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Public Chatter

The Loneliness of Making the Materiality Decision

You're sitting in your office staring at your fern when it dawns on you. It's all you, dude. The buck stops here. You remember the law school lessons. *TSC Industries v. Northway* in 1976. That case has its own Wikipedia page, for heaven's sake. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important." And then there's *Basic v. Levinson* in 1988 that reiterated the *TSC Industries* standard: "A substantial likelihood that the information would have been viewed by a reasonable investor as having significantly altered the total mix of information made available." I served in-house at a Fortune 40 company before the enlightened era of disclosure committees, so I was surprised to hear from my in-house friends that not much has changed. It's still a lonely endeavor. The job of making the materiality call typically lands in the lap of the in-house securities lawyer. ***Not the GC. You.*** Or, even worse, you made the call to *include* the disclosure but you've been overruled by the CFO or the controller – perhaps even the CEO - and now you've got to write up that memo to the file explaining why you've omitted the thing. Your heart isn't in it. You don't agree. There's that gnawing feeling in your stomach. The disclosure committee might convene for a Form 8-K determination – but it won't gather for a ruling related to the Form 10-K or 10-Q. Not that it matters. Even in those instances when the disclosure committee convenes, the committee members often look to you as the securities lawyer to make the judgment call. You can't rely on your law firm to make the call. Smart firms won't touch it with a 10-foot pole. They don't know all the facts. They're not in the best position to assess. True, they might share anecdotes of what clients did in similar situations, they may give you some counsel - but they're not going to make the call. To best protect yourself, the key is to document the disclosures you ***don't*** make. Don't worry as much about the ones you do make, unless you have a reason to be worried about the accuracy of the disclosure. Misleading disclosure is easier to spot by a plaintiff's lawyer than omitted disclosure. This memo that you draft – sometimes called a "SAB 99" memo, based on the SEC accounting guidance in that Staff Accounting Bulletin – is all part of your disclosure controls. For those "omission" calls, there just aren't any data analytics to pull from, to compare with. These are instances of what companies *didn't* do. It's not publicly known. Your own determinations aren't even well-known within your own company. As the band "America" sings:

This is for all the lonely people Thinkin' that life has passed them by Don't give up until you drink from the silver cup And ride that highway in the sky

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