DISCLOSURE: THE SEC AND THE PRESS
An Address By
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On the Occasion of
The University of Connecticut's
G.M. Loeb Awards Luncheon
New York, New York
May 21, 1968

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The press and the SEC are engaged in a common enterprise. It, therefore, gives me particular pleasure to speak today at a luncheon honoring outstanding financial and business writers. You and we assist in implementing an important public policy – that of providing adequate information to the public concerning our economy, the important companies that affect it, the securities that represent the ownership interests in those companies, and the persons and institutions which make up our financial markets. Our respective roles are complementary. Neither of us could do as well without the other.

It is the Commission's job to get material information out from behind closed doors and into the public domain. The job of the press is to review, condense, analyze, comment upon and to disseminate this information to the public in compact and readable form. This is, of course, an oversimplification. The press digs out a good deal of information which the Commission had no part in bringing to public attention. And the Commission's rules require the dissemination of certain information in compact and readable form on certain occasions, notably in the prospectus which must be used by the issuer or underwriter in making a public offering, and in the proxy or information statement which management must send to shareholders in advance of each shareholder meeting.

A basic standard, in many of the statutes administered by the Commission, is "full" disclosure, which generally means that relevant material information must, at the least, be spread on the public record. But not every investor has the time, or the ability, to reach an informed decision by analysis of the information so disclosed. This is when financial and business writers play an important role. They can carry further our attempts to encourage issuers and other to condense and to simplify the information published by a particular company; they can place it in perspective with other developments which may affect an industry or the whole economy; and they can emphasize comparison with or contrast to the financial statements and other information about that company and its competitors.

I do not mean to suggest by this that we are satisfied simply to have the information which the securities laws call for presented in a jumbled disorganized fashion which makes it unusable for ordinary investors. To the contrary, we have over the years continually revised and refined our various reporting and other disclosure forms and

requirements to make them as useful as possible to investors, brokers, security analysts, members of the press and others.

Thus, we are now conducting a through reexamination of our disclosure requirements under the 1933 and 1934 Acts. When that study was initiated last Fall, I asked one of my colleagues to undertake its direction and, thus, to emphasize its importance and to ensure its prompt completion. He and the staff assigned have devoted a great deal of time and energy to this project. We anticipate that it will be completed this summer. We hope that anomalies will be obviated, obsolete requirements eliminated, and the whole scheme updated in the light of the growth and growing complexity of our business and industrial communities. It should also assure a better reservoir of useful information about all substantial publicly traded companies in more convenient and useful form for anyone who has occasion to rely upon it. A more effective relationship between the quantity and quality of information required in connection with the offering of new issues and that routinely required of the larger publicly owned companies could provide other benefits and, perhaps, mitigate certain recurring problems.

In this effort, it is not our intention to encroach, in any way, on the role of the press, even if we had the capability so to do. Significant legal liabilities and other sanctions flow from the filing of inaccurate or misleading information with the Commission, or from the failure to provide information when required. It is a sad, but inescapable fact that the existence of these potential liabilities and sanctions which serve a very important and necessary purpose, on occasion affects the style of these documents to the point that, while informative, they are often not very seductive. The press, however, is not so inhibited. It has access to these somber documents as well as to more exuberant materials not subject to statutory review. And it can and does follow other leads. When deadlines permit, it is frequently in a position to obtain and to present a comprehensive picture in interesting and readable form.

I would be less than candid, however, if I did not refer to suggestions made by each generation of newspapermen, and renewed in recent years as a consequence of certain significant enforcement actions taken by the Commission, that these actions may have inhibited the flow of financial information to financial analysts, members of the press and others. There is no valid basis for these assertions. It is an important aspect of our responsibilities to encourage the widest, most comprehensive and most timely disclosure of relevant information. This is a goal encouraged by the stock exchanges and other institutions involved in our securities markets. It is, however, also commonly accepted that this laudable purpose should not be permitted to subvert other important public and investor protections. Thus, when an issuer is preparing a public offering or seeking acceptance of some proposal, an unusual outpouring of exclusively favorable and sometimes subtly misleading information is a matter of some concern. Manipulation of information at any time is suspect and dangerous; frequently, it is also unlawful.

An area of recent interest to newspapermen, and alarm to others, relates to our Rule 10b-5 which prohibits fraudulent practices in connection with the purchase or sale of securities. I will not discuss in detail the Commission's approach in these cases, since at

least two, which impinge upon the subject of my remarks today, are currently pending in the Court of Appeals for this Circuit.

I will say, however, that the alarmists have overstated the situation. We recognize the desirability of enunciating precise legal rules whenever possible so that business decisions can be made with maximum understanding as to the legal consequences. But questions when and how disclosure of developments in a corporation's affairs should be made involve examination of the peculiar facts and context within which certain actions were taken or omitted. I doubt that this is an area in which it will ever be possible to lay down comprehensive and precise guidelines as to what must be done in the untold number of circumstances in which questions can arise. Such a code would only enhance the substantial premiums guile and subtlety already command. Nevertheless, our recent and continuing experience may allow us to expand on the modest beginnings we have already effected. We will undertake so to do as soon and as long as that seems feasible.

The significant point to stress today is, however, that the problem of "inside information" is one that has tremendous impact on public confidence in the fairness of the securities markets. That confidence, so necessary to the continued healthy growth of our markets, cannot be preserved if there is a belief – indeed only a suspicion – that insiders are taking advantage of information gained by virtue of their relationship to the company or possession of privileged information, even if the insiders are complying with the letter of all the technical guidelines that the ingenuity of the Commission can devise and the inevitable resistance of those subject to them will permit. If I were called upon to name the one area of interest and concern in the six countries of Western Europe I visited recently and in the international organizations involved in current efforts to establish or strengthen real securities markets on a national and supra-national basis, it would be the use, misuse, or abuse of privileged information by persons or organizations privy to it.

Obviously, there are difficulties involved in the resolution of significant corporate problems at certain times. And much relevant but routine information about a company simply cannot be published every day of the year. But security analysts and newsmen are always on the alert to verify rumors or to develop fresh information. If we were to say – and we have most emphatically not said – that no information, no matter what its significance, should be given to a reporter or analyst unless it was simultaneously disseminated by the company to the general public, there is no doubt that this would impede the initiative of journalists and others seeking relevant data, particularly background information significant only to make more useful and meaningful other information already generally available.

Newsmen have told me that management frequently finds one excuse or another (frequently related to the SEC) to decline a request for an interview or for certain information. Most often, I would suppose this reflects legitimate concern. Occasionally, it is merely an excuse to refrain from giving information. At other times, management may be uncertain whether it should, as a matter of policy, provide information to one and not to all. There is, of course, a problem here, but my experience with this problem leads me to question the assertion, sometimes made, that corporate executives are unable to

reach a decision, under the present state of the rules, whether, what and when information should be made available only to the person making the inquiry or to all who may have a legitimate interest in it. There may be some such cases but they would, so to speak, represent the exceptions to the usual.

Of course a corporate officer is faced with the problem of making a quick judgment whenever a financial middleman – here I mean largely public relations men, security analysts and others – asks him for information. A decision must be reached whether the information sought could be used for the personal advantage of the person who seeks that information or the limited clientele to whom he may make the information available. One of the key factors is the "materiality" of the information sought. It is my personal view that there is little room for doubt in most cases and, where there may be legitimate doubt, it should be resolved in favor of the investing public and the markets generally. The decisions in cases now pending in the Court of Appeals will, I am sure, provide significant guidance on several of these questions. Other guidance is already at hand. Mr. Robert Haack, the president of the New York Stock Exchange, recently stated, at a meeting of the Bar of the City of New York, that a listed corporation should issue a press release immediately if an analyst for a large institutional investor discovered anything of a substantive nature in his discussions with corporation officials. He indicated unequivocally that if some important information which had not as yet been published – information which could affect the holding or investment decision of any stockholder – that information should be made the subject of an immediate and comprehensive news release.

Unfortunately, the Commission has also had to deal on occasion with situations in which information middlemen enriched themselves by improper activities related to the acquisition of significant corporate news. Fortunately, these cases are relatively rare. Information can have value, just as other commodities can; and it can be made available in trust for others, just as other commodities can. Thus, the impact on supply or demand which results from receipt of a recommendation by a person or firm thought to be reputable and knowledgeable can have its effect on market prices. In one case, we went all the way to the Supreme Court to establish that the purchase of securities by a middleman prior to wide publication by him of a recommendation to buy, followed by his sale (without notice to his subscribers) after the expected rise in price was a form of "scalping" in violation of the Investment Advisers Act. While financial writers for newspapers and magazines intended for public use do not come within the specific terms of that Act, they have, almost universally, accepted the view that they should be subject to the highest ethical standards in handling the often sensitive and significant information with which they deal.

There is another and important aspect of the relationship between the SEC and the press which I should mention. The press acts as a sort of "ombudsman", reviewing our activity or lack of activity, and that of other agencies of government, with a critical eye and with little reluctance to express its views when that seems appropriate. I consider this role of the press extremely important in the public and investor interest.

The Commission, of course, is not only instrumental in securing the release of material information about issuing companies; as I have already suggested, many of the things that the Commission or its staff says or does or does not say or do may be newsworthy. I say this despite the fact that I am sometimes startled by what is attributed to a "high Commission official" – whoever he may be. The Commission is an agency founded, at least in part, on the concept of fair and adequate disclosure. Most of the material in our files is public, and we attempt to make it readily available to the press and to individual members of the public. Our rules have always provided that all information contained in documents filed with the Commission is public unless otherwise provided by statute or rule, or directed by the Commission. We attempt to assure wide dissemination in convenient form of our rule proposals, rules, decisions, and opinions, statements of policy and other significant releases. Members of the Commission and the staff spend a great deal of time explaining the Commission's actions and policies to financial writers and other interested persons.

Nevertheless, in recognition of the objectives of the Public Information Act, we have over the past year improved our methods of indexing and making available a large amount of information in the Commission's files. We have responded (affirmatively in almost all cases) to requests for background correspondence and other information on questions of current public concern. In many cases we have gone beyond what we consider to be the strict requirements of the Act.

The Act does not, however, require us to open all of our files to anyone who wants to look at them. The Congress recognized the need to strike a balance between "the right of the public to know and the need of the government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." The Act was designed, I believe, to prevent secret government – a wholly laudable purpose which I enthusiastically share. I do not believe, however, that it was intended to open up to public review the most intimate details of transactions of private individuals seeking assistance from the government in working out their problems or to effect compliance with the law.

Putting aside technical legal language, the principle categories of information which we believe should be kept confidential are those which, if subjected to general public scrutiny, (1) would create reluctance on the part of persons attempting to comply with the securities laws to seek the advice and assistance of the staff, would unfairly injure members of the public who do communicate with us, or provide "inside" information concerning forthcoming transactions or tentative proposals, (2) would give possibly unwarranted adverse publicity to persons who are the subject of investigations and certain administrative proceedings conducted by our staff before they have been completed and some official action taken or (3) would interfere with free communication among members of the Commission and its staff or with other government agencies.

The first category includes requests for interpretations and so called "no action letters" which must be accompanied by fairly detailed information concerning past or prospective transactions, as well as comments on preliminary materials submitted to us which are to

be revised before being put into final form for public dissemination. The informal and expeditious manner in which the Commission has been able to deal with these matters, and the consequent cooperation we have received from industry and the public concerned with these matters, has been described, time and time again, by those who have analyzed our procedures, as one of the most notable achievements in our administration of the federal securities laws.

In the second category, investigations almost always, and administrative proceedings frequently, are conducted privately to protect the respondents and others from the possibility of undeserved adverse publicity where there are no countervailing considerations requiring immediate revelation of the matters under inquiry or the charges. A full record of a proceeding is made public usually after the Commission has completed its consideration of the matter and determined the appropriate sanction, if any, to be applied or other action to be taken.

The third category involves the free interchange of ideas among Commissioners and their personal assistants concerning formal proceedings, and with the staff during the consideration of other matters, a process which might be severely hampered if the participants knew that even their most tentative ideas, frequented committed to paper solely for the purpose of discussion and debate, would become available for public examination and possible criticism.

These few categories I believe, constitute a very carefully circumscribed exception to the Commission's general policy of making all relevant information concerning its actions and processes as widely available as possible. We have deliberately made these categories as narrow as possible because, here too, we rely heavily on financial writers to enhance public understanding of the relevant considerations surrounding our objectives and how we try to achieve them. I am prepared to admit that we are not our own best publicists. Thus, in connection with hour current legislative program, as well as in other significant administrative matters pending before us, the financial press has played an important role in helping to educate industry and the public to the need for progress and reform.

In summary, the relationship between the Commission and the press has been a warm, cooperative and mutually advantageous one. It will, I am sure, continue to be so in the future.