note 2; Sale & Thompson, *supra* note 7.

11. *See* Sale & Thompson, *supra* note 7, at 529.

12. *See* Sale & Langevoort, *supra* note 2, at 768.

13. *See id.*

One of the core purposes of disclosures is to protect investors. In fact, the modern regulatory scheme has its roots in the Great Depression, following the 1929 market crash.[14] Both events—the crash and the Depression—resulted at least in part from a lack of investor trust in the market.[15] Recognizing that no one wants to play in a rigged market and that investors had been harmed by market manipulation,[16] section 2 of the Securities Act of 1934 stresses that the "national public interest" undergirds the regulatory regime.[17]

The investor protection goal is met on the front end with disclosure requirements that address required disclosures and omissions.[18] This disclosure regimen is paired with an antifraud rule, the enforcement of which plays a key backend investor-protection role.[19] Together, the rules require that disclosures may not be misleading—either affirmatively or through omissions or half-truths.[20] The basic premise is that fraud in the marketplace is costly, and therefore, prohibiting and punishing it promotes market confidence.[21] Truthful and appropriately complete disclosures are key to building investor confidence.[22] Thus, disclosures allow investors to make reasoned decisions confidently, trusting that they have the most accurate information.[23]

Note that the disclosure regime does not prevent risky products from being sold. Indeed, the regulatory choice was to provide investors with accurate information, not to develop a regime where regulators determined the merits of the securities or entity.[24] As a result, the regulator's role—even when reviewing

14. *See* H.R. REP. NO. 73-85, at 2–3 (1933); *see also* Robert B. Thompson & Donald C. Langevoort, *Redrawing the Public-Private Boundaries in Entrepreneurial Capital Raising*, 98 CORNELL L. REV. 1573, 1578–79 (2013).

15. *See* H.R. REP. NO. 73-85, at 2–3.

16. Sale & Thompson, *supra* note 7, at 530. In a message from President Roosevelt to the House of Representatives in 1933, the President stated that the Securities Act of 1933 was intended to "give impetus to honest dealing in securities and thereby bring back public confidence." H.R. REP. NO. 73-85, at 2; *see also* S. REP. NO. 73-47, at 1 (1933) ("The purpose of this bill is to protect the investing public and honest business.").

17. Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78(b) (2012); *see also* Sale & Thompson, *supra* note 7, at 531.

18. *See* Sale & Thompson, *supra* note 7, at 527; Thompson & Langevoort, *supra* note 14, at 1574–75.

19. *See* Sale & Thompson, *supra* note 7, at 527; Thompson & Langevoort, *supra* note 14, at 1582; *see also* James D. Cox et al., *Public and Private Enforcement of the Securities Laws: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893 (2005).

20. *See, e.g.*, Donald C. Langevoort, *Half-Truths: Protecting Mistaken Inferences by Investors and Others*, 52 STAN. L. REV. 87, 117 (1999) (explaining that both courts and SEC regulators require people to "volunteer any . . . information necessary to make [their statements] not misleading" to avoid liability in fraud-on-the-market cases). *See generally* Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565 (2006) (exploring nondisclosure and omissions in the contract context).

21. *See* Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 345 (2005).

22. *See* Sale & Thompson, *supra* note 7, at 530–31.

23. *Id.* at 528.

24. *See* H.R. REP. NO. 73-85, at 2 (1933) ("Of course, the Federal Government cannot and should not take any action which might be construed as approving or guaranteeing that newly issued securities are sound in the sense that their value will be maintained or that the properties which they represent will earn profit."); S. REP. NO. 73-47, at 2 (1933) ("[C]are has been taken to prevent the public from being

offering documents, for example—is not to determine whether the issuer's proposed business or products are "worthy." Instead, regulators review documents for sufficient disclosures, and then potential purchasers choose whether to invest.[25] This regulatory choice arguably heightens the importance of sufficient and complete disclosures and the concern about omissions.

The "national public interest" in section 2,[26] however, not only encompasses investors, but also extends to issuers and the general public. Like investors, issuers perform more confidently in a robust and fluid market.[27] To that end, disclosure's purpose is to address information asymmetries beyond those facing investors.[28] Langevoort's works reveal that corporate insiders, such as officers and directors, know far more about the entity than investors and the public, but may lack appropriate incentives to ensure disclosure.[29] Addressing information asymmetries thus helps put different companies on more equal footing in the market, and the comparable information allows investors to contrast the entities.[30]

This aspect of disclosure has at least two functions. First, it helps level the playing field between issuers by requiring all of them to provide similar information. This function of disclosure addresses the confidentiality concerns of issuers by requiring that equivalent information be shared publicly, and it also helps to

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led to believe that the Federal Government under the proposed law passes upon the soundness of any security . . . ."); *see also* J. Robert Brown, Jr., *Corporate Governance, the Securities and Exchange Commission, and the Limits of Disclosure*, 57 CATH. U. L. REV. 45, 53 n.45 (2007).

25. *See* Brown, *supra* note 24, at 53 n.45. For more of Professor Langevoort's work on cognitive psychology, behavioral theory, and corporations, see Mitu Gulati, Jeffrey J. Rachlinski & Donald C. Langevoort, *Fraud by Hindsight*, 98 NW. U. L. REV. 773 (2004); Donald C. Langevoort, *Reflections on Scienter (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1 (2006); Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285 (2004) [hereinafter Langevoort, *Resetting the Corporate Thermostat*]; Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition:* Corporate Irresponsibility *and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968 (2002); Donald C. Langevoort, *Commentary: Stakeholder Values, Disclosure, and Materiality*, 48 CATH. U. L. REV. 93 (1998) [hereinafter Langevoort, *Commentary: Stakeholder Values*].

26. Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78(b) (2012).

27. STAFF OF S. COMM. ON BANKING AND CURRENCY, 73D CONG., REP. ON STOCK EXCHANGE REGULATION 3 (Comm. Print 1934) ("There is a relationship between fluctuations in the stock market and unsettlement in business conditions, based on the fact that stock-exchange movements are apt to be regarded by both business men and the general public as an indicator of underlying conditions. A violent fall in the stock market consequently may lead business men to curtail commitments and activities, thereby increasing unemployment, while on the other hand a sharp rise in the stock market may lead to expansion of business activity beyond the bounds of sound economics.").

28. *See* Donald C. Langevoort, *Organized Illusions: A Behavioral Theory of Why Corporations Mislead Stock Market Investors (and Cause Other Social Harms)*, 146 U. PA. L. REV. 101, 114 (1997).

29. *See id.*

30. Sale & Thompson, *supra* note 7, at 528; *see also Securities Exchange Bill of 1934: Hearing on H. R. 9323 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 7717 (1934) (statement of Rep. Thomas F. Ford) ("Now, I think, we have a bill that will protect the public by preventing inequitable and unfair practices and that will in the end prove beneficial to legitimate operators on our stock exchanges. This bill does three things. It protects investors, controls market manipulations that are destructive to values, and tends to curb destructive speculation. . . . [The President] is acting in the interest of honest business and honest investors.").

address their concerns that selective disclosure might result in a competitive disadvantage. In that way, the mandatory regime addresses fairness concerns that might otherwise result in inadequate issuer incentives to disclose and produce suboptimal disclosures. The prohibition on material omissions also plays a key role, ensuring that issuers do not take unfair advantage of their peers by omitting certain disclosures.[31]

Second, disclosure provides investors with information enabling them to choose between potential investments that are not otherwise fungible.[32] When investors have both the information necessary to make informed choices and confidence in that information, they may broaden their potential purchases to investments they otherwise would have discounted or entirely foregone.[33] The information-forcing-substance theory also plays a role here. Categories of required disclosures mean that an issuer with nothing to report in a particular category will stand out relative to its peers. To avoid that outcome, issuers implement systems to produce disclosures like those of their peers. Thus, the required disclosure of information results in substantive corporate decisionmaking and action by directors and management. The resulting systems and disclosures help to increase capital investment in issuers—including some that might not otherwise have received it. That, in turn, contributes to the flow of capital and allocative efficiency, as well as to growth and innovation.

Disclosure is also designed to complement corporate governance systems. Once investors buy stocks, they become an owner of the entity; yet shareholder owners suffer from the classic agency concerns implicated by the distance between owners and operators.[34] Of course, the harm from weak or bad governance extends well beyond shareholders. The disclosure regime helps to police this space in at least two ways. First, mandatory disclosure decreases monitoring costs for shareholders.[35] The result is the facilitation of issuer capital raising and, in theory, the allocation of capital to the best issuers—thus creating substantial benefits for issuers as well.[36] Second, the regulatory structure inserts directors into the disclosure space, requiring them to play a role in diminishing information asymmetries and detecting fraud, which helps to decrease shareholder monitoring

31. *See* Sale & Langevoort, *supra* note 2, at 777.

32. *See* Sale & Thompson, *supra* note 7, at 528.

33. *See* Nicholas L. Georgakopoulos, *Frauds, Markets, and Fraud-on-the-Market: The Tortured Transition of Justifiable Reliance from Deceit to Securities Fraud*, 49 U. MIAMI L. REV. 671, 696 (1995); *see also* S. REP. NO. 73-47, at 1 (1933) (stating that the bill's aim is "to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities offered to the public through crooked promotion; . . . to bring into productive channels of industry and development capital which has grown timid to the point of hoarding; and to aid in providing employment and restoring buying and consuming power").

34. *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 307 (1976); Mahoney, *supra* note 3, at 1048–50.

35. *See* Mahoney, *supra* note 3, at 1051.

36. *See* Sale & Thompson, *supra* note 7, at 529.

costs, facilitate capital raising, and diminish the impacts of publicness.[37] In addition, the construct of publicness[38] is important to discourse and disclosure because it connects the interaction of media, analysts, and the public to issuers' disclosure choices.[39]

As the 2008–2009 financial crisis and the accompanying slow recovery demonstrated, healthy markets are key to growth.[40] Disclosure plays a role here as well. The disclosure theory posits that information promotes robust capital raising and markets.[41] The regulatory structure is focused on offering regulations and a wide array of required disclosures. The goal is building and maintaining market confidence, because without it investors will decline to invest or, arguably, demand larger premia before investing.[42] Why? Because when markets become unreliable, investors choose to put their money in the bank or elsewhere, decreasing market liquidity.[43] This produces an additional problem: the cost of capital increases,[44] and, in theory, investment decreases.[45] The decreases in investment harm not just issuers, but also stakeholders such as employees and the public more broadly. Thus, disclosure regulation plays a powerful role on the front end: it helps to improve accuracy in price setting. Better pricing helps allocate capital to appropriate investments, thereby helping to fuel growth and benefiting investors, issuers, stakeholders, and the public.[46]

These arguments in favor of regulation have detractors and counterarguments.[47] Yet despite calls for changes and overhauls, the system has remained firmly in place—at least in part because market issues and situations involving significant greed and fraud provide regular counterweights to proponents of deregulation.[48] As we shall see next, omissions continue to play a part in the debate about the power of disclosure.[49]

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37. *See* Sale & Langevoort, *supra* note 2, at 787–88; *see also infra* Part III.

38. *See infra* Part IV.

39. *See infra* notes 173–94 and accompanying text.

40. Sale & Thompson, *supra* note 7, at 527.

41. *See id*. at 529.

42. *See* Georgakopoulos, *supra* note 33, at 696; *see also* Sale & Thompson, *supra* note 7, at 538.

43. Georgakopoulos, *supra* note 33, at 696, 707.

44. *See generally* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. PA. L. REV. 229, 300–08 (2007) (discussing evidence of the cost of capital and enforcement).

45. *See* Georgakopoulos, *supra* note 33, at 706.

46. *See* Sale & Thompson, *supra* note 7, at 527, 529.

47. *See e.g.*, John C. Coffee, Jr., *Systemic Risk after Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies Beyond Oversight*, 111 COLUM. L. REV. 795 (2011) (arguing that contingent capital and preferred shareholders can play a role in preventing excessive risk-taking and the ensuing regulation that follows); Paul G. Mahoney, *Technology, Property Rights in Information, and Securities Regulation*, 75 WASH. U. L.Q. 815 (1997) (arguing that technology, in combination with market intermediaries, can help alleviate information asymmetries); Adam C. Pritchard, *Self-Regulation and Securities Markets*, 26 REG. 32 (2003) (arguing that securities exchanges and competition should play a more significant role in disclosure).

48. *See* Sale, *J.P. Morgan*, *supra* note 10, at 1655.

49. *See infra* Part II.

II. DISCOURSE, OMISSIONS, AND LIABILITY

Omissions are key to the integrity of the disclosure regime, and therefore, to the other goals of disclosure.[50] As noted above, the securities regulatory regime is premised on information (and the correlating substance) through disclosure and the resulting discourse. There is a thorough and ongoing regulatory structure that requires substantial, affirmative, truthful disclosures when an issuer offers securities to the public and, in an integrated manner, on an ongoing basis.[51] A cornerstone of this regime is that disclosures cannot be so carefully calculated or cabined that they mislead by omission.[52] Omissions occur through statements with facts or other information missing, and their disclosure is required when material and necessary to make other disclosures truthful or to prevent the disclosures from being misleading.[53] Thus, the requirement is effectively a prohibition against misleading half-truths.

Half-truths and omissions have a daunting history in securities law and litigation, and Professor Langevoort, whose work we celebrate in this issue, has thought and written more about these issues than any other scholar of corporate and securities law.[54] Professors Langevoort and Gulati noted that courts confuse and limit the omissions doctrine by misunderstanding the difference between duty (whether disclosure is required) and materiality.[55] This confusion recently came to a head in a case discussed in Part III, on which the Supreme Court granted certiorari.[56] The allegations in *Leidos* involved omissions related to the cancellation of the issuer's largest revenue source, contracts with the City of New York, due to fraudulent billing practices.[57] Those issues were not resolved because the parties settled the case just prior to argument, and the case was removed from the Court's calendar pending lower court approval of the

50. *See generally* Langevoort, *supra* note 20.

51. *See supra* Part I.

52. *See* Securities Act of 1933 § 11, 15 U.S.C. § 77k(a) (2012).

53. *Id.*; *see* Langevoort, *supra* note 20, at 88.

54. *See generally* Gulati, Rachlinski & Langevoort, *supra* note 25 (examining how hindsight influences the distinction between securtities fraud and mistake); Langevoort, *supra* note 20 (discussing the ambiguity between actionable and nonactioanable half-truths in securities actions); Donald C. Langevoort, *Lies Without Liars?* Janus Capital *and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933 (2013) (analyzing *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2011), and its impact on securities lititgation); Langevoort, *Commentary: Stakeholder Values*, *supra* note 25 (commenting on the issues that accompany expanding disclosure obligations to noninvestor stakeholders); Donald C. Langevoort, *Fraud and Deception by Securities Professionals*, 61 TEX. L. REV. 1247 (1983) (exploring the application of section 10(b)'s deception requirement to breaches of fiduciary duty by securities professionals).

55. Donald C. Langevoort & G. Mitu Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 VAND. L. REV. 1639, 1647–53 (2004); *see also* David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137, 164 (2007).

56. Leidos, Inc. v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395, 1396 (2017).

57. *See* Ind. Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85, 89 (2d Cir. 2016).

settlement.[58] Nevertheless, the omissions issues highlighted by *Leidos* are unlikely to go away.

Under multiple provisions of the securities laws, private plaintiffs can sue for affirmative misstatements and omissions.[59] The first provision that allows for an express cause of action is section 11(a) of the Securities Act of 1933. It states:

> In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security . . . may . . . sue.[60]

As the language of this provision illustrates, there are two potential types of liability. The first clause focuses on what an issuer affirmatively stated, and the second on what the issuer did not say, or omitted.[61] Section 11 does not require fraud or the intent to deceive;[62] rather, except with respect to forward looking statements,[63] it is a strict liability provision.[64]

This standard of liability is tied directly to the purposes of the disclosures. Section 11 is an enforcement mechanism for the disclosure-based premise of the Securities Act: that issuers provide "full and fair disclosure of information" when engaging in a public offering.[65] The idea is that when a company raises money by issuing securities to the public, it is important to diminish the asymmetries and opportunities for fraud. Section 11 imposes liability on those responsible for false or misleading registration statements to all purchasers, regardless of from whom—issuer, underwriter, etc.—the purchasers bought.[66] The purpose of these disclosures is to level the playing field for competing issuers and to decrease information asymmetries for both investors and the public. In addition, the regulatory apparatus not only requires an extensive array of specific disclosures, but also contains a requirement for additional

58. *Leidos, Inc.*, 138 S. Ct. 369.

59. Securities Act of 1933 §§ 10(b), 11, 12(a)(2), 15 U.S.C. §§ 77j(b), 77k(a), 77l(a)(2) (2012); *see also* Langevoort, *supra* note 20, at 90.

60. Securities Act of 1933 § 11, 15 U.S.C. § 77k(a).

61. Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1323 (2015).

62. *Id.*

63. Securities Act of 1933 § 27A(c)(1), 15 U.S.C. § 77z-2(c)(1).

64. Herman & MacLean v. Huddleston, 459 U.S. 375, 381 & n.12 (1983) (noting that "Section 11 creates 'correspondingly heavier legal liability' in line with responsibility to the public" (citing H.R. REP. NO. 73-85, at 9 (1933))). "The section was designed to assure compliance with the disclosure provisions of the Act by imposing a stringent standard of liability on the parties who play a direct role in a registered offering." *Id.* at 381–82 (footnote omitted). Defenses are available, including due diligence, to the strict liability provision. Securities Act of 1933 § 11(b)(3), 15 U.S.C. § 77k(b)(3).

65. *Omnicare*, 135 S. Ct. at 1323 (quoting Pinter v. Dahl, 486 U.S. 622, 646 (1988)).

66. Securities Act of 1933 § 11(a), 15 U.S.C. § 77k(a).

information necessary to prevent the disclosures from being misleading.[67] Thus, embedded in each required disclosure is a prohibition against misleading half-truths.[68]

In addition to section 11, section 12(a)(2) of the Securities Act of 1933 creates liability for misstatements and omissions in another offering document: the prospectus.[69] Section 12(a)(2) allows purchasers to rescind or assert damages if a seller commits fraud in a prospectus or through an oral statement, and it requires privity.[70] The section's coverage overlaps to some extent with that of section 11, and, like section 11, does not require reliance. Defendants do, however, have a defense that allows them to prove that they neither knew nor should have known of the untruth or omission.[71] Again, the purpose here is to prevent misleading disclosures in the offering context and thereby protect investors, issuers, and the public.

The final provision at issue in the majority of private plaintiff class action suits is section 10(b) and the accompanying Rule 10b-5 of the Securities Exchange Act of 1934.[72] This cause of action applies to fraud claims for any misstatements or omissions by issuers.[73] A section 10(b) claim is, therefore, not tied to an offering document. Although the section 10(b) claim was initially developed as an implied cause of action and was subject to arguments that the courts could "disimply" it,[74] Congress has since legislated around the provision, developing pleading standards and many other requirements that arguably firmly establish its place in the securities litigation arsenal.[75] Moreover, in doing so, Congress expounded on the connection between the private enforcement role that this cause of action serves and the purposes of disclosure discussed in Part I of this Article.

For a section 10(b) claim, plaintiffs must plead—and if the case goes to trial, prove—the following: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation."[76] Section 10(b) claims are

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67. *See id.*

68. The scope of this prohibition is at issue here and has been the focus of considerable scholarly writing. *See, e.g.*, Langevoort & Gulati, *supra* note 55, at 1647–53.

69. Securities Act of 1933 § 12(a)(2), 15 U.S.C. § 77l(a)(2). Section 12(a)(1) provides liability for any person who sells securities that were required to be registered but were not. *Id.* § 77l(a)(1).

70. *Id.* § 77l(a)(2).

71. *E.g.*, Casella v. Webb, 883 F.2d 805, 809 (9th Cir. 1989). As a result, this provision is negligence-like in application. *See* Dennis v. Gen. Imaging, Inc., 918 F.2d 496, 507 (5th Cir. 1990).

72. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b). These are called section 10(b) claims.

73. *Id.*

74. *See* Joseph A. Grundfest, *Why Disimply?*, 108 HARV. L. REV. 727 (1995). *But see* Joel Seligman, *The Merits Still Matter: A Rejoinder to Professor Grundfest's Comment*, Why Disimply?, 108 HARV. L. REV. 748 (1995).

75. *See* Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 37 (2011) ("We have implied a private cause of action from the text and purpose of § 10(b).").

76. *Id.* at 37–38 (quoting Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008)).

more complicated than their sections 11 and 12(a)(2) counterparts. In particular, the scienter element is subject to a strict pleading standard.[77] As a result, "an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."[78] Most importantly, section 10(b) provides issuer liability for misstatements and omissions regardless of whether they occur in an offering document, thus significantly broadening the potential scope of liability.[79]

Item 303 of Regulation S–K (the Management Discussion and Analysis section), a key regulatory disclosure provision, presses for narrative information about a company.[80] In particular, Item 303 requires information about known trends and uncertainties.[81] The thrust of this requirement is that issuers should share what they know, or have reason to know, about what is coming around the corner.[82] As Langevoort and Gulati aptly noted, if the company has had three great quarters but knows that the bottom is about to fall out of its business, a reasonable investor would find that information material.[83] Although we do not require issuers to disclose everything, disclosures full of gaps are useless to investors and the public and undermine the issuer-related purposes of disclosure.

Nevertheless, the nature of half-truths and omissions has stretched the courts' abilities to develop clean doctrinal lines. The challenge with omissions is two-sided. The premise for disclosure and liability seems relatively straightforward. If a company is required to make disclosures under the securities laws, as in the case of the Management Discussion and Analysis (MD&A), those disclosures must be sufficiently complete so as not to be misleading.[84] Or, stated differently, there is no point in requiring certain disclosures if an issuer is free to cabin them through omissions in a manner that makes the disclosures misleading. The same is true for voluntary disclosures,[85] because to allow otherwise would undermine the very purposes of a disclosure-based securities regulatory regime. Thus, the disclosure structure, with its emphasis on omissions, is designed to press for complete and accurate information.

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77. *See* Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 21D(b)(2), 109 Stat. 737, 747 (codified at 15 U.S.C. § 78u-4(b)(2) (2012)).

78. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314 (2007).

79. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j (2012).

80. *See* Brief for Petitioner at 2, Leidos, Inc. v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (No. 16-581). The defendants in *Leidos* argued that Item 303 does not create a cause of action. *Id.* at 14. Although Item 303 does not create a cause of action, it is subject to litigation under sections 11, 12(a)(2), and 10—assuming that disclosure was required and that a claim meets the elements of the provisions at issue.

81. 17 C.F.R. § 229.303(a)(2)(ii) (2017). However, according to empirical evidence, as an issuer's situation deteriorates, so does the quality of its disclosures. The MD&A becomes harder to read as tone shifts, sentences become more complex, and the obfuscation of the language increases. *See* Donald C. Langevoort, *Disasters and Disclosures: Securities Fraud Liability in the Shadow of a Corporate Catastrophe*, 107 GEO. L.J 967, 981–84 (2019).

82. Langevoort & Gulati, *supra* note 55, at 1651.

83. *Id.*; *see also* Monsma & Olson, *supra* note 55, at 164.

84. *See* Sale & Langevoort, *supra* note 2, at 790.

85. *See, e.g.*, *In re* Hi-Crush Partners L.P. Sec. Litig., No. 12 Civ. 8557, 2013 WL 6233561, at *18 (S.D.N.Y. Dec. 2, 2013).

Yet a key challenge with omissions is that any investor harmed by a purchase is tempted to argue that more information was necessary and, therefore, omissions must have occurred.[86] As the saying goes, hindsight is twenty-twenty, making it easy to argue about what should have been disclosed when time has passed and the investment looks less promising. The result is pressure to prevent every bit of missing information from becoming an actionable omission.

The challenge for the courts is navigating this space without allowing the "use of" omissions to undermine the purposes of disclosure or allowing every claim to become one about an alleged omission. This is a tricky line to draw. The trouble with omissions is that because they are not affirmative statements, they do not exist. As a result, the courts have determined that there is no reliance requirement for an omission on the theory that investors cannot prove reliance on something that was not said.[87] This is particularly important in the context of class actions, where reliance might well be different for every purchaser. Yet without reliance as an element, the claims are arguably easier to bring, which potentially expands liability dramatically.[88] As a result, courts have cabined potential claims such that, to trigger liability for an omission, the alleged misstatement and the omission must pertain to the same subject matter, and the missing information must render the statement misleading by altering its meaning.[89]

This concern about the expansion of section 10(b) claims continues to be a focus of the courts. Indeed, Langevoort and Gulati argued that concerns about increases in these claims may well have been at the root of earlier attempts by courts to limit their potential.[90] Nevertheless, Congress has stepped in and severely restricted the power of the 10(b) cause of action—developing strict pleading limitations, heightened state of mind requirements, fee-shifting provisions, lead-plaintiff provisions, and more.[91] This higher standard means that the 10(b) and fraud cases that are brought are both stronger and more likely to achieve real settlements.[92] Thus, many of the arguments that defendants and others gnawing at the omissions doctrine make about the strike-suit nature of these class actions have arguably been tackled.[93]

Additionally, omissions are actionable only if material,[94] but here the doctrine is subject to confusion. That confusion arises, in part, because the SEC's standard for materiality in the MD&A is different from—and lower than—the standard for

86. *See, e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27, 36 (2011) (finding plaintiffs' allegations of omissions sufficient despite defendants' arguments of overreaching).

87. *See* Affiliated Ute Citizens of Utah v. United States, 406 U.S. 128, 152–53 (1972).

88. *See id.*

89. *See, e.g.*, Kleinman v. Elan Corp., 706 F.3d 145, 152–53 (2d Cir. 2013).

90. *See* Langevoort & Gulati, *supra* note 55, at 1683.

91. *See generally* Sale & Thompson, *supra* note 7 (explicating in detail the provisions Congress has added to section 10(b) Claims).

92. *See* Sale & Langevoort, *supra* note 2, at 765.

93. *Cf.* Langevoort & Gulati, *supra* note 55, at 1683–84.

94. Securities Exchange Act of 1933 § 11(a), 15 U.S.C. § 77k(a) (2012).

proving materiality under sections 11, 12, and 10(b).[95] The resolution, however, is relatively simple. Whether something should have been included in the MD&A should be judged by the SEC's materiality standard, but whether a private plaintiff can bring a claim for liability should be measured by the appropriate liability provision for the cause of action. Thus, for an omission to result in liability in a private-plaintiff class action, it must meet the requisite materiality standard. This standard is set forth in *TSC Industries, Inc. v. Northway, Inc.*: whether the omitted information "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[96] In short, if the market possessed the correct information, a false statement or omission will not be materially misleading.[97] Further, to the extent that the misstatement in question involves speculative information (as does much of the information contained in Item 303), the test requires balancing the probability of the event with the anticipated magnitude of that event.[98] Importantly, neither standard involves a bright-line rule or strict percentage approach. In fact, it is well understood that any percentage deemed material could result in fraud up to the line, and that an overly stringent definition of materiality would result in the wrong incentives and the potential for more fraud.[99]

The courts have been applying these materiality standards for decades, and they are quite straightforward whether applied to affirmative misstatements or omissions.[100] Moreover, the standard for both types of misleading information must be the same, because any other approach would lead to a standard that creates liability for an affirmative misstatement but not for silence that creates a misleading outcome.[101] That dichotomy would be untenable. It would create an incentive to commit fraud through omissions and undermine the investor, issuer, and public interest protection goals of disclosure. It would also diminish the incentives of those charged with ensuring accurate and complete disclosures—the directors. We now turn to them and their role in disclosure's purpose and in discourse.

III. DIRECTORS, DISCOURSE, AND CANDOR

As we have seen, there are many demands on our disclosure regimen and those, in turn, produce demands on the director gatekeepers. Disclosure and candor are interrelated, and directors have a role in both. So far, this Article has focused on disclosure and its purpose. We now turn to the connection between disclosure, its

95. *See* Langevoort & Gulati, *supra* note 55, at 1651. This was one of the challenges in *Leidos*. *See* Brief for Petitioner, *supra* note 80, at 45.

96. TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

97. *See*, *e.g.*, *In re* Convergent Techs. Sec. Litig., 948 F.2d 507, 513 (9th Cir. 1991).

98. Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988) (quoting SEC v. Tex. Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).

99. *Northway*, 426 U.S. at 448–49.

100. *See*, *e.g.*, Matrixx Initiatives, Inc. v. Siracusano, 563 U. S. 27, 45 (2011); *Basic Inc.*, 485 U.S. at 226; *Northway*, 426 U.S. at 440.

101. Langevoort & Gulati, *supra* note 55, at 1680.

purpose, and candor—a fiduciary duty—with a focus on Delaware law. Like disclosure, candor is an information-forcing rule that requires, for example, the sharing of information between officers and directors.[102] Candor also operates in contexts implicating information shared outside of the corporation, such as when the corporation asks for a shareholder vote on a proposed merger.[103] Here, the Delaware courts typically look to the directors to determine whether proxy disclosures are sufficiently candid.[104]

For the purposes of securities disclosures, candor presses on the informational asymmetries that are internal to the corporation. Thus, the fiduciary duty of candor can play a role in addressing the challenges that directors, who have limited time and access to information, face with respect to their officer counterparts.[105] The demands of the disclosure regimen press on the substantive choices that officers and boards make and provide an opportunity for boards to ask questions and question the answers. This is particularly important when companies face, for example, revenue, profit, or other challenges. Indeed, what we know from the evidence is that disclosures tend to be more transparent and complete when times are good.[106] But when a company experiences a downturn, disclosure quality suffers. Obfuscation and complex sentences abound. Caginess increases.[107]

Directors are arguably situated as the gatekeepers of disclosures to ensure candor and completeness, which supports the purposes of disclosure. Directors must trust officers to provide relevant information but, as this Part of the Article emphasizes, the SEC and the laws and regulations place expectations on directors to mediate the information asymmetry between insiders and outsiders, performing an agency cost role.[108] Directors perform this function through discourse and by developing information and substance.

The securities laws and regulations, along with various orders and statements from the SEC, emphasize that directors must actively review disclosures, thereby

102. *See* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187 (2003) (exploring issues surrounding Enron, Worldcom, and other scandals and the lack of candor between internal actors, corporations, and the public).

103. *See* Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977) (holding that directors must provide with complete candor "information such as a reasonable shareholder would consider important in deciding whether to" tender shares).

104. *See, e.g.*, Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1277 (Del. 1994) (analyzing plaintiffs' claims with respect to material omissions in corporate merger proxy).

105. *See* Langevoort, *Resetting the Corporate Thermostat*, *supra* note 25, at 316–17. *See generally* Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (2007) (analyzing the increased focus on "independent" directors as mediators between corporations and the public); James J. Park, *Rule 10b-5 and the Rise of the Unjust Enrichment Principle*, 60 DUKE L.J. 345 (2010) (discussing expansion of securities claims in the context of officer enrichment).

106. *See* Langevoort, *supra* note 81, at 981–84.

107. *See id.* at 984.

108. *See* Langevoort, *supra* note 28, at 126–27; *see also* Mahoney, *supra* note 3, at 1090–93 (examining efficiency gains of agency information); Letter from Michael S. Gibson, Dir., Bd. of Governors of the Fed. Reserve Sys. Div. of Supervison and Regulation, to John Stumpf, Chair, Bd. of Dirs. of Wells Fargo & Co. (Feb. 2, 2018), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a4.pdf [hereinafter Letter from Michael S. Gibson].

adding to the information-forcing-substance nature of the securities provisions.[109] The information-forcing-substance theory is part of the architecture of the Securities Act of 1933. For example, as previously noted, section 11 of the Securities Act provides an express, strict liability cause of action for misstatements and omissions in a Registration Statement.[110] The statute specifically includes directors as defendants.[111] They do have a due diligence defense available, which makes the claim negligence-like (rather than strict liability-based) in nature.[112]

These provisions are a cornerstone of the information-forcing-substance theory of the federal securities laws. The due diligence provision creates an incentive for directors to engage in dialogue with management about the basis for any disclosures prior to making the disclosures public and engaging in discourse with shareholders, stakeholders, and the public.[113] This incentive structure supports the purposes of the disclosure regime.

The statute also provides that directors, as parties named in the registration statement, can avoid liability for misstatements and omissions under two provisions arguably designed to force discourse and candor.[114] The defense applies if, for example, a named party resigns and informs the SEC of the materially false or misleading statement before the effective date of the registration statement.[115] The design of this provision arguably urges directors to push back internally and, when unsuccessful, to make a noisy exit through resignation. Directors who have been duped by officers can also escape liability by informing the SEC and the public of a false or misleading registration statement after the effective date.[116] Here again, the defense is candor-focused, noisy, and, thereby, supports the purposes of disclosure.

There are many other ways in which the regulatory structure has evolved both in an information-forcing manner and where the role of directors is involved. Regulation S–K, of which the MD&A is a part, is a classic example. The MD&A requires information about known trends and uncertainties related to liquidity, capital resources, and results of operations.[117] The MD&A's purpose is to provide investors with a narrative that describes the business from management's perspective, indicating where gaps or uncertainties might exist, including changes in sales, revenues, or income.[118] These categories are ones about which investors want information, *and* about which directors should know.

109. *See* Sale & Langevoort, *supra* note 2, at 773.

110. *See* Securities Act of 1933 § 11, 15 U.S.C § 77k (2012).

111. *Id.*

112. *See, e.g.*, *In re* WorldCom, Inc. Sec. Litig., 346 F. Supp. 2d 628, 662 (S.D.N.Y. 2004).

113. *See* Sale & Langevoort, *supra* note 2, at 787.

114. *See* 15 U.S.C. § 77k(b).

115. *Id.*

116. *Id.*

117. 17 C.F.R. § 229.303(a) (2017); *see also supra* Part II for the earlier discussion of the MD&A.

118. *See* SEC v. Conaway, 698 F. Supp. 2d 771, 818 (E.D. Mich. 2010) (discussing the MD&A's purpose). For example, Item 303 requires that "[t]o the extent that the financial statements

The MD&A is included both in the offering documents subject to the Securities Act of 1933 and in the periodic disclosures required through the Securities Exchange Act of 1934.[119] Many other areas of Regulation S–K, including risk disclosures required by Item 503,[120] are also included in offering documents and periodic disclosures.[121] Indeed, risk arguably overlaps with all of the disclosures in the MD&A. Understanding the evolving risks to an issuer's business plan is key to investment and to the directors' oversight role.[122]

In addition, all of these disclosures are subject to liability. For offering documents, sections 11 and 12(a)(2) apply.[123] For other documents, including periodic ones, section 10(b) applies.[124] As noted above, the materiality standard for all three provisions is the same: the reasonable investor and the probability and magnitude for forward-looking information.[125] Liability is key to the information-forcing-substance theory—it is a backend enforcement mechanism for the disclosure regime and its purposes, and it is also arguably a key mechanism in prompting the discourse necessary to produce good disclosures.[126]

As a result, every disclosure pursuant to Regulation S–K requires that the people involved in drafting: "(1) ensure that the information exists; (2) confirm it is accurate; (3) determine whether and how to disclose it, including ensuring sufficient disclosure; and (4) disclose the information."[127] The concept of omissions is embedded in this process. Regulation S–K directly addresses omissions by requiring that disclosures include sufficient information so as not to make them misleading.[128] Here again, directors, discourse, and candor play a role.

Directors may not blindly rely on documents prepared by officers. Instead, before invoking the due diligence defense, directors must conduct a reasonable investigation, have reasonable grounds to believe, and actually believe that the

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disclose material increases in net sales or revenues, [issuers must] provide a narrative discussion of the extent to which such increases are attributable to increases in prices or to increases in the volume or amount of goods or services being sold or to the introduction of new products or services." 17 C.F.R. § 229.303(a)(3)(iii).

119. 17 C.F.R. § 229.303.

120. *See* 17 C.F.R. § 229.503 (2017).

121. 17 C.F.R. § 229.10 (2018).

122. *See In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996) (discussing directors' obligations); *see also* Hillary A. Sale, *Fiduciary Law, Good Faith and Publicness*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., forthcoming 2019).

123. Securities Act of 1933 §§ 11, 12(a)(2), 15 U.S.C. §§ 77k, 77l(a)(2) (2012).

124. Securities Exchange Act of 1934 § 10(b), 15 U.S.C. § 78j(b) (2012).

125. *See supra* notes 96–98 and accompanying text.

126. *See* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318, 1332 (2015); *see also* Sale & Langevoort, *supra* note 2, at 786. *See generally* Sale, *J.P. Morgan*, *supra* note 10 (developing the information-forcing-substance theory); Sale, *Independent Directors*, *supra* note 10, at 1380 (explaining how disclosure requirements create conversation and conscious decisionmaking that result in substantive changes and disclosures); Sale & Thompson, *supra* note 7 (emphasizing the importance of transparency and publicness goals to securities regulation theory).

127. Sale & Langevoort, *supra* note 2, at 787.

128. 17 C.F.R. § 229.303(a)(3)(iii) (2017); *see also* Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1296–97 (9th Cir. 1998) (applying 17 C.F.R. § 229.303(a)(3)(ii) and finding that plaintiff failed to state a claim).

registration statement did not contain material misstatements or omissions.[129] The directors must be "active, good faith securities monitors" before they can claim due diligence.[130] To meet the standard, candid discourse between directors and officers and between directors and those preparing the disclosures—experts or otherwise—is required. This is information-forcing-substance in action, one goal of which is ensuring candor in public disclosures and thereby protecting issuers, investors, and the public.

In addition to the statutory provisions that contribute to our understanding of disclosure, candor, and discourse, SEC enforcement actions also implicate directors and their role in ensuring the purposes of disclosure are upheld.[131] There are several themes in these enforcement actions. For example, directors may not defer too much to insiders.[132] They must meet regularly.[133] And if they fail to follow through on requests for information to management, they are also likely to fail to meet their responsibilities under the securities laws.[134] Further, directors who know that officers are under investigation for criminal charges and fail to share this information with shareholders promptly and accurately are failing in their securities monitoring roles.[135] Similarly, directors in a company with a high burn rate need to know if there are liquidity or credit freeze issues and, in some circumstances, update the shareholders.[136] Those who do not fail in their duties to shareholders. In short, "directors have a responsibility affirmatively to keep themselves informed of developments within the company and to seek out the nature of corporate disclosures to determine if adequate disclosures are being made."[137] The director's role, which relates directly to the purpose of disclosure, is heightened when the conduct of management is implicated and when the issues are key to the company's survival or business.[138]

These themes are echoed in more recent SEC enforcement actions and in statements by the Department of Justice. For example, in 2000, the SEC entered a

129. *See* Sale & Langevoort, *supra* note 2, at 772 (citing *Omnicare*, 135 S. Ct. at 1328–29).

130. Sale, *Independent Directors*, *supra* note 10, at 1394; *see, e.g.*, *In re* WorldCom, Inc. Sec. Litig., No. 02 Civ. 3288 DLC, 2005 WL 638268, at *12 (S.D.N.Y. Mar. 21, 2005) (declining to grant summary judgment for due diligence defense when no investigation was conducted and full reliance was placed on management's presentations to the board).

131. *See, e.g.*, *In re* Schwartz, Exchange Act Release No. 42,684, 72 SEC Docket 432 (Apr. 13, 2000); *In re* Cooper Cos., Exchange Act Release No. 35,082, 58 SEC Docket 591 (Dec. 12, 1994); *In re* Nat'l Tel. Co., Exchange Act Release No. 14,380, 13 SEC Docket 1393 (Jan. 16, 1978); *In re* Stirling Homex Corp., Exchange Act Release No. 11,516, 7 SEC Docket 298 (July 2, 1975).

132. *See In re* Stirling Homex Corp., *supra* note 131, at 300; *see also* Letter from Michael S. Gibson, *supra* note 108. These directors would also breach their state law fiduciary duties. *See* Letter from Michael S. Gibson.

133. *Cf. In re* Stirling Homex Corp., *supra* note 131, at 300.

134. *See id.* at 299–300.

135. *See In re* Cooper Cos., *supra* note 131, at 592, 596 (criticizing directors for omissions in public statements concerning wrongdoing by officers and stating that directors must "take immediate and effective action to protect" shareholders by providing accurate statements).

136. *See In re* Nat'l Tel. Co., *supra* note 131, at 1395–96.

137. *Id.* at 1396.

138. *See* 17 C.F.R. § 229.303(a)(3)(ii) (2017).

cease and desist order against an outside director of Incomnet, asserting that she knew or should have known that an officer had engaged in fraud and that prior public statements were inaccurate.[139] The order emphasized the role of directors in policing fraud, stating that they "must maintain a general familiarity with the corporation's public disclosures and accounting practices and investigate 'red flags' that come to their attention."[140] The SEC also criticized the directors for failing "to establish procedures reasonably designed to ensure the accuracy of Incomnet's public statements."[141] In this action, the SEC reiterated the role of directors in ensuring both that disclosures are complete and accurate and that the purposes of disclosure are fulfilled. These securities-based roles are directly tied to the directors' fiduciary, good-faith obligations under Delaware law.[142]

The SEC made similar allegations in *Chancellor Corp.*, where the directors were members of the audit committee when officers fired the company's auditor for refusing to report suspect financial results and information proposed by the officers.[143] According to the complaint, at least one of the directors knew of the underlying audit concerns, but "took no steps" to investigate the issues.[144] The SEC accused the directors of "ignoring clear warning signs that financial improprieties were ongoing at the company and . . . failing to ensure that the company's public filings were accurate."[145] Indeed, the SEC asserted that one of the director defendants signed the annual report "without taking any steps to ensure that it did not contain materially misleading statements," failed to check into several related party arrangements involving the CEO, and "made no inquiry into the [new auditor's] reasons" for the change in position.[146] There are similar allegations with respect to the company's restatements, with the SEC characterizing the director as "ignor[ing] . . . red flags and never question[ing] whether there was any basis" for the revisions.[147]

At a minimum, a change in auditor should prompt clear and direct questioning and candid discourse between directors and management.[148] To help prevent these sorts of shenanigans, management is no longer allowed to serve on the audit committee.[149] That change was intended to increase the role of independent

139. *In re* Schwartz, *supra* note 131, at 434–35 ("[D]irectors have a duty . . . to oversee the corporation's financial reporting process and to ensure the integrity and completeness of public statements made by the corporation."). The standard is negligence. *Id.* at 434.

140. *Id.*

141. *Id.*

142. *See* Sale & Langevoort, *supra* note 2, at 773; *see also* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006) (discussing directors' good faith duties); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 971 (Del. Ch. 1996) (same).

143. *See* Chancellor Corp., Litigation Release No. 20,370, 2007 WL 4165156 (Nov. 26, 2007).

144. Complaint at ¶ 29, SEC v. Chancellor Corp., No. 03-CV-10762-PBS (D. Mass. Apr. 2003).

145. Adley, Litigation Release No. 18,104, 80 SEC Docket 130, 131 (Apr. 24, 2003).

146. Complaint, *supra* note 144, at ¶ 48.

147. *Id.* ¶ 59.

148. *See id.* ¶¶ 89, 100, 120; *see also* Hillary A. Sale, *Federal Fiduciary Duties for Directors*, U.C. BERKELEY L. ECON. WORKSHOP 1, 37 (2006) (recounting an instance in *Stirling Homex* in which a change in auditors sparked an independent director to issue a noisy withdrawal).

149. Sarbanes-Oxley Act of 2002 § 301, 15 U.S.C. § 78j-1(m)(3) (2012).

directors in ensuring accurate and truthful disclosures, and to prompt the candid discourse missing in *Chancellor Corp*.[150] In short, the director's role in the information-forcing regime requires active, candid discourse between directors and corporate insiders. The failure to so engage undermines the purposes of the disclosure regime.

The issues presented in *Leidos* raise similar red flag questions.[151] The investors claimed the company failed to reveal that a key source of revenue tied to its projections was in jeopardy.[152] According to the plaintiffs, the company valued the market opportunity that might grow out of its contract with New York City at over $2 billion.[153] Thus, the amounts at issue were significant, and the contract and revenue issues arose because the company had engaged in an overbilling scheme with its key government client. The City's initial budget for the project was only $63 million; yet within a short period of time and due to allegedly fraudulent overbilling, the City paid more than $600 million before catching the improprieties.[154] The plaintiffs alleged these improprieties risked Leidos's government contracting business, "from which it derived 97% of its revenues."[155] Indeed, the company's annual report specifically noted the importance of its relationships and contracts with government agencies.[156] Shortly after the City became aware of the fraudulent billings, the criminal investigations began, and Leidos started to lose government contracts.[157]

According to the plaintiffs, the directors knew about the misconduct, the loss of business opportunities, and the company's employees' involvement in the improprieties.[158] Nevertheless, the directors allowed the 10–K to move forward, with their signatures and without disclosures about the problems.[159] Although the specifics of the plaintiffs' arguments are complex, the story is similar to others of this nature. Item 303 requires disclosure of known trends and uncertainties that are reasonably expected to impact a company's sales or income.[160] Yet the 10–K, with the MD&A included, did not provide information about Leidos's fraudulent overbilling scheme, which was allegedly known to the defendants and connected

150. *Id. See generally* Jonathan Macey & Hillary A. Sale, *Observations on the Role of Commodification, Independence, and Governance in the Accounting Industry*, 48 VILL. L. REV. 1167 (2003) (analyzing changes in audit and audit committee membership requirements). The SEC could arguably take a stronger role here by increasing its enforcement intensity to press disclosure gatekeepers to engage more. *See* Langevoort, *supra* note 81, at 993–94.

151. Ind. Pub. Ret. Sys. v. SAIC, Inc., 818 F.3d 85 (2d Cir. 2016), *cert. granted sub nom.* Leidos v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395 (2017).

152. Brief for Respondent at 2, Leidos, Inc. v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (No. 16-581).

153. *Id.* at 8.

154. *Id.* at 9.

155. *Id.* at 52.

156. *See* SAIC, Inc., Annual Report (Form 10–K) at 2 (Mar. 25, 2011).

157. Brief for Respondent, *supra* note 152, at 53.

158. *Id.* at 54.

159. *Id.* at 11–12.

160. 17 C.F.R. § 229.303(a)(3)(ii) (2017).

to a significant portion of its projected revenue growth.[161] The alleged omissions thus implicated the directors' information-forcing-substance role. This set of allegations also links the disclosure zone to the directors' state fiduciary duties. Directors focus on strategy, risk, and people. All three of those obligations are tied to the company's core business, revenues, and profits. What could be more material?

In response, the defendants argued that because the issuer had not discussed the issue at all, there was no need to clarify it with additional information.[162] This, they argued, was a "pure omission," in contrast to an omission required to make an affirmative disclosure not misleading.[163] This argument is specious at best and has the potential to gut Item 303. The disclosure regimen is clear: if the revenue source was key to the company's growth, Item 303 requires disclosure and discussion.[164] Indeed, the government argued that reasonable investors understand that when issuers discuss results in financial reports, there is an implicit representation that the issuer is providing all of the information that Item 303 requires.[165] This is arguably the premise for the requirement of additional disclosure to ensure that the initial disclosure is not misleading. It is also consistent with the statutory mandate that issuers comply with regulatory disclosure requirements the SEC deems "necessary or appropriate for the proper protection of investors and to ensure fair dealing in the security."[166] Although the goals of the disclosure regimen are broad, the overarching purpose is to help provide a level playing field for issuers, investors, and the public.

Omissions are at the heart of another significant securities fraud case, *Ramirez v. Exxon*.[167] The *Exxon* plaintiffs alleged that the company violated section 10(b) by omitting disclosures related to its recoverable oil reserves and climate change.[168] In particular, they alleged that internal documents contradicted the disclosures in Exxon's MD&A/S–K.[169] In support, they argued that the issuer's internal reports revealed that climate change would materially impact Exxon's ability to fully extract its hydrocarbon reserves, and thereby negatively impact its future business model.[170] The failure to include this information, which was directly linked to the information disclosed, undercuts the designated role of the MD&A "as an early warning device, designed to alert investors as to risks, trends, and uncertainties with respect to the [issuer's] . . . business that might make it

161. Brief for Respondent, *supra* note 152, at 11–12.
162. Brief for Petitioner, *supra* note 80, at 2.
163. *Id.* at 22.
164. 17 C.F.R. § 229.303(a)(3)(ii) (2017).
165. Brief for the United States as Amicus Curiae Supporting Respondents at 6–7, Leidos, Inc. v. Ind. Pub. Ret. Sys., 137 S. Ct. 1395 (2017) (No. 16-581).
166. Sarbanes-Oxley Act of 2002 § 409, 15 U.S.C § 78m(a) (2012).
167. 334 F. Supp. 3d 832 (N.D. Tex. 2018).
168. Complaint at 1–3, 23, *Ramirez*, 334 F. Supp. 3d 832 (No. 3:16-cv-3111).
169. *Id.* at 1–3.
170. *Id.* at 7.

unwise for investors to rely on past performance."[171] As Langevoort notes, when an issuer describes some risks, but omits others for fear that revealing them would damage the company, the result is materially misleading. Why? Because the disclosure of some material risks makes it reasonable for an investor to believe that the disclosure was complete—or that other risks were not omitted.[172]

IV. DISCLOSURE, DISCOURSE, DIRECTORS, AND PUBLICNESS

Like *Leidos*, *Exxon* reveals both the link between disclosure and publicness and the role of directors in managing publicness. Part I focused on the multiple ways in which disclosure facilitates capital raising, issuer parity, investment, and efficient markets.[173] When coupled with enforcement and litigation, the system is designed to increase the odds of a strong and healthy market system—where fraud is policed and punished and capital is allocated efficiently.[174] Although this system is important for investors and issuers, its reach extends beyond those who are active participants to many others, including employees and stakeholders.[175] This is the zone of publicness.

Publicness is a concept that encompasses the interplay between the inside players in the corporation (directors and officers) and outsiders—like media and analysts—who cover the company.[176] Outsiders reframe and recapitulate information about the issuer and play an important role in the public perception of the company. The decisions that the issuer and its inside actors make can have a significant impact outside of the entity. Corporations are permitted to wield significant economic and political power[177] and are therefore expected to consider the implications of their choices in a context outside the bounds of the

171. Langevoort, *supra* note 81, at 992.

172. *Id.*

173. *See supra* Part I.

174. *See* Sale & Thompson, *supra* note 7, at 525–29.

175. *See generally* E. Merrick Dodd, *For Whom Are the Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–54 (1932) (arguing that there was a shift in emphasis, with a developing focus on the argument that businesses were responsible to communities—not just stockholders—and that corporate leaders should act in that manner without "waiting for legal compulsion"). As stated in the Senate debate regarding the purposes underlying the Securities Act of 1933:

> The aim is to prevent further exploitation of the public . . . through misrepresentation; to place adequate and true information before the investor; to protect honest enterprise, seeking capital by honest presentation, against the competition afforded by dishonest securities . . . ; to restore the confidence of the prospective investor . . . ; and to aid in providing employment and restoring buying and consuming power.

S. REP. NO. 73-47, at 1 (1933).

176. *See generally* Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation After the JOBS Act*, 101 GEO. L.J. 337 (2013); Sale, *J.P. Morgan*, *supra* note 10; Hillary A. Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012 (2013); Hillary A. Sale, *The New "Public" Corporation*, 74 L. CONTEMP. & PROBS. 137 (2011); Sale & Thompson, *supra* note 7.

177. *See* Luigi Zingales, *Towards a Political Theory of the Firm* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 23,593, 2017).

entity.[178] In this context, publicness is substantive, because it requires thought and action by corporate insiders. Moreover, publicness is about what is disclosed, what is not, and how those choices impact the issuer, investors, markets, and the public.

Failing to act with publicness in mind has powerful consequences. In *Exxon*,[179] the climate-change omissions created a reaction by the media and the public. Shareholders filed claims against the company, its officers, and its directors for securities law violations.[180] Stakeholders, scientists, and states stressed the company's failure to disclose its own climate change concerns.[181] The SEC, multiple attorneys general, and various municipalities began to investigate the omissions.[182] Thus, media attention—a form of publicness—resulted in investigations and further attempts to regulate and control the company's business decisions, adding to the layers of publicness.

Exxon struck back by countersuing the public officials, arguing that they had engaged in a politically motivated conspiracy to violate the company's free speech rights.[183] A federal judge threw out the case, calling Exxon's theory "implausible" and describing the lawsuit as "running roughshod over the adage that the best defense is a good offense."[184] The additional wave of bad publicity made the company look like a bully, and the negative public opinion of the company and its dishonesty arguably worsened.

Moreover, the attorneys general involved in the litigation sought documents from Exxon going as far back as 1976 to determine what the company knew

178. *See* Hillary A. Sale, Social License and Publicness (Sept. 30, 2018) (unpublished working paper) (on file with author); Larry Fink, "Annual Letter to CEOs: A Sense of Purpose," BLACKROCK, [https://perma.cc/95JQ-ZXFH] (last visited Oct. 18, 2018); Matthew Rosenberg & Gabriel J.X. Dance, *'You Are the Product': Targeted by Cambridge Analytica on Facebook*, N.Y. TIMES (Apr. 8, 2018), https://www.nytimes.com/2018/04/08/us/facebook-users-data-harvested-cambridge-analytica.html [https://nyti.ms/2HhHRsE] (noting that Facebook has struggled to understand and adequately respond to its users' negative backlash to the Cambridge Analytica scandal).

179. Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d. 832 (N.D. Tex. 2018).

180. *See* Jillian Ambrose, *ExxonMobil Climate Woes Mount as Study Reveals It Has 'Misled' the Public*, TELEGRAPH (Aug. 23, 2017), https://www.telegraph.co.uk/business/2017/08/23/exxonmobil-climate-woes-mount-study-reveals-has-misled-public/ [https://perma.cc/UH72-V45P].

181. *See id.*

182. *Id.*; Bradley Olson & Aruna Viswanatha, *SEC Probes Exxon Over Accounting for Climate Change*, WALL ST. J. (Sept. 20, 2016), https://www.wsj.com/articles/sec-investigating-exxon-on-valuing-of-assets-accounting-practices-1474393593 [https://perma.cc/U6DX-KT4E].

183. *See Judge Dismisses Exxon Lawsuit Against Climate Change Probe*, ASSOCIATED PRESS (Mar. 29, 2018), https://apnews.com/b89cf926eaf64ccebbeb314b905dd67b [https://perma.cc/SRY9-DSM8]. Exxon employed a similar tactic against local governments that sued the company for damage and adaptation costs resulting from climate change. Exxon petitioned a Texas court to subpoena the California officials who brought one such lawsuit, alleging that the officials "are defrauding buyers of municipal bonds by not disclosing to lenders the climate risks they have claimed in their lawsuits." Stuart Leavenworth, *These Communities Sued Big Oil Over Climate Change; Then the Backlash Began*, STAR-TELEGRAM (Mar. 5. 2018), http://www.star-telegram.com/news/nation-world/national/article203208189.html [https://perma.cc/94TG-XCZX].

184. *Judge Dismisses Exxon Lawsuit Against Climate Change Probe*, *supra* note 183.

about climate change and greenhouse gas emissions.[185] They also requested documents related to investor communications on climate change and groups associated with "climate skepticism."[186] In some cases, the attorneys general argued that their states face serious costs to address climate change, and oil companies should help foot the bill.[187] Exxon adopted a strong stance in the litigation and alleged multiple conspiracies against the company.[188] In short, the climate change omissions and lawsuits produced a classic publicness cycle.[189]

How did this happen? At least in part, *Exxon*, like *Leidos*, may be the result of blind spots and the failure of directors to engage and manage *ex ante* with publicness in mind. Indeed, both cases reveal why ensuring complete disclosures matters. Recall that the purpose of these disclosures is to protect investors, issuers, and the public and to ensure fair dealing in the security.[190] Omissions undercut the value of disclosures and erode the purposes; thus, omissions matter to investors, stakeholders, markets, the public, and other issuers. As the SEC stated, disclosures under Item 303 are required, and by implication and rule, investors, the market, and stakeholders should be able to assume that the required relevant information has been disclosed in an omission-free manner.[191]

Directors play a crucial role here by developing candid discourse within the corporation before the disclosures and external discourse occur. As Langevoort's work on behavioral theory in corporations reveals, directors must foster open, truthful relationships with management to combat the structural asymmetry that may increase managers' incentives to suppress negative information about the day-to-day operations of the corporation when communicating with the board.[192] Those choices by management, of course, violate candor requirements and, thereby, undercut the very purposes of disclosure.

Recent litigation over the Wells Fargo cross-sell strategy and resulting scandal provides an example of failed discourse, candor, and disclosure. Wells Fargo failed to tell shareholders about growing legal and other issues. Like *Leidos* and *Exxon*, the plaintiffs suing Wells Fargo argued that the company did not disclose

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185. David Hasemyer, *Massachusetts' Top Court Refuses to Block Exxon Climate Fraud Investigation*, INSIDE CLIMATE NEWS (Apr. 13, 2018), https://insideclimatenews.org/news/13042018/exxon-climate-change-investigation-massachusetts-supreme-court-ruling-refuses-block-attorney-general-healey [https://perma.cc/DQ7T-EH3Z].

186. *Id.*

187. *See* Ucilia Wang, *Federal Judge to Decide Fate of New York City Climate Lawsuit*, CLIMATE LIABILITY NEWS (June 13, 2018), https://www.climateliabilitynews.org/2018/06/13/new-york-city-climate-lawsuit-keenan/ [https://perma.cc/5BE4-ZQTM].

188. *See* James Osborne, *Inside Exxon Mobil's Fight to Stop Climate Change Litigation in Its Tracks*, HOUS. CHRON. (June 14, 2018), https://www.houstonchronicle.com/business/energy/article/Inside-Exxon-Mobil-s-fight-to-stop-climate-12993891.php [https://perma.cc/UDW7-UQWQ].

189. Sale, *J.P. Morgan*, *supra* note 10, at 1655 (describing publicness cycle).

190. *See supra* Part I.

191. Brief for the United States as Amicus Curiae, *supra* note 165, at 7.

192. *See* Sale & Langevoort, *supra* note 2, at 787–88.

sales practice issues in its SEC filings.[193] Yet "the fake-accounts scandal turned out to be a seminal moment for [the company], tarnishing the bank's reputation and upending its management team."[194]

The role of the directors in this scandal has been the subject of congressional hearings, SEC questions, private-plaintiffs' litigation, and even consent decrees from the Federal Reserve.[195] At the heart of the scandal was the company's key strategy and growth mechanism—its cross-sell program, which, it turned out, was premised on fraud. The fraud and cultural issues at the company were so widespread that regulators took the board to task for its failures to challenge managements' assertions. Indeed, according to the Federal Reserve, management reports to the board "generally lacked detail and were not accompanied by concrete action plans and metrics to track plan performance."[196] In short, the board should have caught this. In response to the board's failure, the Federal Reserve instructed the board to "strengthen . . . oversight of the firm and senior management."[197]

This scandal harmed the bank's shareholders. Yet, as in *Leidos* and *Exxon*, the harms extend beyond investors to customers, clients, and employees. Further, similar to the 2008–2009 financial crisis, bank scandals have the potential to cause harm to the public. For Wells Fargo, the result has been billions in settlements and serious limitations on its business. The process of publicness has thus resulted in some powerful forms of substantive publicness, including, for example, limits on the bank's ability to grow its assets and a timetable for appointing new directors.[198] The company also faces ongoing scrutiny in the form of requirements for submitting certain plans for regulator approval.[199] The Federal Reserve also required the directors to sign the consent order, making clear its view of their role.[200] The directors' failures include a lack of candid discourse within the boardroom and with the officers—a key role of directors that, when successfully executed, helps to ensure that the purpose of disclosure is fulfilled with sufficient attention to publicness.

CONCLUSION

The purpose of securities disclosures is to increase the accountability of the issuer and thereby protect issuers, investors, and the public. Indeed, for many of

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193. *See* Matt Egan, *Wells Fargo Will Pay $480 Million to Settle Securities Fraud Lawsuit*, CNN (May 4, 2018), https://money.cnn.com/2018/05/04/news/companies/wells-fargo-securities-fraud-settlement/index.html [https://perma.cc/J9JW-LAFT].

194. *Id.*

195. *See* Sale, *supra* note 178.

196. Letter from Michael S. Gibson, *supra* note 108.

197. *Id.*

198. *See, e.g.*, *In re* Wells Fargo & Co., Order to Cease and Desist by the Federal Reserve, Docket No. 18-007-B-HC (Feb. 2, 2018), https://www.federalreserve.gov/newsevents/pressreleases/files/enf20180202a1.pdf.

199. Letter from Michael S. Gibson, *supra* note 108.

200. *See In re* Wells Fargo & Co., *supra* note 198, at 12–14.

the reasons delineated in Part I, the incentives of issuers to disclose are insufficient due to confidentiality and other concerns. As a result, Congress and the SEC mandate a disclosure regimen and instruct directors to play a key gatekeeper role in ensuring the accuracy of disclosures, including pressure testing for omissions. Here is where discourse and candor come into play. They are part of the information-forcing-substance regime, which is a product of both federal securities laws and state fiduciary duties. When the regime works, it increases the accountability of management and directors to investors, the markets, and the public.[201] The regulatory goal is for directors, as designated securities monitors, to take ownership of disclosures by engaging with management and ensuring accuracy.[202] If they do, they help fulfill disclosure's purpose. Yet, to be effective, directors must both engage in discourse and understand publicness and its potential impact on the company. They must understand how their role connects to the entity's boundaries and private status, as well as to its public obligations, publicness, and social license more broadly.[203] Developing this understanding and engaging in the discourse will increase securities monitoring. In this sense, discourse and candor increase regulatory compliance. In short, pressure testing and candor will produce better, more complete, and more balanced disclosure outcomes for investors, issuers, and the public—and thus, fulfill disclosure's purpose.

201. *See* Sale & Langevoort, *supra* note 2, at 786–88.

202. S. REP. NO. 73-47, at 4–5 (1933).

203. The theory of social license states that businesses and other entities exist with permission from the communities in which they are situated, and from the stakeholders that constitute those communities. In that sense, businesses are social, not just economic, institutions and thus are subject to public accountability and public control. For more information, see Robert G. Boutilier et al., *From Metaphor to Management Tool: How the Social License to Operate Can Stabilise the Socio-Political Environment for Business*, INT'L MINE MGMT. 2012 PROC. 227 (2012); Geert Demuijnck & Björn Fasterling, *The Social License to Operate*, 136 J. BUS. ETHICS 675 (2016); David Jijelava & Frank Vanclay, *Legitimacy, Credibility and Trust as the Key Components of a Social License to Operate: An Analysis of BP's Projects in Georgia*, 140 J. CLEANER PRODUCTION 1077, 1082 (2017); Domènec Melé & Jaume Armengou, *Moral Legitimacy in Controversial Projects and Its Relationship with Social License to Operate: A Case Study*, 136 J. BUS. ETHICS 729 (2016); Sale, *supra* note 178; Robert G. Boutilier & Ian Thomson, *Modelling and Measuring the Social License to Operate: Fruits of a Dialogue Between Theory and Practice*, SOCIALICENSE.COM (2011), https://www.socialicense.com/publications/Modelling%20and%20Measuring%20the%20SLO.pdf.