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DISCLOSING CURRENT VALUES OF FIXED ASSETS IN CORPORATE REORGANIZATIONS

Mergers and some sales of assets involve transfers for value of both securities and assets. When a corporation solicits shareholder approval of such a reorganization, the proxy rules issued under regulation 14A\(^1\) of the Securities Exchange Act of 1934\(^2\) require the issuer to disclose the current value of its stock,\(^3\) so that the shareholders may know the worth of the securities that they exchange. No regulation, however, demands the presentation of current value figures for fixed assets,\(^4\) and thus this data can be omitted unless required by rule 14a-9,\(^5\) the general prohibition against the circulation of materially false or misleading information in proxy statements.\(^6\) Under some circumstances the requirement of presenting material information mandates the disclosure of fixed assets' current values.\(^7\)

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5. "Fixed assets" include land, machinery, buildings, and equipment, which, in the normal operation of a business, will not be exchanged for cash. See W. GRAHAM & W. KATZ, ACCOUNTING IN LAW PRACTICE § 128, at 215 (2d ed. 1938).
6. No solicitation subject to [regulation 14A] shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . .

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6 If proxies are not solicited, the issuer must send "information statements" to security holders entitled to vote. 17 C.F.R. § 240.14c-1 to -101 (1969). Regulation 14C contains an anti-fraud provision analogous to that found in 14A (17 C.F.R. § 240.14c-6 (1969)), but no court has considered whether this provision authorizes a private right of action. See Phillips & Shipman, An Analysis of the Securities Acts Amendments of 1964, 1964 Duke L.J. 706, 794-95, suggesting that such a right exists. See also Laurenzano v. Einbender, 264 F. Supp. 356, 261 (E.D.N.Y. 1966). Section 14(c) of the Securities Exchange Act of 1934, however, does not contain the phrase "for the protection of investors." This phrase is found in § 14(a), and the Supreme Court relied heavily on it in finding a private right of action in § 14(a). J.L. Case Co. v. Borak, 577 U.S. 426, 432 (1964).

Since a merger is a "purchase or sale" of securities within the meaning of § 10(b) of the Securities Exchange Act of 1934, a private party could probably invoke rule 10b-5 to provide a remedy for a material misrepresentation in an information statement. See SEC v. National Securities, Inc., 393 U.S. 453 (1969). But the elements of a 10(b) action may differ from those of a 14(a) action. Richland v. Crandall, 262 F. Supp. 538, 553 n.12 (S.D.N.Y. 1967); Coffey, Procedural Issues in Borak Cases, 2 REV. OF SECURITIES REGULATION 969, 971 (1969). Although it may be more difficult to prove causation under § 14(a), scienter rather than negligence may be necessary to establish a violation of § 10(b). Id.

7 Unless the proxy statement states that the assets are actually worth the amount
CURRENT VALUES CONSTITUTE MATERIAL INFORMATION IN CERTAIN CASES

Investors ordinarily do not consider current values important. Because the worth of fixed assets usually does not affect earning power, it has little effect on the two most common sources of a shareholder's return on investment, dividends and appreciation in market value of his stock. But the proceeds from the sale of assets are another source of return on investment, and the corporation's profit is determined by the assets' current value.

If the merged entity intends to liquidate one of the merging corporations, shareholders of that corporation will share the liquidation proceeds with shareholders of the non-liquidated corporation. The exchange ratio is unfair unless it compensates for the loss of profit. Current values constitute material information here because they determine the profits on the sale. Without this data shareholders in the liquidated corporation cannot determine whether the offered exchange ratio accurately reflects their loss of profits; the historical costs on the balance sheet do not indicate the amount obtainable from liquidation. 8

This analysis assumes that shareholders of the liquidated corporation are sharing profits that originally belonged to them alone. This is true only if the liquidated corporation had a reasonable opportunity to sell the assets and, absent the merger, would probably have done so. Such a situation arose in Gerstle v. Gamble-Skogmo, Inc., 9 where the liquidated corporation owned several real estate parcels. Serious inquiries by prospective purchasers of the land before the merger and a poor earnings record suggested that the corporation would have sold

recorded, it technically would not be false, and it would not convey a half truth. Shareholders would not receive an untrue impression of the properties' worth when only historical costs are presented and when footnotes to the balance sheet state that assets are recorded at cost. Even though the proxy statement is accurate on its face, however, a material omission violates rule 14a-9 if it provokes a response contrary to that expected from complete disclosure. See Note, Shareholders Derivative Suits Under Sections 10(b) & 14(a) of the Securities Exchange Act, 18 STAN. L. REV. 1339, 1348 (1966).

If the proxy suggests that the assets are worth the amount recorded, presenting only the acquisition costs dearly misrepresents the properties' value. In a period of rising prices and inflation, current values often exceed the cost of fixed assets less depreciation. L. Dellenbarger, COMMON STOCK VALUATION IN INDUSTRIAL Mergers 35-36 (1955); Memorandum for SEC as Amicus Curiae at 20, Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. 66 (E.D.N.Y. 1969) [hereinafter cited as Memorandum].

8 Memorandum at 20.
the land had it not merged. The defendant\textsuperscript{10} failed to disclose either its intention to liquidate the corporation or the current values of the assets, and the court held that defendant had violated rule 14a-9.\textsuperscript{11} The court recognized the importance of both the opportunity to sell and the probability that the opportunity would be utilized: “plaintiffs . . . were prevented from exercising their right to decide whether to gamble and speculate upon the profits to be received from the sale of the remaining properties . . . .”\textsuperscript{12}

If the merged entity does not intend to liquidate one of the merging corporations, current values may still be material if a complete or partial liquidation may reasonably be anticipated because there is a ready market for the assets. As amicus curiae in \textit{Gamble-Skogmo}, the Securities and Exchange Commission favored disclosing current values in such a situation.\textsuperscript{13} The Commission did not rest its conclusion on the possibility or probability of sale by the liquidated corporation,\textsuperscript{14}

\textsuperscript{10} It is unclear in what capacity defendant corporation was sued. It was both the acquiring corporation and controlling shareholder of the disappearing corporation. The court’s statement that plaintiffs “seek a remedy primarily as sellers of . . . stock to Skogmo” (id. at 96) suggests that defendant was sued as a party to the merger rather than as the controlling shareholder of the disappearing corporation. But if defendant was sued as acquiring corporation, rule 14a-9 seemingly would not subject it to liability; that rule appears to limit the duty of circulating accurate proxies to the corporation that solicits approval, which in this case would include only the disappearing corporation. Two theories, however, support the application of rule 14a-9 to the acquiring corporation. Both corporations are involved in solicitation of shareholders of both companies, especially when one enterprise is a majority shareholder of the other. Second, the merged entity could be pictured as assuming the disappearing corporation’s liability under rule 14a-9.

\textsuperscript{11} Id. at 103-04. The court did not indicate whether both factors, failure to include the appreciation and failure to disclose the intent to sell, were required in order to find a violation of the rule. It did state that Gamble-Skogmo had a duty to disclose both elements, but perhaps the court considered neither to be material unless both existed. Although intent to liquidate would not be material unless the assets had appreciated in value, since historical costs would represent their current values, appreciation alone may be material. \textit{See} text at notes 16-22 \textit{infra}.

\textsuperscript{12} 298 F. Supp. at 109.

\textsuperscript{13} Memorandum at 20. The Commission stated that although it was improper to include current liquidating values in the financial statements of the proxy material, the textual portion of the proxy should contain this data whenever complete or partial liquidation was intended or could be reasonably anticipated. \textit{Id.} at 19-20. Formerly the SEC did not distinguish between placing current values in the financial statements of the proxy statement and placing them in the text. It seemed opposed to the figures only because the appraisal method was improper or because the appraiser did not follow the method he claimed to have used. \textit{See} cases cited note 60 \textit{infra}. This new distinction probably came as quite a surprise to the directors of Gamble-Skogmo, especially since the Commission probably would have deleted the current value figures had the directors attempted to include them anywhere in the proxy statement. \textit{See} note 66 \textit{infra}.

\textsuperscript{14} \textit{See} Memorandum at 19-20.
and it apparently will insist that current values be disclosed even if only the merged entity can liquidate the assets. Arguably, shareholders of the liquidated corporation lose no profits in this situation, since none would have been received without the merger. But they contribute the assets to the merged entity, and they should be compensated for this contribution, although not to the same extent as if the assets would have been sold without the merger.

The Commission's rationale demonstrates the importance of analyzing the value of the assets to the merged entity. If the properties are valuable to the merged corporation because it can sell them, the liquidated corporation has another bargaining tool even if it is unable to dispose of the assets. For the same reason, current values are material when a corporation replaces a division by merging with an enterprise similar to the division: for example, when a car manufacturer replaces its poorly-performing tire division by merging with a tire company. Here the value of the other corporation's assets to the combined business is their current value; the merged entity may either purchase new assets or acquire them through a merger.

Current values are material in mergers leading to liquidation or replacement because the transaction is essentially a contribution of property rather than earnings to the combined enterprise. But every merger can be viewed as a contribution of properties by the corporations to the combined business, and disclosure of current values should not be confined to liquidation and replacement situations.

15 The Commission stated that current values should be disclosed when "it is practicable to sell off [substantial portions of the] assets and still operate the remaining portion of the business." Id. at 20. Presumably what is referred to is the practicality of the merged entity's selling part of the properties while continuing to operate.

16 But cf. Sowards & Mofsky, Corporate Take-Over Bids: Gap in Federal Securities Regulation, 41 St. Johns L. Rev. 499, 510-11 (1967), suggesting that liquidation values are immaterial when the success of liquidation depends on the ability of the persons undertaking the liquidation. When one party contributes the properties and the other party contributes the ability to liquidate, however, both should share in the profits. Absent disclosure of current values, the party donating the assets will not know if his proper share of the profits is reflected in the exchange ratio.

17 In a replacement situation, the current value figures should equal replacement costs less depreciation. See H. Babcock, Appraisal Principles and Procedures § 753, at 147-49 (1968).

18 See II J. Bonbright, The Valuation of Property 817, 819, 822 (1937); Babcock, supra note 17, § 121.3, at 6.

19 One authority suggests that as a result of the SEC's position in Gamble-Skogmo, directors may be required to disclose current values in every merger. Manne, Disclosure of Asset Values, 2 Rev. of Securities Regulation 897, 900 (1969).

Under § 14(e) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78n(e) (Supp. 1969), a raider may be under an obligation to disclose the current values of the target company. Under § 10(b), however, lack of insider status or of access to appraisals of
Whether disclosure should be required in any particular merger is quite another matter, since it involves the concept of materiality, a concept without precise boundaries. The problem can be partially solved by requiring presentation of current values whenever the management of one corporation considers the current values of the other corporation's assets in analyzing the desirability of the merger. If the target company's assets will negate the duty, Mutual Shares Corp. v. Genesco, Inc., 266 F. Supp. 139, 132 n.2 (S.D.N.Y.), aff'd in part, rev'd in part, 384 F.2d 540 (2d Cir. 1967); Fleischer & Mundheim, Corporate Acquisition by Tender Offer, 115 U. PA. L. REV. 317, 330 (1967); Note, The Regulation of Corporate Tender Offers Under Federal Securities Law: A New Challenge for Rule 10b-5, 33 U. CH. L. REV. 359, 373-74 (1966).

Note, supra note 19, at 364. The materiality of current values has been considered in only a few cases, and the courts have not responded consistently. For example, in Speed v. Transamerica Corp., 99 F. Supp. 808 (D. Del. 1951), the court held that a stock purchaser's failure to disclose the appreciated value of inventory was a material omission under rule 10b-5 if the purchaser intended to merge, liquidate, or dissolve the corporation. Id. at 828. See also III L. Loss, SECURITIES REGULATION 1460 (1961). In contrast, the Gamble-Skogmo court focused only on the defendant's intent to liquidate the acquired corporation. See note 11 supra. In extending the disclosure requirement to a merger, the Speed court perhaps was considering a replacement situation; twice it stated that the central issue was whether the defendant intended to "capture the inventory" by merging, liquidating, or dissolving the corporation that owned the appreciated properties. 99 F. Supp. at 821, 828.

In CMC Corp. v. Kern County Land Co., 290 F. Supp. 695 (N.D. Cal. 1968), the court held that an allegation that proxies did not reveal the appreciated value of assets failed to state a cause of action under rule 14a-9. It indicated that plaintiff was required to show how the claimed difference between the value of the assets of his corporation and the value of the stock received by him adversely affected his interests when he retained some equity in those assets. Id. at 697. No such showing was required in Gamble-Skogmo, however; the court found it sufficient that shareholders in the liquidated corporation were forced to share profits that, but for the alleged deception, would have belonged solely to them. This seems to be the correct approach. The distinction between a complete loss of equity and a serious dilution of equity is relevant to the question of the appropriate measure of damages but not to whether rule 14a-9 has been violated. Once plaintiff establishes that the exchange ratio is unfair because it does not compensate for the appreciation in value of the assets, he has proved that the failure to include current values constitutes a material omission.


Since directors must disclose those facts that reasonably could be considered material (Richland v. Crandall, 262 F. Supp. 538, 553 (S.D.N.Y. 1967)), current values should be disclosed even if directors initially consider these figures and then reject them as a basis for establishing the exchange ratio. Their initial consideration suggests that current values may be relevant, and the figures should be revealed so that security holders can intelligently decide whether the directors made the correct choice. Otherwise, the shareholders' vote is a "rubber stamp." Cf. Globus, Inc. v. Jaroff, 271 F. Supp. 378, 381 (S.D.N.Y. 1967); Note, Violations of Proxy Rules: Private Right of Action: Retrospective Relief: J.I. Case Co. v. Borah, 377 U.S. 426 (1964), 50 CORNELL L.Q. 370, 375 (1965).

Unless another merger proposal is available, shareholders arguably suffer no loss if the exchange ratio fails to compensate for current values; they are no worse off with the merger at hand. The Gamble-Skogmo court, however, concluded that the omission
neither corporation considers current values, it is presumably improper to use these figures in valuing either enterprise. Thus, this data will rarely be important if one corporation did not consider the current values of the other corporation a "plus" factor when determining whether the merger would be advantageous. This standard of disclosure may produce unsatisfactory results in a few cases, but the certainty it provides seems to outweigh this deficiency.

II

ARGUMENTS AGAINST DISCLOSING CURRENT VALUES

A. Generally Accepted Accounting Principles

One obstacle to disclosing current values of fixed assets is the SEC's requirement that presentations of financial data in proxy statements accord with "generally accepted accounting principles." Recording at cost rather than current value is an entrenched rule of accounting, supported by at least two other accounting principles. The principle of conservatism requires that an accountant faced with a reasonable choice between presenting a company's financial condition in a favorable or in an unfavorable light choose the latter; it

of current values would have been material even if the exchange ratio was fair. Gerstle v. Gamble-Skogmo, Inc., 298 F. Supp. 66, 100 (E.D.N.Y. 1969). A better merger proposal may be forthcoming from the same corporation if the first offer is rejected, and other proposals may be made in the future. Shareholders should have the opportunity to decide whether to accept a poor merger offer or wait, gambling that a better offer, one reflecting current values, will arise in the future. See id.

22 A recent study of 33 mergers revealed that in one merger unrealized appreciation influenced the merger terms. Dellenbarger, supra note 7, at 21. Also, there is some indication that replacement cost valuation, based on the market prices of items of similar productive capacity, may be used in negotiating merger terms. Id. at 38-39.


24 Opinion of the Accounting Principles Board # 6, ¶ 17 (Oct. 1965), formerly Accounting Research Bull. # 43, ch. 9, § B (1953); P. Grady, INVENTORY OF GENERALLY ACCEPTED ACCOUNTING PRINCIPLES FOR BUSINESS ENTERPRISES 63 (1965). Some accountants strongly oppose the principle on the ground that presenting only cost figures does not fairly reflect an enterprise's financial condition. See H. Baldwin, ACCOUNTING FOR VALUE AS WELL AS ORIGINAL COST 35-36 (1927).

In Richland v. Grandall, 262 F. Supp. 588 (S.D.N.Y. 1967), the court held that failure to disclose current values was not a material omission under rule 14a-9 and cited the cost recording rule in support of its decision. Id. at 557.

assures prospective investors that a company is at least as good as it purports to be.28 Where current value exceeds cost, conservatism dictates reporting on the basis of cost. The principle of accurate income determination also supports recording at cost.27 "Writing-up" the fixed assets to their current value may alter the earnings figures because future depreciation expenses may be based on the written-up values28 and because the write-up may produce an apparent increase in income.29 Potential investors are interested in the earnings record of a business as an indication of the efficiency with which invested funds are used.

The rationale of cost recording assumes that financial statements are used by purchasers of securities in making their investment decisions;30 the principle should not automatically apply to the financial statements intended for sellers of securities.31 To evaluate the offered price or exchange ratio, shareholders whose companies are about to merge may need to know the highest reasonable value of their business's assets, not the lowest possible value. They may not be primarily interested in how efficiently their funds have been used.

Another argument in support of cost recording is that it is necessary to present financial information consistently. Otherwise, shareholders cannot make meaningful comparisons of financial statements from different years or ascertain the true progress of an enterprise.32 But when corporations are merging, shareholders may want to compare the present worth of the properties of each company as well as the development of each; both factors may be relevant in determining the exchange ratio.

The accounting convention that revenue should be recognized only when realized33 also argues against using current values. Under this convention an increase in the value of assets does not constitute revenue because it does not entitle the enterprise to any cash or credit.34 The rationale of this convention is the necessity for an or-

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28 See id.
31 See III Loss, supra note 20, at 1456-57; Foster, supra note 30, at 33.
32 BALDWIN, supra note 24, at 35.
34 Id.
derly system of computing profits, and computation of profits would not be orderly if their measure changed as the assets' current values fluctuated. But a proxy statement could disclose both cost and current value figures without distorting the computation.

The convention of indefinite existence of an enterprise also discourages the disclosure of current values because it presumes liquidation is not contemplated. Under this convention, the balance sheet presents only unexpired costs that will be expensed against future revenues. To the extent that a merger or sale of assets resembles a sale or exchange, however, the assumption of indefinite existence is inapposite. At this point in a corporation's life, assets are not only unexpired costs to be depleted by the production process; they are also articles of exchange that may be transferred for value.

B. Uncertainty

A second objection to the use of current values is that they are necessarily uncertain. The objection rests on two grounds: (1) the difficulty of determining what type of value should be disclosed, and (2) the problem of obtaining an objectively verifiable figure for that value.

When liquidation is contemplated or can reasonably be expected, current liquidation values should be used. Good faith offers from third parties or appraisals conducted by qualified experts can pro-

35 Id.
36 This can easily be accomplished by preparing the balance sheet in the traditional manner and enclosing the current values in parentheses next to each asset or group of assets. Foster, supra note 30, at 42.
40 Other assets, such as inventory, that are also exchanged for value are generally recorded at the lower of cost or market. Accounting Research Bull. #43, ch. 4, statement 5 (1953). The considerations applicable to inventory accounting, however, should not control presentation of values in a merger situation. The purpose of inventory accounting is to achieve "the proper matching of costs and revenues" (id. at ch. 4, ¶ 8), while the purpose of merger accounting should be to inform shareholders of the highest possible value that can be obtained from an exchange.
41 See I Bonbright, supra note 18, at 10-39.
42 Kennedy & McMullen, supra note 37, at 96.
43 Memorandum at 29.
44 Id. at 21.
vide sufficient accuracy.\textsuperscript{45} If one corporation desires a merger in order to replace one of its divisions with the other merging enterprise, replacement cost less depreciation, defined as the market price the combined enterprise would have to pay to acquire an identical item, provides an appropriate valuation. This method measures the value of the property to the merged entity and can be applied to a wide variety of assets.\textsuperscript{46} Since a corporation will rarely be able to obtain identical assets,\textsuperscript{47} however, it may be more realistic to define replacement cost less depreciation as the cost of items of similar productive capacity.\textsuperscript{48} This method of valuation produces fairly objective figures.

The uncertainty inherent in the appraisal and replacement cost methods of valuation can be decreased by using price level indices to check the accuracy of the figures.\textsuperscript{49} Also, assessed valuation by taxing authorities can provide a lower level of reasonableness,\textsuperscript{50} and insured value an upper level.\textsuperscript{51}

When neither liquidation nor replacement is contemplated, but the directors of either corporation believe current values may be important, the figures they use should be disclosed. Here the assets should be valued in terms of their profit-producing potential to the merged entity,\textsuperscript{52} but because each merged entity will integrate the properties

\textsuperscript{45} The Commission would allow disclosure of appraisals if they were conducted by qualified experts and if they had a sufficient basis in fact. \textit{Id.} at 24.

\textsuperscript{46} Even land can be valued by the replacement cost method. I \textsc{Bonbright}, \textit{supra note} 18, at 169.

\textsuperscript{47} \textsc{Dellenbarger}, \textit{supra} note 7, at 37-38.

\textsuperscript{48} \textit{Id.}

\textsuperscript{49} 
\textsuperscript{50} \textsuperscript{51} \textsuperscript{52}
of the merging corporations differently, it is difficult to formulate a method of valuation applicable to all mergers. Using the directors' figures is a reasonable alternative: if the valuation procedure is conducted in good faith by a qualified expert, and if the resulting figures are considered accurate by the directors, the figures should be disseminated to shareholders. There is no assurance of objectivity, but the management presumably considered the figures valid.

C. Potentiality for Misleading Information

A third objection to using current values is that the data are potentially misleading. Current values are only estimates of present worth, and including this uncertain information may decrease the ability of shareholders to intelligently evaluate a merger.53

If, however, current values are sufficiently determinable for directors' use, the figures should not lead shareholders astray.54 Even though management may be more experienced in determining the accuracy of estimates, their knowledge is not sufficiently superior to deny shareholders access to this information.55 If cost figures alone are presented, shareholders have only a vague realization that the assets might be worth more than the amount disclosed; if both costs and current values are presented, even if the current values are somewhat inaccurate,56 shareholders have the benefit of both accurate figures57 and some indication of present worth.58

53 See Memorandum at 24.

54 As a result of the Commission's suggestion that current values must be disclosed when liquidation is not intended but can reasonably be anticipated (Memorandum at 20), this data might be material although neither the directors nor anyone else ascertained the assets' present worth. In this case, of course, the argument that current value figures are accurate enough for shareholders when directors examine them does not apply.

55 See id. at 25.

56 An accounting study considers current value figures based on price level indices to be sufficiently safe for dissemination to investors. "[R]ecognition of price-level changes in financial statements is practical, and not misleading or dangerous to investors." Accounting Research Study No. 6, at xi. But see id. at 252 (Comment of Robert C. Tyson).

The study suggested that indices known as the GNP Implicit Price Relators are reliable enough for accounting purposes. Id. at 112.

57 Even the original cost figures may include a factor of judgment. I Bonbright, supra note 18, at 142-43.

58 Some data may be imprecise and yet may still be considered material. To be material, information must only have a basis sufficient for reliance by a reasonable man. And in the context of the disclosure policy, "speculators . . . are . . . 'reasonable' investors entitled to the same legal protection afforded conservative traders." SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (footnote omitted). See id. at
Although the arguments against presenting current values in proxy statements have little merit, the SEC apparently accepts them. Although its recommendations that this information be disclosed, the Commission's Gamble-Skogmo memorandum as a whole evidences serious apprehension about placing these items in proxy statements.

849 n.10. In that case, the court held that data obtained from a visual examination of a spectacular copper drill core, which the court considered to be "generally reliable . . . though less accurate than a chemical assay," were material. Id. at 852. However, in Sunray DX Oil Co. v. Helmerich & Payne, Inc., 398 F.2d 447 (10th Cir. 1968), the court held that information concerning the oil-producing capabilities of a field was not material; although the tract "showed great probabilities," it had not attained the status of "proved reserves," and hence the data were not required to be disclosed. Id. at 451. Although these cases might be distinguished on the basis of both the potential of each exploration and the relative reliability of the initial evaluations, their theories appear irreconcilable.

59 Memorandum at 9, 24.

60 Before the Gamble-Skogmo memorandum, write-ups were not officially forbidden per se. See Barr & Koch, Accounting & the SEC, 28 Geo. Wash. L. Rev. 176, 182 (1959); 19 SEC ANN. REP. 9, 21 (1953); 15 SEC ANN. REP. 20, 21-28 (1949). The Commission appeared to disallow write-ups only when the appraiser did not follow the method he claimed to have used (Haddam Distillers Corp., 1 S.E.C. 37 (1934)), or when the appraisal method was improper. Marquette Mines, Inc., 8 S.E.C. 172 (1949); Breeze Corps., 5 S.E.C. 709 (1955); Petersen Engine Co., 2 S.E.C. 893 (1937); American Terminals & Transit Co., 1 S.E.C. 701 (1936); La Muz Mining Corp., 1 S.E.C. 217 (1935); Unity Gold Corp., 1 S.E.C. 25 (1934). In practice, however, the SEC deleted current values in all cases in which this issue was raised. Memorandum at 12.

In Gamble-Skogmo the SEC stated its position on write-ups in financial statements as follows:

"The Commission realizes that there are special situations in which some recognition of increased appreciation of an asset's value should be reflected in a financial statement. Indeed, the general prohibition against the practice of writing-up . . . assets . . . is, as a practical matter, limited to the common commercial corporation with property consisting mainly of fixed assets whose current value is not readily determinable. Accordingly, it should be noted that there are two basic exceptions to the Commission's general prohibition against writing-up assets in financial statements: those provided by statute or Commission rule and those unusual factual situations in which specific authorization has been granted by the Commission."

Id. at 13.

The most liberal interpretation of this quotation is that it is a restatement of the Commission's previous theory as applied. By stating for the first time that there is a general prohibition against write-ups, and by emphasizing that write-ups will be allowed only in "unusual factual situations," however, the SEC may be suggesting a new, more restrictive theory.

In addition, the Commission stated that the textual portion of the proxy statement must disclose current liquidating values whenever a qualified expert makes the appraisal, the appraisals have a factual basis, and "their omission would render the proxy statement materially misleading." Id. at 25. Although the "materially misleading" rule might suggest that disclosure will be required in a variety of situations, current liquidating values seem material only in a liquidation situation. See text at note 43 supra.

Whether the SEC will permit the textual portion of the proxy statement to contain current values in non-liquidation situations is doubtful. In Gamble-Skogmo the Com-
The Commission's fears seem groundless. In the context of a merger proposal, the management of each corporation desires to make the plan appear attractive. This can be accomplished by presenting the financial status of their own company in its worst possible light, thus inducing shareholders to give up their rights in what appears to be a poor enterprise in exchange for less equity in a more promising business. Because the potential for danger rests on an entirely different ground when investors are encouraged to sell rather than to buy, \(^6\) the thrust of the disclosure policy should be reversed. \(^6\)

Current values will not appear in proxy statements until the Commission articulates a policy favorable to their disclosure. Confronted with the limited approval currently accorded write-ups \(^6\) and the vague admonitions of the regulations, \(^6\) directors are justifiably reluctant to include items that have a perfect record of being deleted. \(^6\)

Mission noted that its experience with attempts to disclose current values had been unfavorable, and there was no indication that it believed current value computations would be more reliable in the future. \(Id.\) at 24. \(But see\) Manne, \(supra\) note 19, at 899, suggesting that the Commission's position in \(Gamble-Skogmo\) indicates that it will more readily allow the disclosure of current values in the future.

\(61\) It should be noted that each of the previous instances in which the Commission struck down revaluations occurred in the context of registration proceedings. \(See\) cases cited note 60 \(supra.\) In this situation the policy against presenting current values stands on firmer ground, since when stock is being issued the Commission seeks to prevent unwarrantably high representations of the company's worth.

A similar problem arises when a tender offer is made. The target company's management may disclose current values to protect its own interest \((cf.\) Cohen, \(Tender\) \(Offers\) \& \(Takeover\) \(Bids,\) 23 \(Bus.\) \(LAW.\) 611, 616, (1968)), and one commentator suggests that it should disclose the approximate market value per share of its assets. \(Note,\) \(supra\) note 19, at 364-65. This raises the danger that the figures will be presented at an unwarrantably high amount to discourage shareholders from accepting the offer. \(Cf.\) Fleischer \& Mundheim, \(supra\) note 19, at 360. Because the raider may not have access to this information and because relying on the target company to provide the data may be dangerous, the desirability of providing current values to shareholders faced with a tender offer creates a dilemma. Aside from requiring the target company to allow the raider access, an approach which will be unpalatable to the former, the only possible solution is for the Commission to require the target company to disclose this information and then to carefully scrutinize the data.

\(62\) Foster, \(supra\) note 30, at 33.

\(63\) Before \(Gamble-Skogmo\) the Commission indicated approval of disclosing current values in only three cases. Memorandum at 26 \& n.33.

\(64\) The present regulations require only that the issuer present information in such a manner as to "adequately reflect the financial position" of the company \((17 \text{ C.F.R.} \ §\ 240.14a-3\ (1969))\) and to present data "bearing upon the question of the fairness of the consideration" when assets are sold \((17 \text{ C.F.R.} \ §\ 240.14a-101, \text{ item 16(b)}\ (1969)).\)

\(65\) Although the SEC has never issued an absolute prohibition against disclosing current values, in all cases before the Commission that raised this issue it eliminated this information from financial statements. Memorandum at 12.
Without a positive declaration, directors and the courts will wander about in a morass, attempting to reconcile the disclosure requirements of the SEC with the necessity of adequately informing shareholders.\textsuperscript{66}

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\textit{Robert H. Scott, Jr.}
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\textsuperscript{66} A policy statement is necessary if only to counter a misinterpretation of a note appended to rule 14a-9. There the Commission lists four examples of statements that may be misleading, including "predictions as to specific future market values." The example was designed to eliminate misleading information that was prevalent in proxy contests (see 3 Stock Market Study (Corporate Proxy Contests), Hearings on S. 2045 Before the Subcomm. of the Senate Comm. on Banking & Currency, 84th Cong., 1st Sess. 1569, 1575-76 (1955)), but some courts have construed it as an absolute prohibition against including any uncertain or "prospective" financial information in any proxy statement. See Walpert v. Bert, CCH Fed. Sec. L. Rep. ¶ 92,165, at 96,765 (4th Cir. 1968); Miller v. Steinbach, 268 F. Supp. 255, 278 (S.D.N.Y. 1967). The staff of the SEC seems also to have adopted this interpretation; in a meeting with Gamble-Skogmo representatives, staff members indicated that the current values of the assets constituted prospective financial information and should not be disclosed in the proxy statements. Memorandum at 7-8.

The interpretation is incorrect, since the example was premised on the assumption that in a proxy fight management would issue unrealistic revaluations hoping to convince shareholders that the corporation was being managed efficiently and that they should be retained. Thus it does not seem correct to assume that the example resulted from a fear that management would revalue the assets as a means of persuading security holders to trade them away. See Hearings, supra, at 1569, 1575-76.

\textsuperscript{67} The problem of reconciling the Commission's requirements with the desirability of disclosing current values to shareholders arose in Norcan Oils Ltd. & Gridoil Freehold Leases Ltd. v. Fogler, 1965 Can. S. Ct. 36. Plaintiffs alleged that the proxy should have disclosed revaluation figures of oil reserves; defendants contended that the SEC prohibited releasing this information. The court avoided disagreeing with the Commission by holding that the lower court had no power to vacate the merger. Id. at 44-45. The dissent argued that the omission of revaluation figures was misleading, since it resulted in the presentation of a "dire picture" of the corporation and induced shareholders to acquiesce in the merger proposal. Id. at 49. The lower court, which had upset the merger, also considered the omission misleading:

\begin{quote}
If this valuation was taken into account shareholders' equity was at least nearly $2,000,000 more than that disclosed in the balance sheet set out in the proxy statement.
\end{quote}

\begin{quote}
... If the valuation of the oil and gas properties of Gridoil was accurate, that company had a surplus instead of a substantial deficit.
\end{quote}