MATERIALITY AND THE SEC

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The idea of materiality runs through and appears practically everywhere in the Securities Act and the Securities Exchange Act, as well as in other statutes with which you are not so much concerned. It is used as a test for what should be put into a registration statement under the Securities Act and the Securities Exchange Act, and into reports filed with the Commission and into proxy statements. It's used in the basic fraud provisions, Section 17 (a) of the Securities Act and Rule under the Securities Exchange Act. It is used to define the scope of civil liability in Section 12 (2) of the Securities Act for fraudulent misrepresentations in sales of securities and in Section 11, the liability scheme for a false 33 Act registration statement and in Section 18 of the Exchange Act and in all of the implied civil liabilities that sprung from Rule 10 (b) 5.

Now, one may wonder why so much emphasis on this particular concept. The reason is that a concept of this nature is essential to any scheme of required or controlled disclosure. By required disclosure I mean registration statements, reports and so forth. By controlled disclosure I mean the limitations on what you can say and what you can omit to say without running afoul of the fraud provisions.

It is absolutely essential to distinguish between what is trivial and what is significant to an investor. The investor doesn't care what the president of the company had for breakfast this morning but he does care what the company is earning and whether it's going to stay out of bankruptcy, and there has to be some means of distinguishing the one from the other, or else a disclosure scheme such as exists in the securities laws would simply be impossible.

Since materiality is used so frequently in the securities laws, in the Commission's rules and in the decisions of the Courts under the securities laws, one might wonder whether the Commission or the Congress invented it for this purpose. That is not the case. The reason why the word materiality is used rather than some other word is that it goes way back into the common law, where it was used as a test for violation or liability in common law fraud and common law deceit and in those contexts, of course, it was much more general because of the variety of transactions involved. A classic common law definition which is not very far

from the definition that's used in our work,. reads as follows, general of course, because of the generality of the subject. "A fact is material if its existence or non-existence is a matter to which a reasonable man would attach importance in determining his course of action in the transaction in question." This is basically it. A fact whose existence or non-existence would be regarded as important by a reasonable man in deciding what to do.

This is translated in various ways into a securities context as for example in Rule 405 under the Securities Act, which specifies the concept for purposes of a 33 Act registration statement. It says, "Those matters as to which an average prudent investor ought reasonably to be informed before purchasing the registered security." Again, the underlying theme is the same. I could stop there but I have a few other things that I'll mention including a particular problem. Two or three of them.

As translated for purposes of the securities laws the term instead of a reasonable prudent man is a reasonable prudent investor. Now this has several inherent problems. In the first place it is objective primarily. It is not addressed to you or to me. We might think something is or is not important but, as is the usual practice in the common law, it is not primarily addressed to what a particular person thinks or doesn't think, knows or doesn't know, but to a reasonably prudent investor -- this is of course a variant of the old common law character who is said to dominate the whole field of liability under the common law and to be, in fact, non-existence, a reasonable man. The subjective comes in occasionally. There are suggestions of a double test. Was this fact one to which a reasonable man, a reasonable investor would attach importance and also did the particular investor who received it attach importance to it? Is this an alternative or are both requirements there? This gets very important in the case of, for example, the work of broker/dealers in recommending securities to investors, in which the circumstances of the particular investor have to be examined into. It is not, however, fortunately for you so very important in your work which lies primarily in making disclosures to the general public or to your stockholder public where the objective test of the reasonable man is the one you use.

There is a question that has been raised from time to time as to who the reasonable prudent investor is. In the Texas Gulf case the defendants contended and the District Court tended to agree, that a reasonable prudent investor is a long term investor on the theory, I suppose, that for the average man it is not prudent to invest for a short swing. But the Court of Appeals disagreed and they said that a speculator may also be a reasonable investor and that information significant to him can be material, even though it would not matter greatly to a man who was investing for ten years. Which might be said to be true of the Texas Gulf situation in part because the Texas Gulf information was bound to produce an immediate market reaction but maybe it won't govern what Texas Gulf is worth in 1985.

There is also developing, and I just want to touch on this although it is perhaps a sideline, the question of what an investor is and what he is interested in. The traditional focus of the securities laws has been that an investor is a person who buys and sells securities on the basis of their investment merit. What is their yield going to be? Are they going to go up or go down? Is this a worse or a better buy than some other security in the same or another industry?

We have been recently told that investors are changing and they are interested in a lot of other things, that they are interested, for example, in whether a company has or has not an affirmative program of non-discrimination in employment and whether the company does or does not pollute the environment and if it does, what it's doing about it. Now, we recognize that these may be material from an investment viewpoint. A company which violates law or policy in these areas may well incur either substantial expenses or liabilities for doing so and we have indicated that, at least so far as that is so, the company's record in these areas is material. We are told by some that that doesn't really matter. That investors want to know what the company's record in this kind of area is, whether or not it has much of anything to do with the investment merit of its securities in the traditional sense and we are told that the National Environmental Policy Act of 1969 impliedly amended the securities laws to interpolate this requirement. We haven't quite bought that idea 100 percent yet and so we are now being sued in the Court of Appeals over it by an organization known as the National Resources Defense Council, as well as The Project for Corporate Responsibility and we will have to see what the Courts will do with that and you may want to watch that too.

Turning back again to the mainstream of materiality, a principal problem with it is that this same word is used in many different contexts and there is a tendency on the part of the Courts and I suppose of the Commission, to use the same definition each time when there is really a difference because of the difference in context. Thus, it is used to indicate what should be in a registration statement. There are a good many items in a registration statement where you are supposed to provide disclosure about this or that, such as your competition or your properties, or transactions with your management and so forth, but in most instances this is qualified by saying that you don't have to put something on this subject in if that information is not material.

There you are confronted with a judgment as to what to put into your registration statement and what to leave out and normally you err on the side of caution and put it in if it might be material. This is practice which creates its own problem, which our chairman has addressed himself to, in connection with making these documents readable and understandable for the investor, but in any event it is a somewhat different problem that what the next group of your panelists will discuss, i.e., inside information.

This same test of materiality is used in the same way in the

proxy rules. But as the Courts have indicated there is nevertheless a difference. In registration statements you are mostly required to address yourself to a prospective buyer of a security and to concern yourself with what he should know when he decides whether to buy it or not and this has led, historically, to some emphasis, from my own personal viewpoint perhaps at times some overemphasis, on negative facts. Facts which are unfavorable but which he should know about because if he doesn't know about them he may buy the securities when he otherwise wouldn't.

In the proxy rules the context is a little different. There particularly when it is a proposition to be voted upon rather than an election of directors and particularly the proposition of a merger, the investor is called upon to cast his vote and it is just as important to provide to him information which will guide him in determining whether to vote yes as it is to provide information which will guide him in determining whether to vote no. In other words, what is needed is a balanced presentation.

The Gamble Skogmo case recently illustrated that. Traditionally there have been excluded from the Commission's official disclosure documents appraisals of property on the theory that these are often somewhat unreliable and further because of generally accepted accounting principles concerning the value at which assets are stated. In this particular case, which was a proxy matter, the company was in the process of selling off its properties at considerably more than their book value, had done so, and was proposing to continue to do so. The Court held that while it was not necessary to amend the financial statements, it was necessary to disclose elsewhere in the proxy statement the value at which the company had reason to believe that it could sell these properties, based upon the sales that had occurred and upon the offers it had received.

Now, there is some question, which I gather Mr. Babson got into this morning, as to whether some similar type of information involving a judgment as to the future such as projections should be included. This is a difficult question. I will not go into it because it's a little away from my subject. On the one hand there is the fact that projections have never been in and there is a question as to whether investors will appreciate the fact that projections, unless, highly conservative and therefore, possibly misleading for that reason, often turn out to be wrong.

On the other hand it is a fact, as our chairman has pointed out, that particularly in venture capital situations that's about all you have got. The actual net worth of the company, its sales, its earnings historically, are apt to be in the neighborhood of zero or somewhat more and you're interested in what the company expects to do and venture capitalists expect and get this information, why shouldn't ordinary investors. We have gone part way in that direction by calling in the case of new companies for budget information which however, is not so much intended as a projection of earnings as a projection of whether the company is going to suddenly and grindingly run out of money.

Turning now to another context with which materiality is

significant, this arises in connection with annual reports to stockholders not required under present law to be filed with the Commission and particularly in press releases. Here unlike a registration statement, an annual report or a proxy statement, there is no prescribed content. There is no form that you look at to determine what you should put in and what you should leave out. But nevertheless the concept of materiality is there because if such a document "omits a material fact necessary to make the statements therein not misleading", it may violate Section 12(2) or Rule 10(b)5. This then requires a species of editorial judgment. If you say something what else do you have to say to make what you said complete and this brings me to one of the more difficult phases of this concept of materiality and that is the concept of omission.

It's not too difficult to determine that you shouldn't make a statement that's false. It is much more of a problem both in the context of releases and also to a degree in the context of registration statements and other documents to determine what you put in, what you are required to put in, when there is no form calling for disclosure on a particular topic. Omissions take two forms which should not be confused.

One, is the one I have just been discussing. Omission to state something necessary to make what has been stated not misleading. For example, suppose in a release or in a report or any other document you state quite truthfully that the company earned a dollar a share in the first quarter, but speaking in May you don't happen to memtion that it lost a dollar a share in April. That kind of thing -- of course, that is a oversimplified example -- runs through this whole field. When you say something, you have to look at what you havon't said and consider the two together.

The other principal aspect of materiality arises, and here we get to the insider trading area, as to what happens when you keep completely silent. You don't say anything although you know something. There are numerous variations and problems in this area which go beyond materiality and have to do with such concpets as the duty to speak and when it arises and whether insiders may keep silent and still trade and when is information public. These parts of insider trading do not relate directly to materiality, but materiality is there. There in two different ways.

First, of course, the conventional viewpoint, if you elect to discuss the subject, what do you have to say, but beyond that, the question of whether you have a duty to speak before you trade or perhaps if you don't trade. At present the rule generally is that insofar as corporate disclosure is concerned, that is issuing releases voluntarily, or not issuing them, a corporation does not have an affirmative duty to come forward with disclosures provided that neither it nor its insiders are trading and if, this is not quite the law but I think you might consider that it's going to be, it has a good business reason to keep still. If it has a good business reason to keep still and if there is no trading and there are no half truths, I think the law now is that it doesn't have to come through. If, however, it has no good business reason to

keep silent, whether or not failure to disclose is now illegal, it may become so. It is, at least unfortunate for a corporation not to come forward with such disclosure. The stock exchanges call for this. It is good corporate practice to do it, but it may or may not be the law that you have to.

But then now what do you have to disclose if you have a duty to come forward and speak. The conventional answer found in all of the insider trading cases going back to the common law, insofar as this doctrine originated there, and it did, is that what you have to disclose is a material fact, not an immaterial fact and this is highly important. In the day to day operation of a corporation numerous things happen. Goods are sold. Supplies are purchased. Money in small amounts is made or lost. There is a vast amount going on in a large corporation. It cannot be expected to come out and disclose all of this, if it's not material and this is true even if it is trading if it's insiders are trading.

On the other hand, there may be a duty to disclose and certainly insiders cannot trade where there is undisclosed a material fact. In other words, the materiality creates the duty which is a very different thing from materiality in the context of what you should put into a registration statement when you have a duty to file one.

Now, there is a great deal of concern as to whether materiality has the same meaning in these two very difference contexts and I can understand that, because courts in general language sometimes import the standard common law definition of materiality into this context. But you will observe that where the Commission has taken action against someone under the insider trading principles, for trading without disclosing something, that something has not been a matter that a prudent man would rather like to know about. It has been something significant and something important.

In the Commission's opinion in the Investors Management case of July 29, 1971, Exchange Act Release #9267, page nine, there is a discussion of materiality. In fact it takes up most of the page. That discussion is significant. It doesn't talk about the average prudent investor. It talks about a fact of such importance that it could be expected to effect the judgment of investors and if generally known to effect materially the market price of the stock and then it goes on to define certain factors to be considered in this context such as the degree of its specificity. This is important. I mean there are all kinds of facts that float around in a corporation which all put together lead an analyst to his judgment, but here the reference is to the degree of specificity of the fact and in that case, which was part of the Douglas-Merrill Lynch situation, the fact, a sharp reversal of earnings, was quite specific.

Another aspect is the extent to which the information differs from information previously publicly disseminated, that is where, as in this situation, it had been thought that Douglas was doing reasonable well in earnings, and it turned out that it wasn't. And some knew this and some did not. Then there is another test which really is not so much a part of materiality and yet, it is,

from the viewpoint of people at least one step removed from the corporation, that is its reliability in the light of its nature and source. All kinds of gossip floats around Wall Street and the inhibitions of insider trading cannot be attached to this. On the other hand, information that comes, so to speak, from the horse's mouth where the recepient knows this, is rather different.

In closing I would like to mention another aspect of this question of insider trading and of materiality which was an important theme, in the Investors Management decision, that is that the responsibility for the proper handling, and the avoidance of abuse, of inside information is not solely the responsibility of the corporation. The corporation has that responsibility, of course, but analysts who talk to the corporation likewise have such a responsibility. We have observed in several cases, to our distress, a feeling on the part of some analysts that if they can get hold of something hot, they better do it and then they can make money by peddling it to someone. Analysts who do that will get into trouble and they should know it.

This doesn't mean that analysts shouldn't do their job. This is the opposite side of what I attempted to convey down in Atlanta. That is that corporate executives, occasionally with the best of motives, are indiscreet and if they are, the analyst should not jump to take advantage of that indiscretion but rather should work with the corporation to make sure that the information is properly handled and properly disclosed and an analyst may also be held responsible if he fails in that duty.

I believe that I have talked as long as I intended to and I'll be happy to try and handle your questions. Thank you.

Question: On the very last point, are you saying that analyst is required to register, is subject to the rules of the SEC and may be suspended?

Mr. Loomis: Surely, most of the analysts are registered. The question was is an analyst as responsible as a registered representative.

The answer is as far as the SEC disciplinary powers and policies are concerned, we do not draw any such distinction in the area of insider trading and analysts are for our purposes in the same boat as registered representatives. Of course, they may do different things. If they just stow the information away in their notebook they are not violating anything.

Question: Would you care to comment on a corporation's duty to correct errors not originating with the company?

Mr. Loomis: The Court of Appeals for the Second Circuit some years ago said that a corporation has no obligation to correct rumors, and that I think is probably good law but on the other hand, the stock exchanges say you should and it's probably good practice to do it. You may get the problem put right up to you when somebody asks, is this true, or isn't it.

Question: How would you guage materiality in a case where a

corporation gives to an analyst a newly developed source of earnings. This is information that new procedures allow the corporation to get a better bead on its costs and therefore, to get a better breakdown on the sources of its earnings. There's no real change in the aggregate or anything. Is that a material fact or not?

Mr. Loomis: Essentially the question is suppose an analyst learns that a company has improved its system for cost control and matters of that kind and as a result will probably be able to carry down a greater share of its revenue into earnings than it has heretofore done, but there is no immediate change in the earnings or in immediate prospects. This is somewhat similar, I think, to the company which has developed a new and more efficient method of production or a new and presumably salable product.

All of these things cannot be judged in the abstract. They must be considered in the context of the corporation. There is further the question that I alluded to earlier of specificity. If there's a whole range of things going on which are designed to tighten things up, it probably is not necessary to come forward and disclose all of these various steps that are being taken. If, however, something significant, specific and unexpected emerges in this area, it may be inside information.

Question: Is it conceivable that a corporation maybe violates its duty to the public by disclosing too much. In other words, by giving such a welter of immateriality that material facts are lost, they have to be dug out by the analyst or whoever finds them.

Mr. Chatlos: We're having some problems here. If you don't mind, I'll repeat the question. The question was, can a company give too much information?

Mr. Loomis: Well, as such it doesn't violate the law for a company to give too much information. Really this is a matter essentially of your judgment and your relationships with the investment community subject to only one caveat you can't use a mass of immaterial stuff as a device to conceal something that is material.

Question: If a corporation feels it has a good business reason for non-disclosure, competitive problems and the like, its counsel is generally so damn prudent they will always err on the side of disclosure, so what is the practical solution to a problem of that type?

Mr. Chatlos: In the case of corporate opportunity, counsel generally errs on the side of conservatism and requires a disclosure. Are there any ground rules that should be given on that?

Mr. Loomis: I didn't think it is precisely corporate opportunity. It is a situation where the corporation felt it had a good reason to keep quiet. Aside from stock exchange requirements of timely disclosure, the Courts so far have said that a corporation doesn't have an affirmative duty to come forward with disclosure provided that neither it nor its insiders are trading. On the other hand it's desirable to come forward with the infor-

mation if you can, not only from the viewpoint of stockholder relations and compliance with the stock exchange rules, but to avoid embarrasement if unknow to top managements some insiders are trading on this information.

Question: Do you feel that the company has a responsibility in terms of the conclusions in an analyst's report? What I mean is this, very often a report will be prepared which is extremely bullish. The salesman will then contact their customer saying in one week a report will be issued. Therefore, I advise you to buy the stock quickly before that report is issued so that report will effect the price of a stock. That doesn't concern the company at all but that is probably more material to the price of the stock than anything that the company itself would say. When this report is issued it's too late to buy the stock because it's moved up maybe 10 or 15 percent in anticipation of the bullish report.

Mr. Chatlos: The question is on the use of insider trading within a brokerage house in anticipation of a bullish brokerage report.

Mr. Loomis: Well, I would say that if a brokerage house knew that it is going to issue a bullish report, it would be altogether desirable, and probably required by law, that the broker itself not trade on that information for its own account. I would take a rather dim view of a salesman in a brokerage firm who called up a favorite customer and said we're going to issue a bullish report on the company. Get in before it's published. I think we would find a way to discipline that salesman.

Question: In a new issue situation where there is information on a corporation's future, earnings expectations known to the selling syndicate, is there a duty of disclosure on the part of the corporation?

Mr. Loomis: Well, in the Merrill Lynch case, we said that the managing underwriter in that situation became an insider because the information had come to him in the capacity of managing underwriter, as to the liability of the corporation, we didn't speak to that. I don't think the corporation is responsible at law what the managining underwriter does. On the other hand the corporation might well be embarrased and if there is a registration statement on file, it would be advisable to amend it as quickly as possible to disclose this information.

Question: Would you draw a distinction between the analyst who handles a piece of let's say, inside information for his own fund as opposed to an analyst who used it, as you said, to peddle that information? In other words between analysts who represent institutions as opposed to analysts who are selling to other institutions.

Mr. Chatlos: The question is the use of information by an analyst if he's simply using it for a recommendation for a fund as opposed to recommending and selling stock.

Mr. Loomis: I understood it to be that, but I understood also the question to be whether the corporation is freer in imparting information to an institutional investor for its own use than in imparting it to a broker for transmission to his customers. As far as the corporation is concerned, I really don't see a distinction there. I mean, if they know that this particular institution is going to use this information to buy or sell, I think that they are under the same inhibitions as if they know the broker was going to pass it on to his customers. I don't see a distinction.

Question: Could you please get into the question again of a corporation which makes disclosures of something it considers significant but no one pays attention. Publications don't carry it and no one finds out about it. What further responsibilities does the corporation have?

Mr. Chatlos: What responsibility does the company have when it says something it thinks is important and the whole world doesn't care?

Mr. Loomis: That is a very difficult problem in theory at least. I would expect that most of the corporations represented in this room are of such a nature that people do care about what they say. I frankly haven't encountered this problem except in theoretical form. The disclosure that a company has to make in this area or attempt to get across, is keyed to its constituency, that is to the size and nature and location of its shareholder body and of the body of investors that are interested in it. If General Electric has something to say, the stock exchange procedures prescribe how it says it, and it will be published.

If a small corporation in a local community whose affairs would not be of the slightest interest to Dow Jones or the Wall Street Journal has such a problem, they can deal with it, I would think, by giving it to their local newspaper and any other newspaper that will print it and perhaps putting it in a letter to stockholders.

Question: David Babson related the conflict of interest within brokerage houses where they serve as financial advisor and then later went on to promote securities that they perhaps had underwritten. Is there anything illegal about this? Would you comment on it please?

Mr. Chatlos: The question is on the conflict or potential conflict of interest between what Mr. Babson said this morning about investment advisors who later promote the stock, merchandise the stock, I think he said.

Mr. Loomis: Well, it's a common practice for an investment banker which underwrites an issue to become a sort of an advisor to the corporation, by reason of that and also to make markets in the company's stock. Per se, there is nothing wrong with this. If the investment banker or advisor or whoever he is, gets inside information as a result of that relationship I would suspect that he couldn't use it for his own account and he probably couldn't

use it for the benefit of his customers. We have cases that point in that direction.

I recently had discussions with a representative of a big investment banking house which does a lot of underwriting and acts as a financial advisor to some of the corporations whose securities it floats. They also have a research department which writes up corporations. They told me that they had decided not to write up research reports on those companies where they might be in possession of inside information in their relationship as financial advisor.

Question: To extend an earlier question, with the Commission's desire to have earnings forecasts and the responsibility therefore of keeping those forecasts current, it occurs to me that with all the listed companies having to make these forecasts and subsequently revise them to make them accurate, it's very possible the media or the full disclosure problems you would face would be a very serious situation. Has the Commission faced the mechanics of that kind of disclosure?

Mr. Loomis: We haven't because we haven't required it. We don't at present require projections of earnings particularly in the case of established corporations. If we were ever to do that, and I am not at all sure that we ever will, there would be this problem of revising these forecasts where necessary. It appears, however, that some corporations do make forecasts even though they are not required to do so. You read about them in the Wall Street Journal all the time, and where such forecasts that have been published turned out to be wrong, I think the corporation should correct them.

Question: Does a company have any protection against a fact that turns out to be material after the fact, and the company honestly didn't know it was material at the time it happened?

Mr. Chatlos: Is there any protection against materiality that turns out to be material after the fact, the company innocently had no idea it was material at the time of its occurrence.

Mr. Loomis: A fact is material or it isn't. Now, something that wasn't disclosed may turn out to be material. Really the question here as far as the company's responsibility, is its good faith and due diligence. In the Texas Gulf decision it was indicated that in this kind of situation a company would not be in violation if not only it believed that the fact was not material, but it believed so after reviewing the matter with due diligence.

Question: The recent revisions in Regulation severely narrow the definition of materiality. Could you discuss that please.

Mr. Chatlos: Regulation XX and the narrowing of the definition of materiality.

Mr. Loomis: This is new to me. I'm not an accountant and I didn't realize that those revisions had done that. I didn't think they were intended to.

Question: I want to repeat the other question on materiality, Mr. Loomis. I'm not going to let you get away with it because I think everybody in this room has been confronted at some point with the question that arises in this manner. One of those papier mache heroes that institutional investor has foisted upon the American public, makes his own decision which a reasonable and prudent man -- I'll go further, that a reasonable and prudent investment manager would not regard as material, but is in a position and commands so much money that he makes a decision that has a material effect on the price of the stock. That's a real problem that we're going to be dealing with, I'm afraid, in the future if not now.

Mr. Loomis: Are you going to restate that?

Mr. Chatlos: The question is am I going to restate that and the answer is no.

The question was that happens, as I understand it -- what happens if a manager of a fund by the simple device of untilizing his funds after having a piece of possibly immaterial information creates an impact on the price of the stock and therefore, does that make it a material piece of information?

Mr. Loomis: Well, I don't think it does. You have to separate these concepts. A fact is a fact and it's material or it's not material. The impact of an institutional investor's decision, whatever its reason, on the market is another thing and we have started to wrestle with it. We don't have the answer yet. Are you going to say that, if somebody knows that he or his brother-in-law is going to buy a lot of stock and this will have an impact on the market, does he have to disclose what is going to happen? So far we have not said so. There are immense problems in this area because if so, how does somebody who wants to buy a lot of stock go about doing it? How can he do it if he has to say he's going to do it in advance? We haven't reached that one yet. We're wrestling with it.

Question: Mr. Commissioner, does the Commission and/or the Courts review a company's past record of disclosure in determining good intention in a particular instance like a stockholder's suit or anything?

Mr. Loomis: Do the Commission and the Courts review a company's past record for disclosure in determining its liability for a particular alleged incident?

The answer to that is sort of yes and no, and possibly. The reason is that the Courts have said that if a corporation is in the habit of releasing misleading information why they will view anything that comes from there with considerable suspicion. The converse situation where the corporation has a good record does not in and of itself excuse it for a failing in a particular situation but it does tend, as was quite observable in the Texas Gulf case, to cause all concerned to treat that corporation with more respect.

Question: We have had a great deal of problem dealing with

the Texas Gulf case, particularly because of the Court of Appeals which seemed to point out that almost any minutia of information could be of material interest, could be of material interest to someone and the prudent man theory seemed to be out the window. It seemed to me that the Investors Management case, the comment that you made, the effect of the judgment on the investors, and therefore the price of the stock, is a much, much more practical area of activity for us to follow. Does the SEC have any comment if we were to try in good faith to pursue the Investors Management case rather than the Court of Appeals Decision in Texas Gulf?

Mr. Loomis: I don't think the Court of Appeals was wrong, I don't want to quarrel with them, but I think, and I would hope and believe that you would have no problem with the Commission and, I hope, with the courts, if you used the Investors Management case. The Court of Appeals in its opinion was merely repeating three or four definitions of materiality which had been announced in prior court decisions and I don't think they were really focusing, while citing these assorted authorities, on the particular problem which you have.

Question: Is there any inconsistency between your statement that you do not require any major investor to disclose their purchases and you requirement that a corporation announce that it's going to purchase its own stock?

Mr. Loomis: The question is, is there an inconsistency between not requiring a major investor to report his purchases and requiring a corporation to report its purchases of its own stock?

When and to the extent that we require a corporation to report its purchases of its own stock we don't do so under insider trading rules or principles. We do so under Section 13(e) of the Exchange Act, as added in 1968, which expressly dealt with the problem of corporations purchasing their own stock and indicated a judgment on the part of Congress that where this when done on a significant scale it should be disclosed.

Mr. Chatlos: Thank you very much, Mr. Commissioner. We appreciated your being here.