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Disclosure of Steve Jobs's Illness: Round Two

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By Ben W. Heineman Jr.

On January 17, I wrote a piece saying that Apple should disclose what illness had caused Steve Jobs to take a medical leave for an unspecified time.

In my view, such disclosure of CEO health should be undertaken voluntarily as a matter of good corporate governance and sound investor relations. But, the SEC should also issue guidance under the securities law that, if certain conditions exist, such information should be disclosed as material (because, per the definition of materiality, it would affect an investor's decision to buy or sell securities).

This piece became part of a broader, energetic debate, which then raised a variety of issues about CEO health disclosures.

Let me discuss in summary form some of those issues -- issues, which either companies or the SEC, would have to address in more detail when establishing an investor policy or a regulation of broad applicability.

- ***Past Disclosures:*** The pieces and commentaries often exclusively focused on Jobs (I did) and did not remind readers that for decades some CEOs and companies have chosen to provide detailed disclosure. For example, Tenneco gave an extensive description of CEO Michael Walsh's brain cancer in 1993, and he stayed long enough to restructure the company and choose a successor before dying in 1994. In October 2010, Pacific Biosciences provided detailed disclosure about CEO Hugh Martin's diagnosis of multiple myeloma. In between,

> then vice chairman of GM, Harry Pearce, disclosed in 2001 that he had leukemia and said "there is an absolute requirement to make full [public] disclosure."

In an interview at the time, Pearce elaborated:

> Any investor in the company is entitled to know the health of all the members of the senior management team. We're being paid to take on serious management responsibilities that can affect the financial health of the company. If we are in any way seriously impaired and can't perform those responsibilities, the shareholders need to be apprised.

Yet, for every full disclosure (and there are many other examples), there is non-disclosure about CEOs, as has been the case consistently with Apple and Steve Jobs.

- ***About whom?*** Any disclosure policy or rule would apply to the CEO. The question is whether it should apply to others who are important to the company -- the vice chairs, the five most highly compensated employees disclosed in the proxy statement, the key product designer -- in short company "luminaries" who have great influence on company success or failure? My starting position is that companies should decide for themselves who is important enough, other than the CEO, to warrant health disclosure. But the SEC should start with a proposal for a bright-line rule -- CEOs only -- and review comments about whether a broader set of corporate officials can be defined clearly enough so as not to leave companies uncertain about the reach of the regulation.

- ***When?*** Some commentators and readers were concerned about broad invasions of CEO privacy. But any company policy or SEC rule would be quite limited to circumstances in which the health issues significantly impaired a CEOs ability to do his job for more than a short period of time. The flu, a broken bone, most run of the mill conditions would, of course, not be disclosed.

Both companies and the SEC would state that privacy concerns are overridden in public companies in certain specified circumstances when, in general, there is significant impairment to do job for more than a very short period of time. Such circumstances which trigger disclosure would include the ones I mentioned in the first piece: when the illness is life-threatening; when there is a substantial leave of absence from present duties; when the CEO can stay on the job but is impaired by the illness. Other triggering circumstances that result in significant impairment could emerge in a regulatory process or be left to companies to decide. These circumstances themselves would be part of the disclosure.

investors susceptible to very different standards. Most importantly, diagnosis and treatment in a limited set of circumstances is clearly a material fact, in the view of many sophisticated business people, lawyers and commentators other than me. Investors should know what medical condition caused Steve Jobs to take an indefinite leave of absence from his operational responsibilities. Period. Full Stop.

- ***How SEC Should Proceed.*** Because everyone recognizes that this a sensitive area in which regulators should proceed with care, the SEC need not put out a proposed rule now. It can indicate a strong interest in a possible rule or guidance and through a Commissioner's speech or a public round-table discussion or a concept release solicit ideas about need for rule/guidance and possible dimensions. But, just from the summary points above, I think it should be clear that this area is no different than other complicated areas: a careful rule, which is informative but not too complex, can be drawn or at a minimum an interpretive release, which provides guidance, can be issued. Difficulty should not be an SEC excuse for continued silence in this important area.

- ***Companies Should Clarify their Disclosure Principles.*** Finally, the Jobs reprise of bad corporate practices should stimulate companies who have not thought through the issues surrounding health disclosures to do so. These issues may obviously come up without warning, and having a well considered disclosure position is prudent. But, an SEC rule, or even serious SEC discussion of a possible rule, may be necessary to motivate some companies to formulate a sound approach.

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