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HOW GOOD IS THE END OF THE CHAIN? A LOOK AT FINANCIAL REPORTING

An Address By

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Forty years ago someone on the banks of the Potomac created an elaborate myth.

In 1934, somewhat as a supplement to the disclosure requirements of the Securities Act of 1933, Congress adopted the Securities Exchange Act of 1934. This Act was intended to do many things: establish federal control over the conduct of stock exchanges, make "insiders" liable for short-term trading profits, empower the newly created Securities and Exchange Commission to control proxy solicitations, require federal registration of broker-dealers and give the Commission considerable power over the manner in which they conducted their business. In addition to that Section 13 required that companies listed on securities exchanges file with their respective exchanges and the Securities and Exchange Commission periodic reports containing such information as the Commission might require, given the suggestions incorporated in the statute. Pursuant to its powers under this section (in 1964 most non-listed companies having publicly traded securities became subject to its requirements) the Securities and Exchange Commission has created increasingly intricate and elaborate requirements for the information which must be included in these filings with the Commission and, in the case of listed securities, the exchanges. For the typical industrial issuer there must be filed the familiar annual report on Form 10-K, the

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quarterly Form 10-Q and periodically, upon the occurrence of certain events, the Form 8-K. In addition, of course, "insiders" -- officers, directors, beneficial owners of 10% or more of a class of equity securities -- must file reports with respect to changes in their ownership of the issuer's securities.

These requirements have become steadily greater. In the last couple of years the Commission has expanded considerably the information required to be disclosed in these forms. One of the most significant changes was that which required in Item 12 of Form 8-K certain information when there has been a change of auditors. This particular change points up the increasing use of disclosure as a means of deterring conduct which the Commission lacks direct power to control. By requiring disclosure of such matters as changes of auditors it is frankly felt that this may act as a deterrent to improvident action of that nature. Similarly, the Commission presently has under consideration other proposals which are designed to have the same sort of impact.

There is nothing in the sections of the 1934 Act which mandates the filings of information with the Commission and exchanges that requires such information per se to be disclosed in mailings to shareholders, press releases or otherwise through public distribution. To the extent that information contained in such filings finds its way into the hands of shareholders, it happens either because of other provisions of the disclosure scheme or through the purely fortuitous circumstance that such information is contained in press releases put out by the issuer or uncovered in the Commission or exchange files by advisory services or resourceful reporters.

The Commission has increasingly sought to destroy the myth of which I spoke. That myth is that filing information with the Commission somehow constitutes public dissemination. Very frankly this myth in some cases can be a bit of an embarrassment. The Commission is very loath to suggest that the information filed with it is not publicly available; on the other hand, its sense of realism is very often sorely tried when the assertion is made, countering a charge that information has not been disclosed, that indeed it had been disclosed because it was in a filing with the Commission.

As I said, the Commission has sought to destroy this myth. Increasingly, through its rule making power under Section 14(a) of the 1934 Act in respect to proxy solicitations, it has required that much information similar to that contained in the periodic reports be incorporated in proxy statements. Furthermore, it has been less diffident in requiring the expansion of information contained in annual reports to shareholders. Thus, it has in recent months proposed that the annual report to shareholders include, among other things, a summary of operations covering a five-year period substantially in the form required by Item 2 of Form 10-K -- this would include the textual explanation by management of elements that cause material changes in items of revenue and expense recently called for by the adoption of Guide 1 relating to 1934 Act filings; textual information which will, in the opinion of management, indicate the nature and scope of liquidity and working capital requirements of the issuer -- matters indicated to be considered include peak seasonal demands for working capital, availability and cost of credit, policies associated with the extension of credit to customers, purchase commitments related to inventories, policies followed as to the magnitude of inventory to be maintained, and future financing requirements

and plans; information about the business done by the issuer and its subsidiaries during the fiscal year such as will in the opinion of management indicate the general nature and scope of the business of the issuer and its subsidiaries; line of business reporting data similar to that now required in the Form 10-K; the name, principal occupation or employment and the name and principal business of any organization in which each director and each executive officer of the corporation is employed; information about the principal market in which the securities of any class entitled to vote at the meeting are traded, and high and low prices (or in applicable cases, the range of bid and asked quotations) for each quarterly period within the most recent two years, information about dividends paid on such securities during such two years, and a statement of the issuer's dividend policy with respect to such securities.

But even this effort to take information out of the files of the Commission and exchanges and put it directly into the hands of shareholders has serious shortcomings. As we all know too well, the economic life of the country, and the affairs of individual companies, change much too swiftly for annual reports to provide a sufficient medium for keeping the investing public informed. We have developed incredibly rapid means of communication. We have apparently developed an inexhaustible desire for the printed word, so much so that I doubt if there is a single person in this room who has not within the last month complained about the amount of reading he feels compelled to do simply to stay abreast of matters directly relevant to his profession or business. Investment decisions are not made when information becomes available in the Commission's files or in annual reports. They are being constantly made and they are made on the basis of the information available at the moment. That information is usually a

complex mix -- depending upon the resources, sophistication, awareness of the investor or his adviser -- consisting of Commission-filed reports, official disseminations by the issuer, less official emanations of analysts and commentators, and, unfortunately, a lot of misinformation, half-truths, pseudo-truths, misconceptions and just plain baloney.

Emulating somewhat the jargon of the economists, I think the Commission could formulate a "model" of what would be the perfect disclosure system. This would be a system in which all corporate disclosure was prepared with the same fastidiousness that characterizes the preparation of a Form S-1 registration statement. Disclosure would be made of all "material facts" (I'll leave to another day the discussion of the ambiguities inherent in that pair of words) and dissemination of this information would be instantaneous, it would be spread evenly among all investors so that all of them would have access to it at exactly the same time and no one would be able to say that any other investor had an advantage as far as the quality of factual information available or the promptness with which it became available.

Like most economist's models, that model is obviously not descriptive of the world as it is today and frankly, while it may constitute a desirable objective, there are circumstances that preclude the full achievement within the world as we know it today.

Simple economics preclude the sort of meticulous preparation of all disclosures that characterizes the preparation of a Form S-1. Can you imagine a company submitting to that sort of scrutiny all of its disclosure material? For one thing, obviously disclosure would be significantly delayed in many cases and quite frankly in many instances I suspect its informational quality would

suffer. I have at other times spoken of the desirability of utilizing the public relations arts in the preparation of the annual report; I adhere strongly to the notion that it is not simply enough to disclose. Disclosure must also be packaged attractively so that all of us lazy people are somehow or other coaxed into taking advantage of it. Thus, we cannot -- and should not -- expect, or desire, all disclosure to rise to the highest levels of preparation. Furthermore, it is impossible to expect instantaneous dissemination that reaches the eyes and ears of all investors immediately and equally. There are inherent limitations in the process. Not everyone watches the Dow Jones broad tape 24 hours a day; not everyone can read the P. R. outpourings of all American corporations. Mechanical limitations of our media preclude broad, immediate, equal dissemination.

We have come to realize that at least for the average investor a tremendous amount of the information that he uses in making investment decisions originates not in formal filings with the Commission and perhaps not even in proxy statements and annual reports. Rather, it has its origins in the intermittent and relatively unregulated disclosures that corporations make concerning current corporate events. These bits of information are usually contained in press releases ordinarily prepared by the public relations department and in most corporations only rarely reviewed in advance by qualified counsel.

Let's focus upon this mode of disclosure for a moment. There is nothing in the statutory scheme as it exists today which expressly accords the Commission the power to control the contents of press releases or the manner of their dissemination. To the extent that such a power exists anywhere, it derives from our friend, Section 10(b) and Rule 10b-5 thereunder, and Section 17(a) of the 1933 Act. The Texas Gulf Sulphur and Heit v. Weitzen cases established that

in effect all corporate dissemination of information by publicly held corporations is embraced by the federal securities laws. You recall that in Texas Gulf Sulphur the corporation prepared a press release which was released on April 12, 1964 discussing rumors which had circulated concerning the possibility of a major mineral find in Timmins, Ontario. This release, which the court easily determined was misleading, confronted the court with two difficult problems. The first was: What is the standard of conduct required of a corporation in preparing a release incorporating material information? To sustain an action for an injunction, must willfulness be present, or is recklessness sufficient? Is the issuer in effect a guarantor of its accuracy, so that responsibility from a legal standpoint attaches regardless of fault, or must there be at least negligence? The Court of Appeals for the Second Circuit determined that at least in enforcement proceedings by the Commission it is sufficient to show negligence on the part of the preparer, recognizing that such a standard applied in civil actions for damages might create excessive penalties. The second problem the court confronted was whether a press release could be said to be "in connection with the purchase or sale of a security" when the issuer of the release was not purchasing or selling securities. In this case, as in Heit v. Weitzen, the court concluded in effect that the public release of information was "in connection with the purchase or sale of securities" when a trading market for the corporation's securities existed. Thus was the stage set for imposing upon disclosures not expressly mandated or controlled by statute or Commission rules controls under the federal securities laws.

This extension of the federal securities laws, of course, was not lost on issuers or their public relations counsel. Immediately after the Texas Gulf Sulphur case there arose a spate of stories that corporations had clammed up, that

exposures suggested by TGS were so great that corporations could no longer adopt an open posture with analysts, the press or even their shareholders beyond that expressly mandated by the law, that, indeed, silence would be golden. For a while it looked as if we might indeed be moving into a time when The Wall Street Journal would be trimmed down to the proportions of a supermarket flier and be published once a week, and financial writers and editors would join the bread line. Despite misgivings and concerns, this did not happen. After a period of initial shock issuers began turning on their mimeograph machines and loading the Xerox machines and putting out corporate information in as great profusion as before.

As has happened in so many other cases, the extension of regulation accomplished by the Texas Gulf Sulphur case was first greeted with dismay and shock, followed by assertions that this new burden would irreparably and fatally hamper legitimate activity. Initial appearances were that such prophecies were correct. However, calm reason asserted itself (helped, I think, by assurances from the Commission and the staff that the Texas Gulf Sulphur case would not be construed unreasonably) and quiet returned. And as has happened in the past in the face of new regulatory requirements, substantive beneficial change followed. I am sure that there is far greater care and attention given to the contents of press releases now than there was before the Texas Gulf Sulphur case. In many cases, when important matters are proposed to be disclosed, inside and outside counsel are consulted; care is taken to be sure that the releases are consistent with the disclosures that will be required by Form 8-K and other filings with the Commission; facts are checked out meticulously; and a balanced disclosure is sought to be accomplished. Hence, I think it is safe to say that the post-Texas

Gulf Sulphur world is a better and more accurately informed world than the one before that case.

As a result of this there exists a greater potential than ever before for investors to secure promptly useful information on a continuous and ongoing basis as a supplement and addition to the information contained in formal filings with the Commission and the proxy statements and annual reports circulated to shareholders and others. There are, of course, many remaining problems. The small company continues to have difficulty in getting its information into the public print where it can be seen by the investing world. Suggestions have often been made that mailings to shareholders or broker-dealers which have displayed an interest in the company's securities, or perhaps an advertisement in strategically placed publications, could remedy the disadvantage. Those means, of course, are expensive, particularly when it is taken into account that the companies we are speaking of are less able to afford such means than those which can simply publish a release and be assured of its circulation. Further, in a market which responds instantaneously to disclosure, as has the present one, it would be well if everyone received all information at exactly the same moment. Unfortunately, no one, including the Commission, has an easy answer to this problem, but surely anyone involved in the dissemination of corporate information must be concerned with seeking every means of assuring equality of access to the information.

I turn now to that last and most important step in the dissemination of corporate information. Press releases receive distribution varying with the policies of the corporation. In some instances they are circulated very broadly and a variety of mailing lists are used; in other instances they are confined pretty much to the media. They are distributed to some mailing lists through the mail,

while they will have been distributed to the media and have received wide circulation through the media before the mails can bring them to the attention of the persons to whom they are mailed.

Most investors receive day-to-day information concerning corporate enterprises through financial publications and the financial pages of daily newspapers. Pre-eminently The Wall Street Journal and The New York Times provide day-to-day information about the activities of many corporations. Consequently, the process of informing the investing public with regard to a corporation's affairs does not cease with the distribution of the press release or the calling of the press conference. It continues down to the text of the news article based on that release or conference and to the headline on it. This is a subject I would like to address for a few moments -- the manner in which corporate information is handled by the press.

I will not talk about such obvious topics as the conflict of interest problems of financial editors and writers, exemplified by a Commission proceeding some years ago and addressed by the code adopted by the Society of American Business Writers recently. Surely in this day no one needs to be reminded that financial writers and editors should not sell out their professional integrity for the sake of advertising dollars, that they should not write of companies and securities with anxious eyes on their own portfolios, that they should not enrich themselves through inside information that may drift into their ken, that they should not expose themselves to charges of favoritism by the acceptance of gifts or preferences. Rather, I will talk about a far more routine and subtle subject, namely, the manner in which corporate information is written up in the media and the manner in which it is displayed to the investing public.

The financial vice president of a very large American corporation discussed this matter with me recently and in an effort to underline his concerns, he sent me a batch of material, including a press release that his corporation had put out disclosing earnings for a recently ended year and the fourth quarter of that year. The release was, in my estimation, a carefully prepared, well balanced, intensely factual non-interpretative disclosure document. Included with the release were reprints of articles based on this release which appeared in numerous publications. I would like to read for you simply the headlines and lead paragraphs of the stories in half a dozen publications.

" * * * EARNINGS UP 10%

"* * * reported its 1973 sales, income and earnings per share reached record levels for the 14th consecutive year."

A good, simple and informative lead.

"* * * 4TH QUARTER NET DOWN 6.6%

"* * * Unit Is a Factor -- 1973 Profit Up 9%

"* * * one of the world's largest and most controversial conglomerates reported yesterday that net income in the fourth quarter of 1973 declined 6.6% per cent to \$117.2 million from year-earlier levels.

"The decline was caused primarily by a writedown of \$35.4 million on the company's investment in * * * which * * * is selling under an antitrust consent agreement.

"For 1973 as a whole, * * * said net income rose 9 per cent to \$528 million, from \$484 million in 1972."

Only six paragraphs later did the writer return to the full year's notable results.

"* * * POSTS RECORDS IN PROFIT, SALES

"* * * yesterday posted record profits and sales for 1973, but a substantial part of the increased earnings resulted from new international currency exchange rates."

This was indeed perceptive: about half the increase stemmed from currency transaction rates.

"* * * SAYS IT SET 4TH PERIOD MARK IN OPERATING NET

"But 5.4% Climb Was Pared by Charge to Cover Loss
Expected on * * * Sale

"* * * reported operating profit in the fourth quarter, before extraordinary items, rose 5.4% to a record \$152.6 million, or \$1.23 a share, from \$144.8 million, or \$1.15 a share, a year earlier. Revenue climbed 21% to a record \$3 billion from \$2.5 billion."

Only in the third paragraph were results for the year discussed -- and then only after remarking in the second paragraph on a large extraordinary charge which resulted from an antitrust divestiture.

"* * * PLANS EXPANSION

"* * * expects to more than double present volume of company services and products by 1980, its annual report said today."

Six paragraphs later the first earnings and sales figures appeared, following extensive discussion of future plans.

"* * * REPORTS RECORD '73 NET, SALES

"* * * yesterday reported record net income from continuing operations of \$526,606,000, or \$4.21 per share, fully diluted for 1973.

"This compares with 1972's results from continuing operations of \$463,383,000, or \$3.68 per share."

This very factual statement, I might note, occurred in a publication away from major financial circles and not in any of their presumably sophisticated journals.

It hardly sounds as if the writers were talking about the same company, does it? I think it is fair to say that an investor reading these diverse presentations might have very divergent responses. If he read the headline and lead paragraph of the first story I mentioned, he would be sorely tempted to sell the securities of the company; if he read the second, the temptation to hold might seem appropriate; and if he read the third, he would probably put in a call to his broker to buy the stock.

It can fairly be said that newspaper men, like the rest of us, work under stringent deadlines, must read large amounts of material quickly and digest it swiftly, and that the headline writers simply don't have the time or the expertise to write balanced rather than catchy headlines, and in any event, different people read the same words and get different impressions. All of that has, I suppose, a certain amount of validity. However, I am troubled when I realize that all of our diligent efforts to achieve an upgrading of corporate disclosure can be completely nullified by careless reporting and slapdash headlines. I realize that publications cannot print the full texts of the releases of even the largest corporations in the country. But is it asking too much to suggest that those who prepare material for the media summarizing such releases bend over backwards in an effort to achieve a balance between affirmative and negative, between bullish and bearish, try to reflect, when the issuer has sought to be fair, that same fairness of presentation in the article? We know this is possible because we see it every day. We all see in financial publications day after day instances in which reporters quite obviously alert to their responsibilities seek to make fair and balanced presentations.

As I indicated, I am also troubled by the headlines. Unfortunately, many investors, like most people, tend to be lazy and seek to gain information with little effort; in their defense, it might be said that they, too, suffer from intense time pressures and cannot weigh and balance the contents of lengthy articles. Is it asking too much of headline writers to ask that they read the article submitted in toto and try to accomplish in the headlines the same sort of a balance that a good reporter tries to accomplish in his work product? Look again at the headlines I quoted above: "* * * EARNINGS UP 10%," "* * * 4TH QUARTER NET DOWN 6.6%," "* * * POSTS RECORDS IN PROFIT, SALES," "* * * SAYS IT SET 4TH PERIOD MARK IN OPERATING NET," "* * * PLANS EXPANSION," "* * * REPORTS RECORD '73 NET, SALES." It is hard to believe that these headline writers were dealing with the same raw material. I realize that the headline writers are to some extent creatures of the reporters and the rewrite men and their emphasis will reflect the emphasis that is given a matter by those people, but I would suggest that part of the editorial responsibility of a newspaper is to see that the headlining does not compromise the basic fairness of the presentation.

One of the unresolved problems of our complex financial world is the multiplication of data and information, the difficulties of assimilation, the necessities of simplification and condensation. This results in complicated financial statements, fully compliant with the most stringent requirements of disclosure, boiled down to two or three line tabulations in a Wall Street Journal earnings report. In those presentations all the subtleties of non-recurring income, extraordinary items, changes in accounting principles, selections of accounting alternatives slip out of sight and the reader is left with last year's

earnings per share, this year's earnings per share, last year's sales, this year's sales with perhaps a cryptic reference to the fact that the earlier year is "restated." I would not have you construe these remarks as critical of the Journal or of any other publication that prints this highly condensed information. Simple limitations of space necessitate it. There is a problem that all of us have in educating the public to the limitations of this mode of presentation and urging them, before making investment decisions, to seek out fuller information. Such condensed information should simply be a suggestion that more information is needed and not the basis upon which investment decisions are made. Similarly, the easy simplicities of the price-earnings column accompanying stock tables in many publications conceal and blur all kinds of complexities. There are many who suggest that the printing of such information is not really a beneficial addition to the fund of information in the hands of investors but is, rather, a detriment to sound investing practice. I would not debate this subject today, but again I would suggest that all of those involved with investors have an obligation to educate them to the limitations of such simplified information.

Over a period of 40 years the Commission has developed a highly sophisticated system of continuous disclosure. For those with the time and the inclination and the desire, more information is available about American corporate enterprise than about enterprises in any other place in the world. Pronounced efforts are being made to get more and more of this information into the hands of those who can use it on a day-to-day basis, as well as those who may have only occasional use for it. Despite this four decade effort, however, most investors must still depend upon non-regulated publications for a goodly portion of the day-to-day information they have about corporations in which they

invest or in which they may wish to invest. We have brought responsibility and integrity and accuracy a long distance in the corporate world. But all that effort can go for naught if it trips on the rocks of reportorial indifference, careless summarization, writing with a hidden bias, or sloppy headline writing that tries to be cute.

The Commission is well aware of the strictures of the First Amendment which protect the media and we have no desire whatsoever to impinge upon the rights enjoyed by newspapers, television and radio in the slightest. However, we do hope that the sense of integrity, fairness and honesty which is deeply ingrained in the journalistic profession in this country will assert itself in the area of financial reporting, as it has increasingly asserted itself in other areas. Financial reporting is usually not front page news; financial reporting doesn't sell many newspapers (although certainly stock tables sell plenty of afternoon newspapers); financial reporting addresses a smaller audience than the funny papers. And yet it is extremely important reporting.

The more I serve at the Commission, the more I realize that indeed the financial structure of the country is a seamless web and that a rend anywhere in it endangers the whole fabric. Integrity of our markets is built upon full disclosure. Full disclosure implies integrity, forthrightness, candor, completeness and accuracy at every stage of the process, from the first reporter of the fact to the last before the ultimate reader. If these principles of full disclosure are damaged or overlooked or neglected, then the entire capital raising process in this country is in danger, for experience clearly indicates that if investors are going to commit their funds to corporate enterprise they will only do it if they have confidence in the information upon which their investment decision is made.

I would urge in the strongest language I can upon financial writers, financial editors and those who write the headlines on financial reports: be models of fairness, be models of balance, be models of proportion, be models of accuracy. When you do, you will serve more than simply the ideals of your profession; you will make a distinct contribution to the integrity of the investment process without which the economy of this country will founder.