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# Duty to Disclose, Duty to Correct, and Duty to Update in the United States and the Republic of Korea

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**Abstract:** Even though no general disclosure duty exists under the U.S. federal securities laws, an issuer has a duty to disclose material non-public corporate information in the following specific circumstances: (i) when a statute or regulation expressly requires disclosure; (ii) when a corporate insider or an issuer trades its stock on confidential information; (iii) when an issuer voluntarily choose to make a public disclosure, it has a duty to disclose sufficient information so that the disclosure made is not false or misleading.

In Korea, issuers must disclose corporate information when they go to initial public offerings and file continuing disclosure under KSEA §§ 186-2 and 186-3. However, there is no basis for a duty to update and a duty to correct. Some commentator says KSEA § 186 is a kind of a duty to update because it needs timely disclosure. However, the items listed under § 186 refer to kinds of hard facts that relate to events which have already taken place. A duty to update is about kinds of forward-looking information.

For the purpose of improving investor protection by establishing mandatory disclosure, a duty to disclose should be imposed on issuers who distribute their securities to the public. Further, a duty to correct and a duty to update should also be attached to corporate disclosure of material information to provide accurate information to the public. From this point of view, Korea should prepare those duties to force issuers to provide accurate information; in this way, investor protection may be established.

**Key words:** duty to disclose, duty to update, duty to correct, timely disclosure, investor protection, affirmative duty to disclose

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## I. The United States

### 1. Does a General Duty to Disclose Exist?

Some commentators<sup>1</sup> and courts<sup>2</sup> have used the term “affirmative duty to disclose”<sup>3</sup> in order to consider whether an issuer has a duty to disclose “all material information even if there is no insider trading, no statute or regulation, incomplete, or misleading prior disclosures.”<sup>4</sup> Although cogent arguments in favor of a general duty to disclose have been made,<sup>5</sup> the courts have never been willing to recognize this duty.<sup>6</sup>

The prevailing view is, however, that the federal securities laws

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1. See generally Jeffrey D. Bauman, Rule 10b-5 and the Corporation’s Affirmative Duty to Disclose, 67 GEO L.J. 935 (1979); Dennis J. Block et al., Affirmative Duty to Disclose Material Information Concerning Issuer’s Financial Condition and Business Plans, 40 BUS. LAW. 1243 (1985); MARC I. STEINBERG, SECURITIES REGULATION: LIABILITIES AND REMEDIES § 2.01 (1998).

2. See, e.g., *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 153 (1972); *Chiarella v. United States*, 445 U.S. 222, 227, 231 (1980); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 851 n.12 (2nd Cir. 1968), cert. denied, 394 U.S. 976 (1969); *Financial Industrial Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514, 514, 518 (10th Cir.), cert. denied, 414 U.S. 874 (1973); *Fridrich v. Bradford*, 542 F.2d 307, 325 (6th Cir. 1976), cert. denied, 429 U.S. 1053 (1977); *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 991 n.23 (3rd Cir. 1984); *Grossman v. Waste Management, Inc.*, 589 F. Supp. 395, 409 (N.D. Ill. 1984).

3. Why do some courts and scholars use the term “affirmative” duty to disclose? If it refers to a duty to disclose all material non-public information in a situation in which there is no statutory duty to disclose, it is enough to use the term “general” duty to disclose. In other words, under certain circumstances, an issuer may, affirmatively, have to do something to avoid certain liability although it does not have to do so directly under statutes or regulations. However, since there is no admission by statutes or the SEC of using the term “affirmative” duty to disclose, this study will use the term “general” duty to disclose to refer to a situation in which an issuer must disclose material non-public information, even if it does not have any duty to disclose under securities regulations.

4. *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 27 (1st Cir. 1987).

5. See generally Bauman, *supra* note 1.

impose on issuers no such general duty to disclose material non-public information.<sup>7</sup> The SEC has apparently conceded that no general duty to disclose exists under the federal securities laws, unless a company's shares are traded in the public stock market.<sup>8</sup> Accordingly, in general, with regard to absent trading or any activities that might trigger liability to issuers,<sup>9</sup> no general duty exists to disclose material non-public information in connection with the issuing or transaction of securities,<sup>10</sup> because a duty to disclose "does not arise from the mere possession of non-public market information."<sup>11</sup>

However, even though no general disclosure duty exists under the

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6. *See, e.g.*, *Greenfield v. Heublein, Inc.*, 742 F.2d 751, 756 (3rd Cir. 1984); *Texas Partners v. Conrock Co.*, 685 F.2d 1116, 1120-21 (5th Cir. 1982); *South Coast Services Corp. v. Santa Ana Valley Irrigation Co.*, 669 F.2d 1265, 1273 (9th Cir. 1982); *Weiner v. Quaker Oats Co.*, 928 F. Supp. 1372, 1385 (D.N.J. 1996); *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 268 (2nd Cir. 1993).

7. *See, e.g.*, *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 27 (1st Cir. 1987); *Starkman v. Marathon Oil Co.*, 772 F.2d 231, 238 (6th Cir. 1985). cert. denied, 475 U.S. 1015 (1986); *Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3rd Cir. 1982); *Grossman v. Waste Management, Inc.*, 589 F. Supp. 395, 409 (N.D. Ill. 1984); *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1489 n.12 (D. De. 1984); *Schlanger v. Four-Phase Sys. Inc.*, 582 F. Supp. 128, 133 (S.D.N.Y. 1984); Block et al., *supra* note 1, at 1249-50; J. ROBERT BROWN, JR., *THE REGULATION OF CORPORATE DISCLOSURE* §3.01, at 3-3 (3rd ed. 1999).

8. See Memorandum of the SEC, *amicus curiae*, *Michaels v. Michaels*, 767 F.2d 1185, 1195 n. 2 (7th Cir. 1985), cert. denied, 474 U.S. 1057 (1986).

9. See *Levinson v. Basic, Inc.*, 786 F.2d 741, 746 (6th Cir. 1986), *rev'd* on other grounds, 485 U.S. 224 (1988). The Six Circuit held here that "[a]n initial duty to disclose material merger negotiations exists only in certain limited circumstances.... Courts have held that a duty to disclose negotiations arises in situations, such as where the corporation is trading in its own stock, or where it is responsible for rumors of the discussions leaking into [the] market."

10. See *Fridrich v. Bradford*, 542 F.2d 307, 315 (6th Cir. 1976), cert. denied, 429 U.S. 1053 (1977); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 848 (2nd Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969). See also *Roeder v. Alpha industries, Inc.*, 814 F.2d 22, 27 (1st Cir. 1987); Block et al., *supra* note 1, at 1249-50.

11. *Chiarella v. United States*, 445 U.S. 222, 235 (1980). See also *Fridrich v. Bradford*, 542 F.2d 307, 312 (6th Cir. 1976), cert. denied, 429 U.S. 1053 (1977).

federal securities laws,<sup>12</sup> an issuer has a duty to disclose material non-public corporate information in the following specific circumstances: (i) when a statute or regulation expressly requires disclosure;<sup>13</sup> (ii) when a corporate insider or an issuer trades its stock on confidential information;<sup>14</sup> (iii) when an issuer voluntarily chooses to make a public disclosure, it has a duty to disclose sufficient information so that the

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<sup>12</sup> See *supra* note 7 and accompanying text.

<sup>13</sup> There are three situations in which a duty to disclose may arise related to a statute or regulation. First, in the context of an initial public offering, an issuer has a disclosure obligation of corporate information by filing a registration statement with the SEC and providing a prospectus to the purchasers in connection with the issuing of securities under the Securities Act. A corporation also has disclosure obligations to file several periodic reports with the SEC.

Second, an issuer may have a duty to disclose corporate information by filing periodic reporting materials. However, the issuer has no duty to update periodic reporting materials until the filing of the next required report, because the Exchange Act does not require that “a corporation report material information that is not otherwise required by the periodic reporting and shareholder information requirements.” THOMAS L. HAZEN, *THE LAW OF SECURITIES REGULATION*, 664 (4th ed. 2002).

Finally, an issuer may have the duty to disclose under stock exchange or NASDAQ rules. For example, the New York Stock Exchange Manual provides that corporations whose securities are listed on the NYSE are expected to release promptly to the public any information that reasonably might be believed to materially impact on the market for those securities. See NYSE Manual §§ 202.01 - 202.06, 3 CCH Fed. Sec. L. Rep. ¶¶ 23,513 - 23, 520.

<sup>14</sup> This is called insider trading context, in which duty to disclose is usually at issue. In the past, almost all cases regarding duty to disclose have dealt with insider trading issues. See generally *Chiarella v. United States*, 445 U.S. 222, 228-229 (1980); *In Matter of Cady, Roberts & Co.*, 40 SEC 907, 912 (1961); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2nd Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); *Greenfield v. Heublein Inc.*, 742 F.2d 751, 756 (3rd Cir. 1984) (“If a corporation is not trading in its securities and is not otherwise under a duty to disclose material corporate information, ...”); *Fridrich v. Bradford*, 542 F.2d 307, 318 (6th Cir. 1976), cert. denied 429 U.S. 1053 (1977) (“If the insider does not trade, he has an absolute right to keep material information secret.”); Jeffrey A. Brill, *The Status of the Duty to Update*, 7 CORNELL J.L. & PUB. POL’Y 605, 610-12 (1998).

In general, a fiduciary or equivalent relationship is required to put a duty to

disclosure made is not “false or misleading or . . . so incomplete as to mislead.”<sup>15</sup> Accordingly, a company does not owe any general duty to disclose material non-public information absent any obligation that the securities laws require or any activities in the securities market that might trigger liability of the corporation.

A duty to disclose concerns the disclosure of material information. Most of the judicial decisions concern issuers that are in possession of material information and do not disclose it. Non-disclosure is actionable under the federal securities laws “only when the corporation is subject to a duty to disclose the omitted facts.”<sup>16</sup> “Mere silence about even material information is not fraudulent absent a duty to speak.”<sup>17</sup> A corporation is not required to disclose a fact “merely because a reasonable investor would very much like to know that fact.”<sup>18</sup> However, if an issuer chooses “to reveal relevant, material information even though it had no duty to do so, it must disclose the

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disclose on an issuer in the insider trading context. Chiarella court held that “[a]n affirmative duty exists between sellers and [persons] in whom the sellers had placed their trust and confidence.” Chiarella, 445 U.S. at 232. See also Issen v. GSC Enterprises, Inc., 538 F. Supp. 745, 751 (1981). Also, the SEC identified two bases, in Cady, Roberts & Co., which trigger the duty to disclose material inside information: (1) a fiduciary or equivalent relationship of trust that enables a corporate insider to learn of inside information and (2) the unfairness of permitting an insider, absent disclosure, to avail himself of the information through trading. See *In Matter of Cady, Roberts & Co.*, 40 SEC 907, 911-12 (1961); Brill, *supra*, at 610.

15. SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2nd Cir. 1968). See also Greenfield v. Heublein Inc., 742 F.2d 751, 756, 758 (3rd Cir. 1984) Grossman v. Waste Management, Inc., 589 F. Supp. 395, 409 (N.D. Ill. 1984); Sharp v. Coopers & Lybrand, 83 F.R.D. 343, 346-47 (E.D. Pa. 1979); Kowal v. MCI Communications, 16 F.3d 1271, 1277 (D.C. Cir. 1994).

16. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2nd Cir. 1993). See *Basic v. Levinson*, 485 U.S. 224, 239 n.17 (1988); *Glazer v. Formica Corp.*, 964 F.2d 149, 157 (2nd Cir. 1992). See also *Kowal v. MCI Communications Corp.*, 16 F.3d 1271, 1277 (D.C.C. 1994).

17. *Stransky v. Cummins Engine Co. Inc.*, 51 F.3d 1329, 1331 (7th Cir. 1995). See also *Chiarella v. United States*, 445 U.S. 222, 235 (1980).

18. *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2nd Cir. 1993).

whole truth.”<sup>19</sup> In addition, the existence of a fiduciary or equivalent relationship may also require an insider or issuer to disclose non-public material information.<sup>20</sup>

In general, antifraud rules under the federal securities laws may provide the basis of a duty to disclose, because a duty to disclose may be implicitly required to avoid implied civil liability under Rule 10b-5. Although Rule 10b-5 under the Securities Exchange Act of 1934 (hereinafter referred to as the “Exchange Act”) is said to be the basis for duty to disclose, whether Rule 10b-5 alone is sufficient to trigger a general duty to disclose is doubtful,<sup>21</sup> because even if information is material, there is no liability under Rule 10b-5 unless there was a duty to disclose it. In other words, “in order for there to be liability under 10b-5 for omission or nondisclosure of non-public material information, a duty to speak must exist.”<sup>22</sup> A company can violate Rule 10b-5 of the Exchange Act by an undue delay, not in good faith, in making disclosure.<sup>23</sup> However, it is not a problem of whether a company has a duty to disclose. In addition, even though Section 17, which is an antifraud rule under the Securities Act of 1933 (hereinafter referred to as the “Securities Act”), also may provide the basis of a duty to disclose, the vast majority of courts<sup>24</sup> have declined to imply a

19. *First Virginia Bankshares v. Benson*, 559 F.2d 1307, 1314 (5th Cir. 1977). See also *Stransky*, 51 F.3d at 1331; *Ackerman v. Schwartz*, 947 F.2d 841, 848 (7th Cir. 1991).

20. See *Chiarella v. United States*, 445 U.S. 222, 228 (1980).

21. See *HAZEN*, *supra* note 13, at 665. See generally *id.* n.18.

22. *Walker v. Action Industries, Inc.*, 802 F.2d 703, 706 (4th Cir. 1986), cert. denied, 479 U.S. 1065 (1987). See also *Starkman v. Marathon Oil Company*, 772 F.2d 231, 238 (6th Cir. 1985), cert. denied, 475 U.S. 1015 (1986); *Flynn v. Bass Brothers Enterprises, Inc.*, 744 F.2d 978, 984 (3rd Cir. 1984).

23. See *Financial Industries Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514, 519 (10th Cir.) (en banc) (per curiam), cert. denied 414 U.S. 874 (1973).

24. See, e.g., *Wexner v. First Manhattan Co.*, 902 F.2d 169, 173-74 (2nd Cir. 1990); *Sears v. Likens*, 912 F.2d 889, 893 (7th Cir. 1990); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F.2d 817, 819 (10th Cir. 1990); *Newcome v. Esrey*, 862 F.2d 1099, 1100 n.2 (4th Cir. 1988); *Currie v. Cayman Resources Corp.*, 835 F.2d 780, 784 (11th Cir. 1988); *Krause v. Perryman*, 827 F.2d 346, 349 (8th Cir. 1987);

private cause of action under that section as all courts have done under Rule 10b-5.

In conclusion, absent trading by an issuer or any other activities that may cause issuers' liability, there is no general duty to disclose non-public information in connection with issuing or transaction of securities,<sup>25</sup> because a duty to disclose "does not arise from the mere possession of non-public market information."<sup>26</sup> The federal securities laws do not directly require a company to disclose all available material corporate information on its position that could affect the price of its stock.<sup>27</sup> However, the necessity of allowing a duty to disclose may be raised in certain of the above-mentioned specific circumstances.<sup>28</sup> Nevertheless, immediate disclosure is not compelled, because for example, Form 8-K, which requires the filing of a report

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Washington Public Power Supply System Securities Litigation, 823 F.2d 1349, 1355 (9th Cir. 1987); Landry v. All American Assurance Co., 688 F.2d 381, 384-91 (5th Cir. 1982); Bradford v. Moench, 670 F. Supp. 920, 927-28 (D. Utah 1987); Norman v. Brown, Todd & Heyburn, [1988-1989 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 93,914 (D. Mass. 1988); Stern v. Grossman, [1988-1989 Transfer binder] CCH Fed. Sec. L. Rep. ¶ 94,025 (S.D.N.Y. 1988); Smith v. Thompson McKinnon Securities, [1987 Transfer binder] CCH Fed. Sec. L. Rep. ¶ 93,349 (E.D.N.Y. 1987); Hammerman v. Peacock, [1984-1985 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 91,937 (D.D.C. 1985); McFarland v. Memorex Corp., 493 F. Supp. 631, 649-53 (N.D. Cal. 1980).

25. See Solomon v. Peat, Marwick, Main & Co., 976 F.2d 738, 1992 WL 231098, p.3 (Unpublished Disposition) (9th Cir. 1992); Roeder v. Alpha industries, Inc., 814 F.2d 22, 27; Fridrich v. Bradford, 542 F.2d 307, 318 (6th Cir. 1976), cert. denied, 429 U.S. 1053 (1977); SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 848 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); Block et al., supra note 1, at 1249-50.

26. Chiarella, 445 U.S. at 235.

27. See Roeder v. Alpha industries, Inc., 814 F.2d 22, 26 (1st Cir. 1987); Capri Optics Profit Sharing v. Digital Equipment Corp., 760 F. Supp. 227 (D. Mass. 1991), affirmed 950 F.2d 5 (1991); Weiner v. Quaker Oats Co., 928 F. Supp. 1372, 1385 (D.N.J. 1996); In re Time Warner Inc. Securities Litigation, 9 F.3d 259, 268 (2nd Cir. 1993).

28. See supra notes 13-15 and accompanying text.

within fifteen days of certain specified events, does not specifically require an immediate timely disclosure.<sup>29</sup> However, a Self Regulatory Organization, such as the NYSE, may compel companies to follow their rules that require timely disclosure of material developments.<sup>30</sup> If the market is fully aware of the corporate information or the information is available to the market from other sources, however, the information is no longer non-public and the company is not under a duty to disclose.<sup>31</sup>

## 2. The Scope of Each Duty

### (a) Distinguishing the Duties to Disclose, Correct, and Update

Although many courts and articles have held that the federal

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29. Form 8-K does require disclosure of a material disposition of assets. See Form 8-K, item 2. Also, the Second Circuit in *Texas Gulf Sulphur* held that “[w]e do not suggest that material facts must be disclosed immediately, the timing of disclosure is a matter for the business judgment of the corporate officers entrusted with the management of the corporation within the affirmative disclosure requirements promulgated by the exchanges and by the SEC.” *SEC v. Texas Gulf Sulphur*, 401 F.2d 833, 850 n.12 (2nd Cir. 1968). See also *Financial Indus. Fund, Inc. v. McDonnell Douglas Corp.*, 474 F.2d 514, 518 (10th Cir.), cert. denied, 414 U.S. 874 (1973).

30. See, e.g., *American Stock Exchange Company Guide* § 401(a) (“A listed company is required to make immediate public disclosure of all material information concerning its affairs, except in unusual circumstances.”); *NYSE Company manual*, § 202.05, *Fed. Sec. L. Rep. (CCH)* ¶ 23, 519 (“[to] act promptly to dispel unfounded rumors which result in unusual market activity or price variations.”). For more information, see HAROLD S. BLOOMENTHAL, *SECURITIES LAW HANDBOOK* 768 (2000 ed.).

31. A company does not have the duty to disclose “information that is already in the public domain” because already-known information to the public is already reflected in market price, and may not harm investors seriously any more. See *Jensen v. Kimble*, 1 F.3d 1073, 1079 n.11 (10th Cir. 1993); *Acme Propane, Inc. v. Tenexco, Inc.*, 844 F.2d 1317, 1323 (7th Cir. 1988); *Westwood v. Cohen*, 838 F. Supp. 126, 133 (S.D.N.Y. 1993); *In re Mobile Telecommunication Technologies Corp. Securities Litigation*, 915 F. Supp. 828, 838 (S.D. Miss. 1995).

securities laws do not impose a general duty to disclose on issuers,<sup>32</sup> the following conditions usually require an issuer to disclose, correct, or update material corporate information: (i) when a statute or regulation expressly requires disclosure;<sup>33</sup> (ii) when an issuer buys or sells its securities without disclosing all material non-public facts;<sup>34</sup> (iii) when an issuer made inaccurate, incomplete or misleading prior disclosures;<sup>35</sup> (iv) when rumors in the marketplace are attributable to an issuer;<sup>36</sup> or (v) when an issuer made a disclosure, including a disclosure of forward-looking information, that was originally accurate, but became materially misleading due to time or subsequent events.<sup>37</sup> (i) and (ii) conditions are already discussed, and we will now explore the rest of the above-mentioned cases. Throughout this study, situations (iii) and (iv) are referred to as the context of a duty to correct, and situation (v) is referred to as the context of a duty to update.

Both duty to correct and duty to update are, indiscriminately and interchangeably, cited in many cases and articles. Furthermore, the courts, the SEC, and commentators have failed to recognize the

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32. See *Starkman v. Marathon Oil Co.*, 772 F.2d 231, 238 (6th Cir. 1985). cert. denied, 475 U.S. 1015 (1986); *Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3rd Cir. 1982); *Grossman v. Waste Management, Inc.*, 589 F. Supp. 395, 409 (N.D. Ill. 1984); *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1489 n.12 (D. Del. 1984); *Schlanger v. Four-Phase Sys., Inc.*, 582 F. Supp. 128, 133 (S.D.N.Y. 1984); *Block et al.*, supra note 1, at 1249-50; *BROWN*, supra note 7, § 3.01, at 3-3.

33. See supra note 13.

34. See supra note 14.

35. This case refers to a situation in which the prior disclosure was not correct when made. In other words, the prior disclosure was originally not true statements. See Brill, supra note 14, at 617-19; The Securities Act Release No. 6084, the Exchange Act Release No. 15944, [1979 Transfer binder] CCH Fed. Sec. L. Rep. ¶ 82117, 1999 WL 16388 (S.E.C.), p.7.

36. See *State Teachers Retirement Board v. Fluor Corp.*, 654 F. 2d 843, 850 (2nd Cir. 1981); *Weintraub v. Texasgulf Inc.*, 564 F. Supp. 1466, 1470 (S.D.N.Y. 1983); *Zuckerman v. Harnischfeger Corp.*, 591 F. Supp. 112, 119 (S.D.N.Y. 1984).

37. See generally Brill, supra note 14, at 620-27.

distinction between the duties to disclose, correct, and update in corporate disclosure.<sup>38</sup> It is, however, required to distinguish “duty to disclose,” “duty to correct,” and “duty to update” according to specific facts and particular circumstances,<sup>39</sup> because classifying those duties helps to clarify which facts or circumstances will give rise to which types of duties for an issuer.<sup>40</sup>

In general, historical hard facts are the object of a duty to correct, and future-oriented information, including forward-looking information, is the object of a duty to update. In a broad sense, an issuer’s duty to disclose includes a duty to correct and duty to update, but in a narrow sense it has a different meaning from the other two duties.

*(b) A Duty to Correct*

A duty to correct arises when a statement originally made by an issuer was, in reality, not correct, and thus the issuer has an obligation to correct it.<sup>41</sup> The information that needs correction is hard information,<sup>42</sup> mostly historical statements.<sup>43</sup> In addition, forward-

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38. See *id.* at 606.

39. See *id.* at 615-27, 636-38; *Backman v. Polaroid Co.*, 910 F.2d 10, 16-21 (1st Cir. 1990) (en banc).

40. There are many particular disclosure issues: disclosure of bad news, merger negotiations, stock repurchases, projections, and appraisals. See generally BROWN, *supra* note 7, §§ 6, 6A.

41. See Brill *supra* note 14, at 617; *Stransky v. Cummins Engine Co., Inc.*, 51 F.3d 1329, 1331 (7th Cir. 1995).

42. “Hard” or “factual” information may be defined as the information that was considered by an issuer when that issuer made a statement or press release. Hard information is “typically historical information or other factual information that is objectively verifiable, and subject to disclosure if material to the relevant transaction.” See *Garcia v. Cordova*, 930 F.2d 826, 830 (10th Cir. 1991); *In re Sofamor Danek Group, Inc. Securities Litigation*, 123 F.3d 394, 401 (6th Cir. 1997); see also Carl W. Schneider, *Nits, Grits, and Soft Information in SEC Filings*, 121 U. PA. L. REV. 254, 258-59 (1972). Such information is to be contrasted with “soft” information, which includes some subjective analysis or extrapolation, such as projections, estimates, opinions, forecasts, predictions, motives, or intentions. See

looking information<sup>44</sup> that has a sound factual or historical basis needs correction,<sup>45</sup> because safe harbor rules may apply to forward-looking information made in good faith and with a reasonable basis.<sup>46</sup> If the misrepresented fact is not material, however, the misrepresented fact is not actionable.<sup>47</sup>

The scope of a duty to correct varies according to the facts and circumstances of individual cases.<sup>48</sup> Some courts have been reluctant to place a duty to correct on issuers, unless issuers were responsible for the emanation of wrong information.<sup>49</sup> To impose the duty on issuers,

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Garcia v. Cordova, 930 F.2d 826, 830 (10th Cir. 1991); Lewis v. Chrysler Corp., 949 F.2d 644, 652 (3rd Cir. 1991); In re Craftmatic Securities Litigation, 890 F.2d 628, 642 (3rd Cir. 1989); In re Sofamor Danek Group, Inc. Securities Litigation, 123 F.3d 394, 400 (6th Cir. 1997); Bruce A. Hiler, The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views, 46 MD. L. REV. 1114, 1116-17 (1987).

43. See *Stransky v. Cummins Engine Co. Inc.*, 51 F.3d at 1331.

44. Forward-looking information is a part of the family of soft information. See generally *Schneider*, supra note 43, at 255; Jonathan B. Lurvey, Who is Bespeaking to Whom? Plaintiff Sophistication, Market Information, and Forward-looking Statements, 45 DUKE L.J. 579, 579 n.3 (1995).

45. See *G & M, Ins. V. Newbern*, 488 F.2d 742, 745-46 (9th Cir. 1973); *Marx v. Computer Sciences Corporation*, 507 F.2d 485, 489 (9th Cir. 1974); In re *MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 938 (D.N.J., 1998).

46. See 17 C.F.R. §§ 230.175(a) and 240.3b-6(a).

47. In re *MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 938 (D.N.J. 1998). See also *Basic, Inc. v. Levinson*, 485 U.S. 224, 238 (1988); *Weiner v. Quaker Oats Co.*, 928 F. Supp. 1372, 1384 (D.N.J. 1996).

48. See the Securities Act Release No. 6084, the Exchange Act Release No. 15944, [1979 Transfer binder] CCH Fed. Sec. L. Rep. ¶82117, 1999 WL 16388 (S.E.C.), p.7.

49. See *Zuckerman v. Harnischfeger Corp.*, 591 F. Supp. 112, 119 (S.D.N.Y. 1984) ("A Company has no duty to correct or verify rumors in the marketplace unless those rumors can be attributed to the company"); *State Teachers Retirement Bd. V. Fluor Corp.*, 654 F.2d 843, 850 (2nd Cir. 1981); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 949 (2nd Cir. 1969) ("While a company may choose to correct a misstatement in the press not attributable to it, cf. *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 857-864, 866-869 (concurring opinion) (2nd Cir. 1968), we find nothing in the securities regulation requiring it to do so.").

the existence of specific situations that would cause issuers to be more cautious about those wrong or misleading statements is necessary.<sup>50</sup> An issuer has a duty to correct if a disclosure is in fact misleading when made, and an issuer thereafter learns of the mistakes.<sup>51</sup>

The SEC adopts the term “duty to correct” to cover situations in which statements by an issuer were false, misleading, or inaccurate whether or not those statements are related to a specific transaction or event, if the statements either have become inaccurate by virtue of subsequent events, or are later discovered to have been false and misleading from the outset, and the issuer knows or should know that persons are continuing to rely on all or any material portion of the statements.<sup>52</sup> However, the usage of “duty to correct” by the SEC is not appropriate, because “correct” means a correction of wrong information. If the original statement was correct and has become inaccurate by virtue of subsequent events, there should be a duty to update instead of a duty to correct. If the statement was accurate, there is no room for correction, because it was originally correct information. It merely needs an “update,” if the circumstances have changed due to subsequent events, because this situation is similar to that characterized by forward-looking information that is subject to a duty to update, not a duty to correct. Forward-looking information may be progressive information based on future or ongoing events. Accordingly, a duty to update is appropriate usage to refer to the contexts of forward-looking information and the information that was originally accurate, but later became inaccurate due to subsequent events.<sup>53</sup> A duty to correct is not that burdensome and it is unlikely to discourage companies from making any other disclosures.<sup>54</sup>

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50. In the past, almost all cases regarding a duty to disclose have dealt with insider trading. See generally *In the Matter of Cady, Roberts & Co.*, 40 SEC 907, 912 (1061); *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 862 (2nd Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); Brill, *supra* note 14, at 610-12.

51. See *Backman v. Polaroid Corp.*, 910 F.2d 10, 16-17 (1st Cir. 1990).

52. See *supra* note 48 and accompanying text.

53. See *Stransky v. Cummins Engine Co. Inc.*, 51 F.3d 1329, 1332 (7th Cir. 1995).

A duty to correct situation may arise in disclosures of an initial public offering and periodic reporting.<sup>55</sup> For instance, the use of a preliminary prospectus is allowed before a registration statement becomes effective under Section 10(b) of the Securities Act.<sup>56</sup> However, when a prospectus is used more than nine months after the effective date of the registration statement, the information contained therein shall be as of a date not more than sixteen months prior to such use,<sup>57</sup> because civil liabilities may apply to misstatements contained in the prospectus due to Section 12(a)(2) of the Securities Act and Rule 10b-5 under the Exchange Act.<sup>58</sup> Accordingly, the issuer has a duty to correct factual information in the prospectus whether the prospectus is used for primary distribution or for resale of its securities. Also, the Exchange Act requires amendments of Forms and Schedules filed with the SEC.<sup>59</sup>

Issuers do not owe the duty to correct rumors or misstatements made by third parties to the public,<sup>60</sup> because the existence of those rumors or misstatements made by third parties is not enough to show that the issuer knew or should have known that the public would be misled by those rumors or misstatements. In other words, a duty to correct may not be triggered unless rumors can be attributed to an issuer, because a corporation has no duty to investigate the reasons for unusually heavy trading in its stock.<sup>61</sup> Although a corporation may

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54. See Brill *supra* note 14, at 638.

55. See *supra* note 48 and accompanying text.

56. See 15 U.S.C. § 77j(b), Section 10(b) of the Securities Act.

57. See 15 U.S.C. § 77j(a)(3), Section 10(a)(3) of the Securities Act.

58. Rules 470 to 477 under the Securities Act also prescribe amendments of a registration statement.

59. See Rule 12b-15 (Amendments) and Rule 13d-2 (Filing of Amendments to Schedules 13D or 13G) under the Exchange Act.

60. See *State Teachers Retirement Bd. v. Fluor Corp.*, 654 F.2d 843, 850 (2nd Cir. 1981); *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937, 949 (2nd Cir. 1969); *Solomon v. Peat, Marwick, Main & Co.*, 976 F.2d 738, 1992 WL 231098, p.3 (Unpublished Disposition) (9th Cir. 1992).

61. See *Weintraub v. Texasgulf Inc.*, 564 F. Supp. 1466, 1470 (S.D.N.Y. 1983); *Zuckerman v. Harnischfeger Corp.*, 591 F. Supp. 112, 119 (S.D.N.Y. 1984).

choose to correct misstatements made by the media, the corporation has no duty to correct erroneous factual statements appearing in a newspaper article about the corporation.<sup>62</sup>

*(c) A Duty to Update*

A company may have a duty to update when it has disclosed information and then some change has occurred. Even though the Securities Litigation Reform Act of 1995 states that “[n]othing in this section shall impose upon any person a duty to update a forward-looking statement,”<sup>63</sup> this duty has been judicially recognized.<sup>64</sup> The exact parameter of this duty, as developed by courts, is unclear. The SEC adopts the term “duty to correct” to cover situations in which statements by an issuer were false, misleading, or inaccurate either in the context of a forward-looking statement or any filing circumstances.<sup>65</sup> However, as mentioned above,<sup>66</sup> the attitude of the SEC is not correct. The duty to update arises when a statement was originally accurate, but has become materially misleading due to subsequent events,<sup>67</sup> regardless of whether the information at issue

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62. See *Electronic Specialty Co. v. Int’l Controls Corp.*, 409 F.2d 937, 949 (2nd Cir. 1969).

63. See 15 U.S.C. 77z-2(d).

64. See, e.g., *Rubinstein v. Collins*, 20 F.3d 160, 170 n.41 (5th Cir. 1994); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 503-504 (9th Cir. 1992); *Backman v. Polaroid Co.*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc); *In re Phillips Petroleum Securities Litigation*, 881 F.2d 1236, 1245 (3rd Cir. 1989); *Rudolph v. Arthur Anderson & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986); *Ross v. H. Robins Co., Inc.*, 465 F. Supp 904, 908 (S.D.N.Y.), rev’d on other grounds 607 F.2d 545 (2nd Cir. 1979), cert. denied 446 U.S. 946 (1980).

65. See *supra* note 48 and accompanying text.

66. See *supra* p.9-10.

67. See *Backman v. Polaroid Co.*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc). The SEC calls this situation a duty to correct. “With respect to forward-looking statements of material facts made in relation to specific transactions or events (such as proxy solicitations, tender offers, and purchases and sales of securities), there is an obligation to correct such statements prior to consummation of the transaction where they become false or misleading by reason of subsequent events which render

was a forward-looking statement or not.

An historical statement cannot logically be updated,<sup>68</sup> because it is already hard fact that may not be changed. A duty to update may exist in disclosure of future-oriented information: forward-looking information and projections. When the original projections have become misleading as the result of intervening events, a duty to update the projections may arise.<sup>69</sup> Materiality of that information is also important here, because these predictions and other forward-looking statements are not per se inactionable.<sup>70</sup> Some articles confine the scope of duty to update only to forward-looking information;<sup>71</sup> however, the scope of this duty should be determined by whether the projections and other forward-looking information would be material in specific circumstances. Accordingly, the boundary between duty to correct and duty to update should be placed according to the specific circumstances. Nevertheless, the prior disclosure of forward-looking information is enough to satisfy the base of the duty to update situation, because the information that requires a duty to update may become “deficient or misleading over time or due to subsequent events.”<sup>72</sup>

A problem can arise when an issuer has made a disclosure which was accurate when made, and has remained “alive” in the marketplace but which has become materially false or misleading as a result of subsequent events. Under those circumstances, an issuer may be faced

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67. material assumptions underlying such statements invalid.” See supra note 48 and accompanying text. See generally Brill supra note 14, at 636-38.

68. See *Stransky v. Cummins Engine Co. Inc.*, 51 F.3d 1329, 1332 (7th Cir. 1995).

69. See *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2nd Cir. 1993). However, only hope of a company does not provide the basis of duty to update to the company. See *id.*

70. *In re Donald J. Trump Sec. Litig.*, 7 F.3d 357, 368 (3rd Cir. 1993).

71. See Robert H. Rosenblum, *An Issuer’s Duty under Rule 10b-5 to Correct and Update Materially Misleading Statements*, 40 CATH. U.L. REV. 289, 317 (1991); Brill, supra note 14, at 620.

72. *Id.*

with a duty to update.<sup>73</sup> A statement remains alive as long as it continues to engender reliance.<sup>74</sup> Public investors are, generally, apt to rely on the information disclosed by the corporations. This is absolutely true when the corporations are big and creditable. Analysis of corporate information by the securities industry also predicts coming effects on the securities market, and investors decide whether they will invest or not, according to the materiality of the information. Therefore, although a duty to update may prove burdensome for companies, it should be imposed on issuers, because it may protect investors.<sup>75</sup>

Assuming a prior issuer disclosure to the public, for example in a press release, the issuer might be required to include that information in an SEC filing. When such a filing occurs with the same information as previously disclosed, the public is likely to give greater weight to that information - i.e., “reasonable reliance” on the earlier disclosure statements increases. However, as time passes, there is increased disparity between the earlier disclosure statements and the current information.<sup>76</sup> If there is a subsequent change that renders the previously made statement materially misleading, further disclosure must be made.<sup>77</sup> Even if earlier disclosure statements were literally

73. See *Backman v. Polaroid Co.*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc); *Ross v. H. Robins Co., Inc.*, 465 F. Supp 904, 908 (S.D.N.Y.), rev'd on other grounds 607 F.2d 545 (2nd Cir. 1979), cert. denied 446 U.S. 946 (1980); *In re Phillips Petroleum Securities Litigation*, 881 F.2d 1236, 1245 (3rd Cir. 1989); *Rubinstein v. Collins*, 20 F.3d 160, 170 n.41 (5th Cir. 1994); *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 503-504 (9th Cir. 1992); *Rudolph v. Arthur Anderson & Co.*, 800 F.2d 1040, 1043 (11th Cir. 1986). See generally BROWN, *supra* note 7, § 3-04[2], at 3-27; STEINBERG, *supra* note 1, § 2.02, at 2-6.

74. See *Mitchell v. Texas Gulf Sulphur Co.*, 446 F.2d 90, 103 (10th Cir.), cert. denied, 404 U.S. 1004 (1971).

75. See Brill *supra* note 14, at 637.

76. See also *Ross v. A.H. Robins Co.*, 465 F. Supp. 904, 908 (S.D.N.Y.), rev'd on other grounds 607 F.2d 545 (2nd Cir. 1979), cert denied 446 U.S. 946 (1980); Bauman, *supra* note 1, at 964-65; STEINBERG, *supra* note 1, § 2.02, at 2-7.

77. See *Backman v. Polaroid Co.*, 910 F.2d 10, 17 (1st Cir. 1990) (en banc); *Greenfield v.*

true, the statements could be misleading by the circumstances of the market and corporations.<sup>78</sup>

As noted earlier, the duty to update is especially important with respect to forward-looking information. The SEC encourages the use of projections.<sup>79</sup> The SEC strongly encourages corporations to update prior forward-looking disclosures due to subsequent events.<sup>80</sup> Finally, the SEC has established a safe harbor for disclosure of such future financial projections.<sup>81</sup> Because projection falls under the rubric of soft information that need not be disclosed,<sup>82</sup> a company is not required to disclose all projections unless they have reasonable basis.<sup>83</sup> However, a projection is a “factual” misstatement “if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement’s accuracy.”<sup>84</sup>

To avoid liability for misstatements, an issuer must prepare projections as the best, most accurate representation, as of the time they were prepared, of what the issuer’s financial results would likely be for the prospective quarter.<sup>85</sup> The SEC introduces a safe harbor from the applicable liability provisions of the federal securities laws for statements relating to or containing “(1) projections of revenues,

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77. Heublein, Inc., 742 F.2d 751, 758(3rd Cir.1984); Jeanne Calderon & Rachel Kowal, Safe Harbors: Historical and Current Approaches to Future Forecasting, 22 J. CORP. L. 661, 679 (1997); Robert H. Rosenblum, An Issuer’s Duty under Rule 10b-5 to Correct and Update Materially Misleading Statements, 40 CATH. U.L. REV. 289, 316 (1991).

78. See McMahan & Co. v. Warehouse Entertainment, Inc., 900 F.2d 576, 579 (2nd Cir. 1990).

79. See Item 10(b) of Regulation S-K.

80. See Item 10(b)(3)(iii) of Regulation S-K.

81. See Securities Act Rule 175, 17 C.F.R. § 230.175; Securities Exchange Act 3b-6, 17 C.F.R. § 240-3b-6; Regulation S-K, item 10(b), 17 C.F.R. § 229.20.

82. See *In re Craftmatic Securities Litigation*, 890 F.2d 628, 642 (3rd Cir. 1989).

83. See *Provenz v. Miller*, 102 F.3d 1478, 1488 (9th Cir. 1996).

84. *Id.* at 1487; *Kaplan v. Rose*, 49 F.3d 1363, 1375 (9th Cir. 1994).

85. See *Provenz v. Miller*, 102 F.3d 1478, 1488 (9th Cir. 1996).

income (or loss), earnings (or loss) per share or other financial items, such as capital expenditures, dividends, or capital structure, (2) management plans and objectives for future company operations, and (3) future economic performance included in management's statement."<sup>86</sup>

In conclusion, issuers' duty to correct or duty to update may exist only in specific circumstances where dissemination of material non-public corporate information is lacking in connection with trading, with activity of an issuer related to accuracy of information, or with material change of corporate business surroundings. Accordingly, materiality is also an important factor in determining whether projections or other forward-looking information is subject to a duty to update. In addition, those circumstances must have a close relationship with issuers, not with third parties.

## **II. The Republic of Korea**

### **1. The Structure of Corporate Disclosure**

The corporate disclosure system in Korea resides in the Commercial Code of Korea<sup>87</sup> and the Securities and Exchange Act,<sup>88</sup>

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86. Securities Act Release No.6084, the Exchange Act Release No.15944 (June 25, 1979), 17 SEC Docket 1048 [1979 Transfer Binder] CCH Fed. Sec. L. Rep. ¶ 82,117, 1999 WL 16388 (S.E.C.), p.1.

87. The Commercial Code was promulgated on January 20, 1962, Act No. 1000. It will be referred to as "the KCC." The KCC regulates commercial transactions in connection with almost all commercial areas, such as sales, partnership and agency, companies, insurance, and maritime commerce. It also relates to the regulation of the securities market because Part III of the KCC is so called the "Company Act" which sets forth provisions regarding corporate governance, the formation of corporate capital and issuance of securities. Of the four kinds of companies covered by the KCC, only Chusik Hoesa, that is, a stock-issued business corporation, can issue stocks and corporate bonds.

88. "The KSEA," throughout this study, will refer to the Securities and Exchange Act of January 15, 1962, Act No. 972 of Korea (as amended January 26, 2002).

which help public investors make good investment decisions.<sup>89</sup> The KCC prescribes a basic corporate disclosure system,<sup>90</sup> and the KSEA, like both securities acts of the United States, makes it compulsory for companies to disclose material information on corporate management and assets when companies are going public and issuing their securities. However, the KSEA sets forth only general principles, which are supplemented by Presidential Decrees and the Ministry of Financial and Economy Regulations.

Disclosure under the KSEA is a concrete and direct disclosure control system in the securities market designed to protect current and future investors. Under the disclosure system of the KSEA, there are two phases of registration for the issuer.

The first phase is “a registered step of an issuer” with the Financial Supervisory Commission.<sup>91</sup> Any company that intends to list its

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89. The Capital Market Promotion Act of 1968 (Act No. 2046 of November 22, 1968, hereinafter referred to as “the CMPA”) was one of the earliest pieces of law to promote the securities market and may influence the securities market by recommending public offerings. One particular feature of the CMPA was that the KSEC may recommend that companies go public, which was called “designated public offering.” This allowed the KSEC to select large capitalized companies to go public to promote the domestic capital market and allow investors more investing opportunities.

However, the CMPA was abolished by Addenda Section 25 of the KSEA (Act No. 5254 of January 13, 1997) due to the establishment of the Financial Supervisory Commission, which supervises the securities market.

90. Disclosure under the Korean Commercial Code is the disclosure designed to protect the interest of shareholders and creditors; this does not directly deal with material non-public information related to protection of public investors in the securities market. That is, in general, referred to as “a basic information”: Disclosure of Articles of Incorporation (the KCC § 289 ) and Minutes of general meeting (the KCC §§ 373 and 396 ), Obligation to send, maintain or disclose business reports, B/S, P/L and audit reports by CPA, Rights to inspect the books and records by minority shareholders (the KCC § 466 ) and so on.

91. The Financial Supervisory Commission of Korea will be referred to as “the FSC,” which was established on April 1, 1998, as an integrated financial supervisor in Korea. The former four financial supervisory authorities in Korea are the Office of

securities on the securities market or to make a public offering is required to register with the FSC, under the “corporate registration system.”<sup>92</sup> That company shall file with the FSC documents detailing their general circumstances, property conditions, and other aspects prescribed by the FSC.<sup>93</sup> This kind of company is referred to as a “registered corporation” in Korea.<sup>94</sup> Where any significant changes in the filed documents occur, such information shall also be filed with the FSC.<sup>95</sup> This step, which is wholly regulated by the FSC, is a disclosure by the issuer that has a plan to issue its securities in the future. The purpose of this step is to ensure fair issuance of securities and disclosure of corporate information,<sup>96</sup> which may provide a general outline of prospective issuers to the public. The benefit of corporate registration with the FSC is that a company will be subject to less stringent requirements when it applies to go public, list its shares on

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Bank Supervision, the Securities Supervisory Board, the Insurance Supervisory Board, and the Non-bank Supervisory Authority. They were merged into one authority, the Financial Supervisory Service, which is an enforcement body of the FSC.

92. See ROBERT C. ROSEN, *INTERNATIONAL SECURITIES REGULATION: STOCK EXCHANGES OF THE WORLD: KOREA BOOKLET 1*, P. 50 (1998). The KSEA Section 3 states: Companies that belong to any of the following categories are required to register with the FSC: 1. Deleted; 2. Unlisted companies other than an Association-registered company, which intends to make a public offering of new or outstanding securities; 3. Companies other than listed company or Association-registered company, which intends to have business consolidation with a listed company or Association-registered company; 4. Deleted; 5. A company, in the process of incorporation, which intends to make a public offering of its new securities; or 6. A company intending to confer stock options on its officers or employees in accordance with Section 189-4 of the KSEA.

93. See the KSEA Section 4.

94. See the KSEA Section 6. This is different from “Association-registered company” that is going to have its securities traded on KOSDAQ. See Sections 172-2 & 2 of the KSEA.

95. See the KSEA Section 4. This will be discussed later part of this article, which deals with the topic of duty to disclose, duty to correct, and duty to update.

96. See the KSEA Section 3.

the KSE, or register with the Korea Securities Dealers Association which manages the over-the-counter market in Korea.<sup>97,98</sup> This kind of corporate registration system is not common in other countries' exchanges.<sup>99</sup> It is different from registering with the Register of Companies when a company is incorporated, and is distinct from the "securities registration system"<sup>100</sup> that requires the filing of a registration statement with the FSC for the issuance of securities to the public.

This "corporate registration system" should be abolished because it is the result of the government policy that, to develop the securities market in a short time, induced companies to go public.<sup>101</sup> However, currently, in spite of the immaturity of the Korean securities market, the volume or value of current market transactions<sup>102</sup> is enough to

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97. See ROBERT C. ROSEN, *INTERNATIONAL SECURITIES REGULATION: STOCK EXCHANGES OF THE WORLD: KOREA BOOKLET* 1, 51 (1998).

98. The over-the-counter market in Korea, the KOSDAQ, is called an intermediary market of the Korea. It is managed by Korea Securities Dealers Association (hereinafter referred to as the "KSDA"). See the KSEA Section 2(14).

The KSDA was established under Section 162 of the KSEA for the purpose of maintaining market surroundings between securities companies, assuring fair trading of securities, and protecting investors. Before January 13, 1997, the KSDA "may have been established." However, now it "shall be established" under Section 162 of the KSEA. The role of the KSDA in the securities market has to be re-examined because its existence could create an additional, unnecessary supervisor in the market that may confuse investors as well as issuers. Although it is the supervisor over the intermediary market, that is, the over-the-counter market, it still affects the major securities market, the KSE. The existence of KOSDAQ market, which is a SRO, is enough to regulate the market. Also, the financial reform plan in 1997 had already made the FSC the main financial supervisory agency. It could take the role of the KSDA. A redundancy in supervisory institutions may not be good for the market.

99. See ROSEN, *supra* note 97, at 51.

100. This registration is the second type of registration in Korea.

101. The purpose of compulsive corporate registration is to create well-informed market surroundings. For the background of compulsive "corporate registration system," see YOUNG MOO SHIN, *SECURITIES REGULATION IN KOREA* 102-03 (1983).

enable companies to voluntarily go public.<sup>103</sup> Compulsive corporate registration without issuing securities is burdensome for companies that have no plan to go public in the near future. Further, excessive government involvement in the management of the securities market may result in unnecessary government intervention in the business world. Government involvement in the business world must be limited to cases of indispensable need.

The second phase of registration is known as the “securities registration system,”<sup>104</sup> which requires the filing of a registration statement with the FSC under the KSEA for the issuance of securities to the public. This step, which is regulated by the FSC and the Ministry of Finance and Economy,<sup>105</sup> is the one that is generally referred to as the corporate disclosure in the securities market when an issuer is going to issue its securities to the public.

## **2. Disclosure Procedures in the Korean Securities Market**

### *(a) Disclosure Obligations under the Korean Securities Laws*

In the history of Korean securities law, there had been little discussion or debate about an issuer’s general duty to disclose any information until the IMF crisis in 1997, whether hard or soft, unlike in the United States. This was due to the brief history of the securities

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102. As of the end of 2002, the total number of listed shares of Korean Stock Exchange was 26,463,384,151 shares, and total stock trading value was 40,590,642,547 million won (\$ 32,841 billion). See Market Statistics of Korea Stock Exchange, 2002

103. See JONG-JUN SONG ET AL., JUNGK WONKULAEBOP-SANG KYUNGYOUNGJA MINSA CHOKIM [CIVIL LIABILITIES OF MANAGER UNDER THE SECURITIES AND EXCHANGE ACT] 203-204 (1999).

104. See ROSEN, *supra* note 97, at 50.

105. The Ministry of Finance and Economy will be referred to as “the MOFE.” The MOFE was the highest supervisor in the Korean securities market before the establishment of the FSC. After that, the FSC took over control and supervisory power of the market, except for the legislative power of the MOFE.

laws and market, which had not allowed enough time for Korean legal academia to consider the disclosure issues. The quick set-up and development of a securities regulation scheme was the first goal for the Korean economy.

Further, due to differences in the U.S. and Korean legal systems regarding case laws, the theoretical development by the courts in the area of duty of disclosure could not have been expected in Korea. In the United States, the case laws established by the courts are an important source of regulation due to the Common Law spirit. However, in Korea, the courts' decisions are usually very conservative. It is also true that Korean case laws have not actively led the development of legal theory, because Korea has adopted a Civil Law system. Although after the IMF crisis there has been much discussion about corporate disclosures in the securities market, no lawsuit has been directly raised regarding duty problems until now.<sup>106</sup> Nevertheless, the legal development in disclosure rules of the United States may be borrowed when dealing with disclosure problems in Korea, because the two securities laws have many rules in common. In addition, because the Korean securities market has reached a state of maturity, it is now time to find and analyze the basis of duties in Korean securities laws: duty to disclose, duty to correct and duty to update, especially in soft information area. Discussion about those duties may lead issuers to provide more accurate information and timely disclosure so that investors can make investment decisions based on reliable information.<sup>107</sup>

Under the current KSEA, when an issuer makes a public offering of new or outstanding securities, it must file a registration statement

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106. Recently, some courts have started to deal with the problem of civil liability in connection with insider trading regulation. This late development in securities regulation by the courts is not a product of litigation culture. It is a result, rather, of a close relation between the legal apparatus and the economy since the beginning of the modern Korean economy and securities market.

107. This is also related to Regulation FD, which Korea securities market has introduced it since November 2002.

with the FSC pursuant to the Securities and Exchange Act Section 8 and file a prospectus under the KSEA Section 12 .<sup>108</sup> If an issuer determines a period in which it is to issue securities pursuant to the Ordinance of the Ministry of Finance and Economy, files a shelf registration statement with the FSC, and the statement is accepted by the FSC, the issuer may be exempt from filing a separate registration statement on other public offerings during that period.<sup>109</sup>

However, Section 13 of the KSEA does not require an issuer to provide a prospectus to purchasers of a security, unless it is requested to do so by them. Without a request from purchasers, the issuer does not owe any duty directly to them. In other words, if there is no request from purchasers, the filing of disclosure documents with the FSC satisfies an issuer's disclosure duty under the KSEA. Thus, under current KSEA disclosure guidelines, there is no basis for establishing a duty to disclose corporate information at initial public offering, because disclosures under Sections 8 and 12 are certain filing duties of disclosure documents to a securities regulatory authority. Filing disclosure documents with the FSC does not mean that issuers give corporate information to investors for well-informed investment decision. Filing such documents alone is insufficient to provide the chance for investors to make well-informed investment decisions.

By contrast, Section 5(b)(2) of the Securities Act of the United States prohibits sale or delivery of a security, unless accompanied or preceded by a prospectus. Issuers are supposed to disclose corporate information at initial public offering as well as in the securities marketplace, because when purchasers of a security suffer loss due to false statements or omissions of material information contained in a registration statement and prospectus, issuers may be liable for the

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108. Although a prospectus is an important source of providing well-informed investment decisions to investors at initial public offering, under the KSEA regulation, the prospectus is not mandatorily provided to purchasers unless purchasers request that the issuer do so.

109. See the KSEA Section 8 and .

losses of other potential plaintiffs. Buyers and sellers should be “adequately informed of material information affecting the value of the securities traded,”<sup>110</sup> although “federal securities laws have not required issuers of securities to disclose material information concerning their business on a current basis.”<sup>111</sup>

On the other hand, under the current KSEA, listed corporations and non-listed companies<sup>112</sup> have the duty to notify or disclose, as prescribed by Presidential Decree, the Financial Supervisory Commission and Korea Stock Exchange, the fact or the contents of resolutions made at meetings of the board of directors with respect to certain facts pursuant to Section 186 .<sup>113</sup> Those facts listed in Section 186 are referred to as ongoing disclosure or timely disclosure in Korea.

However, the items listed under Section 186 refer to kinds of

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111. See *Staffin v Greenberg*, 672 F.2d 1196, 1204 (3rd Cir. 1982); *Schlanger v. Four-Phase Sys. Inc.*, 582 F. Supp. 128, 133 (S.D.N.Y. 1984); *Greenfield v. Heublein, Inc.*, 575 F. Supp. 1325, 1336 (E.D. Pa. 1983).

112. Non-listed companies here means companies that register with the KSDA. See *supra* text accompanying notes 94 & 98.

113. The certain facts that Section 186 states are the following: 1. When any bill or check is dishonored, or when transactions with banks are suspended or prohibited; 2. When the operation of business is suspended in part or in whole; 3. When it applies for reorganization of corporation or commences actual reorganization under the provisions of relevant laws; 4. When it changes its business objective; 5. When it faces a lawsuit that may have great influence upon listed securities; 7. When any one of the events referred to in Sections 374, 522, 527-2, 527-3 and 530-2 of the Commercial Code occurs; 8. When legal causes for dissolution take place; 9. When there is a resolution of the board of directors on the increase or decrease of capital; 10. When the operation is suspended or is unable to continue due to special causes; 11. when a correspondent bank commences management of the corporation; 12. When there is a resolution of the board of directors, or a decision of the chief executive officer or other person who is prescribed by the Presidential Decree, on the acquisition and disposal or the treasury shares; and 13. When a fact having an important effect on the operation and assets of the corporation prescribed by Presidential Decree occurs, other than those referred to in Paragraphs 1 through 12 of Section 186.

hard facts that relate to events which have already taken place. They are not forward-looking information like the lists of Section 8 . The nature of facts under Section 8 is soft information,<sup>114</sup> but the nature of facts under Section 186 is not, because Section 8 may apply *mutatis mutandis* to disclosure of hard facts pursuant to Section 186 .<sup>115</sup> Items listed under Section 186 are timely disclosure items that may occur while doing business in the secondary market, and are not general descriptions of an issuer's business in the initial going-public or periodic reporting contexts.

To the contrary, listed corporations or companies registered with the KSDA<sup>116</sup> have to file with the FSC annual, semi-annual, and quarterly reports under the periodic reporting requirements of the KSEA.<sup>117</sup> Investors in the context of periodic reporting may make better-informed investment decisions than in the initial public offering context. Although no general duty to directly issue periodic reporting materials to investors in the secondary market, however, this is not a big deal because investors in the secondary market usually got enough more corporate information to make good investment decisions than

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114. The KSEA Section 8 defined soft information as “information on the predictions or prospects for the issuer’s future financial status or results of operation.”<sup>114</sup> Section 8 describes the criteria of soft information: (1) information on the issuer’s results of operation such as size in sales and revenues, or other predictions or prospects for results of operation; (2) information on the predictions or prospects for the issuer’s financial status such as the size in capital stock and funds flows; (3) information on the issuer’s results of operation or changes in financial status, and targeted levels at a certain point due to the occurrence of a particular event or the establishment of a particular plan; and (4) other information on the predictions or prospects for the issuer’s future as determined by the Presidential Decree.

115. See the KSEA Section 186 .

116. These companies refer to “Association-registered” companies. See *supra* text accompanying notes 94 & 98.

117. The KSEA Sections 186-2 and 186-3. These reports, which are required under the KSEA, are different from the annual report, which is furnished for shareholders, pursuant to the KCC Section 447-2.

in the primary market. Even if issuers has no general duty to disclose by filing disclosure documents with the FSC, they are still required to disclose correct corporate information to avoid civil liabilities pursuant to Section 14 , which imposes civil liabilities for misstatements or omissions in a registration statement and prospectus, because it applies *mutatis mutandis* to periodic reporting materials.

The KSEA prescribes a duty to disclose certain timely disclosure issues.<sup>118</sup> However, for registration statement,<sup>119</sup> prospectus,<sup>120</sup> and periodic reporting requirements,<sup>121</sup> there is no general duty to disclose clause in the KSEA, unlike the timely disclosure clause under Section 186(1). Nevertheless, it is not difficult to impose civil liabilities for misstatements or omissions in the registration statement, prospectus, and periodic reporting documents, because Section 14 of the KSEA prescribes civil liabilities for misstatements or omissions in those disclosure documents.<sup>122</sup> To avoid civil liabilities under Section 14, issuers must correct those disclosure documents. We would assume that it is important to impose a duty to disclose clause for the registration statement, prospectus and periodic reporting documents. However, this is not required because those disclosures are supposed to be made in certain forms of documents. By contrast, timely disclosure does not have certain forms like a registration statement, prospectus and periodic reporting documents. When certain facts happen, issuers have a duty to disclose them under Section 186 . The existence of certain forms of disclosure is not sufficient to establish issuer's duty to disclose or update. Therefore, it is hard to say whether there is a duty to disclose or update in cases of initial public offering and periodic reporting circumstances. However, in timely disclosure

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118. See the KSEA Section 186.

119. See the KSEA Section 8.

120. See the KSEA Section 12.

121. See the KSEA Sections 186-2 and 186-3.

122. The KSEA prescribes civil liabilities regarding initial public offering in Section 14 and this provision applies *mutatis mutandis* to the annual reports and semi-annual reports pursuant to Section 186-5.

contexts, an issuer has a duty to disclose material non-public information because Section 14 of the KSEA requires disclosure of those facts described in that Section.

An issuer has a duty to file “a revised statement” under the KSEA Section 11. A person who has filed a registration statement may file a revised statement, if any change of information contained in the registration statement occurs before the day of subscription as determined by the statement commences.<sup>123</sup> If the FSC decides that information contained in the registration statement is incomplete in its form or inadequate in its disclosure of any material information, it may issue an amendment order to the issuer with reasons.<sup>124</sup> When an amendment order is issued, the registration statement filed with the FSC is considered incomplete.<sup>125</sup> However, this section does not deal with the duty to disclose or correct material events that occurred after disclosure and may affect the market price of a security. It merely prescribes the FSC’s power of delivering a correction order for incomplete filing with the FSC. Further, this provision does not refer to any authority of the FSC to investigate disclosure documents.<sup>126</sup>

However, the KSE or the KSDA may request that a listed corporation or a company registered with the KSDA clarify rumors or news that has caused unusual changes in market trading volume or price with the securities concerned.<sup>127</sup> This is referred to as “disclosure

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123. In this case, if important information as determined by the Ordinance of the MOFE is changed, the revised statement shall be filed. See Section 11 of the KSEA.

124. See the KSEA Section 11 .

125. See the KSEA Section 11 .

126. See the KSEA Section 8. This point would be important because issuers have a duty to file disclosure documents under Section 8 and the FSC must make them available to the public for inspection. If the FSC has a duty to investigate and false statements have been provided to the public, to whom can investors appeal to claim their loss? Nevertheless, in Korea, this point is futile to discuss because Korea’s legal system does not admit a lawsuit for duty performance of an administrative body in administrative suits.

127. See the KSEA Section 186 .

upon inquiry.” When those companies fail to disclose requested information, the KSE or the KSDA shall inform the FSC so that it may take action pursuant to Section 193.<sup>128</sup>

*(b) Disclosure in the Primary Market*

There are two means of corporate disclosure for listed corporations in the securities markets under the KSEA: disclosures in the primary market and the secondary market. A registration statement and prospectus are the principal sources of disclosure in the primary market in Korea.<sup>129</sup> A company intending to issue its securities to the public through the Korea Stock Exchange<sup>130</sup> and on the over-the-counter Korean market<sup>131</sup> is required to register with the FSC.<sup>132</sup> A company that lists its securities on the KSE is called a “listed corporation.” To be listed on the KSE, an issuer must follow regulations on listing established by the KSE. Any company intending to make a public offering of new or outstanding securities worth more than 2 billion won<sup>133</sup> must file a registration statement and a

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128. See the KSEA Section 193 states: “If a listed corporation or company registered with the [KSDA] violates this Act, orders or regulations thereunder, or orders of the Financial Supervisory Commission, the Financial Supervisory Commission may recommend the general meeting of stockholders of such corporation to discharge the officers concerned, or may take such measures prescribed by the Presidential Decree as restriction of securities issuance for a certain period.”

129. See the KSEA Sections 8 and 12.

130. The Korea Stock Exchange will be referred to as “the KSE,” which is a corporation consisting of members. It is designed to establish a securities market to pursue the fair and stable formation of securities price and securities transaction. See the KSEA Section 71 .

131. See *supra* note 98.

132. See the KSEA Section 3.

133. See the KSEA Section 8 and the KSEA Enforcement Rule 2. The currency exchange of 2 billion won in U.S. dollar is currently about \$1,666,666.

Section 8 of KSEA states: where the total value of a public offering of new or outstanding securities, which is calculated as prescribed by the Ordinance of the Ministry of Finance and Economy, is not less than the amount prescribed by the Ordinance of the Ministry of Finance and Economy, the public offering of such

prospectus with the FSC.

In general, a prospectus contains more information than a registration statement does. The information to be stated in a registration statement or documents accompanied therewith shall be determined by the Presidential Decree of the KSEA, and those documents must be filed with the FSC.<sup>134</sup> A registration statement contains a wide range of indispensable information about the company wishing to make a public offering, including a description of the public offering, the use of proceeds, the opinion of the securities company that made a contract with the issuer, an outline of the company, a description of business and financial condition, information on directors and officers, a description of liquid assets and properties of the issuer.<sup>135</sup> An issuer of securities specified in a registration statement then in effect shall file with the FSC an “after-report” on the results of public offering of new or outstanding securities under the conditions determined by the FSC.<sup>136</sup> The registration statement and the after-report shall be kept in the FSC and the FSC must make it available for public inspection for two years.<sup>137</sup>

A company that is going to make a public offering pursuant to Section 8 of the KSEA must also prepare a prospectus, under the

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securities may not be made unless the issuer files a registration statement on such securities with the Financial Supervisory Commission and the registration statement is accepted by the Financial Supervisory Commission: provided, That if the issuer determines a period in which he is to issue securities pursuant to the Ordinance of the Ministry of Finance and Economy, and files en bloc a registration statement of securities to be offered publicly during the period (hereinafter referred to as a “shelf registration statement”) with the Financial Supervisory Commission, and the shelf registration statement is accepted by the Financial Supervisory Commission, he shall not be required to file separately the registration statement on securities to be offered publicly in such period.

134. See the KSEA Section 8 and the KSEA Presidential Decree Sections 5-4~5-8.

135. Id

136. See the KSEA Section 17. Before the Amendment by Act No.5982, 1999. 5.24., this was supposed to be determined by the Ordinance of the MOFE.

137. See the KSEA Section 18 and the Presidential Decree Section 8.

conditions determined by Presidential Decree of the KSEA, which must be filed with the FSC.<sup>138</sup> The FSC must also make it available for public inspection at the designated places by the Ordinance of the MOFE<sup>139</sup> from the filing date of the prospectus until the filing date of the after-report. The prospectus shall include the following: effective data of the registration statement, offering price, subscription period, a copy of the registration statement and a place of public inspection, and market stabilization information that must be consistent with the content of the company's registration statement filed previously with the FSC.<sup>140</sup>

*(c) Disclosure in the Secondary Market*

The secondary market disclosure system consists of periodic reports and continuing disclosure of material information. The former is composed of the annual report, semi-annual and quarterly reports; and the latter contains disclosure of information on the future-oriented situation of corporations.

What is especially noteworthy is that a stock-listed corporation is required to file a quarterly report from January 1, 2000 due to the amendment of the January 13, 1997 Act No. 5254. As a matter of fact, before the enactment requiring the filing of a quarterly report, the disclosure system of Korea was not sufficient to provide current accurate corporate information to investors.<sup>141</sup> Furthermore, the Korean securities market has enacted an important work that prescribes filing of "conglomerate combined financial statements."<sup>142</sup>

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138. See the KSEA Section 12 and the Presidential Decree Sections 6, 7, 7-2, & 7-3. Before the Amendment by Act No.5982, 1999. 5.24., this was also supposed to be determined by the Ordinance of the MOFE.

139. Id.

140. See the KSEA Section 12 .

141. I talked about imperfect disclosure system of Korea in my LL.M. Thesis. See supra note 21, at 83-86. Recently, many changes have been made in the corporate disclosure system in Korea. Therefore, this paper treats contemporary regulations, which means that regulations discussed in this paper might be changed in the future.

142. See the KSEA Section 186-2(5).

It would press the Chaebol to reform their concentrated ownerships and financial practices.

A listed corporation or a company registered with the KSDA<sup>143</sup> shall submit “an annual business report” to the FSC and the KSE or the KSDA within 90 days after the lapse of each business year.<sup>144</sup> The corporation must also file with those above-mentioned regulatory institutions “a semi-annual business report” for six months from the beginning of a business year within 45 days after the lapse of the period, and “a quarterly business report” for three months and nine months from the beginning of a business year within 45 days after the lapse of the period.<sup>145</sup> Until the end of 1999, all listed corporations in the Korea Stock Exchange filed their annual reports and semi-annual reports. However, with the need of a quarterly report from the public market, on February 1, 1999, Section 186-3 was established in the KSEA.<sup>146</sup> Moreover, the scope of companies that have to file periodic reports has expanded to include companies registered with the KSDA.<sup>147</sup> These reports must contain information such as a general outline of the corporation, the nature of its business, matters relating to its financial condition, and an auditor’s opinion made by a certified independent accountant. Submission of the periodic reports and timely disclosure by listed corporations enable investors to make informed investment decisions and help the FSC and the KSE to maintain a fair and orderly market. The FSC is required to make these business reports available for public inspection for two years.<sup>148</sup>

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143. A company registered with the KSDA refers to “Association-registered company.”

See supra text accompanying notes 94 & 98.

144. See the KSEA Section 186-2 and the KSEA Presidential Decree Sections 83-2 & 83-3.

145. See the KSEA Section 186-3 and the KSEA Presidential Decree Sections 83-2 & 83-3. Section 186-3 has newly been established and started to enforce from January 1, 2000.

146. Act No. 5736 of February 1, 1999. See also the KSEA Section 186-3 and the KSEA Presidential Decree Sections 83-2 & 83-3

147. See also supra text accompanying notes 94 & 98.

148. See the KSEA Sections 186-5, 18, and the Presidential Decree Section 8.

The KSEA contains a special provision called the disclosure of combined financial statements. Its purpose is to disclose relationships between affiliated companies in Chaebol for protection of public investors. When a corporation that has to submit an annual report under Section 186-2 is a company affiliated with a conglomerate that has to prepare “conglomerate combined financial statements”<sup>149</sup> pursuant to Section 1-3 of the Act on External Audit of Stock Companies,<sup>150</sup> it must submit conglomerate combined financial statements as prescribed by subparagraph 3 of Section 1-2 of the External Audit Act to the FSC and the KSE or the KSDA within six months from the end of a business year.<sup>151</sup> If two or more legally independent companies are substantially unified into a single financial body, the controlling company must file such consolidated statements, combining the financial statements of their subsidiaries. The purpose of this regulation is to disclose relationships between several affiliated companies, which exist usually in the Chaebol and thus provide advantages to each other in doing business. The regulation may provide investors with more accurate financial information on the companies in which they are going to invest. Before the enactment of the regulation, the Chaebol could expand their business with an amount of money that would not be enough for regular operation; this was one of the main reasons for the economic and financial crisis in Korea during the past several years. Therefore, this regulation should be welcomed in the Korean securities market.

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149. See the KSEA Section 186-2 . The term “conglomerate combined financial statements” means conglomerate combined balance sheets, conglomerate combined income statements or other documents as determined by the Presidential Decree, which a conglomerate referred to in subparagraph 2 of Section 2 of the Monopoly Regulation and Fair Trade Act prepares by combining financial statements of its subsidiary companies (The Act on External Audit of Stock Companies Section 1-2).

150. Almost all companies under this regulation fall into the category of the Chaebol. The Act on External Audit of Stock Companies will be referred to as the “External Audit Act.”

151. See the KSEA Section 186-2 .

As corporate management activities cause growing concerns, material information on the present and the future of a company is more important to investors than information about the past. Forward-looking information on the predictions or prospects for the issuer's future financial status or results of operation, which fall into certain categories,<sup>152</sup> may be included or indicated in the registration statement and three major business reports.<sup>153</sup> When an issuer chooses to include predictions or prospects in the registration statements and in those reports, it may incur liabilities for false statements as prescribed in the KSEA.<sup>154</sup>

The KSEA has special disclosure issues: acquisition of treasury stocks,<sup>155</sup> merger of stock-unlisted company,<sup>156</sup> report of mass holding over 5/100,<sup>157</sup> report of any officer or major shareholders' holding of stock certificate-listed corporation,<sup>158</sup> restriction on ownership of

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152. See the KSEA Section 8 states the following categories: 1. Information on the issuer's results of operation such as size in sales and revenues, or other predictions or prospects for results of operation; 2. Information on the predictions or prospects for the issuer's financial status such as the size in capital stock and funds flows; 3. Information on the issuer's results of operation or changes in financial status, and targeted levels at a certain point due to the occurrence of a particular event or the establishment of a particular plan; 4. And other information on the predictions or prospects for the issuer's future as determined by the Presidential Decree.

153. See the KSEA Sections 8 and 186-5.

154. See the KSEA Section 14.

155. Under the KSEA Section 189-2, a stock-listed corporation or an Association-registered company shall report the acquisition or disposal of their treasury stocks to the FSC. Association means the "KSDA," which refers to the Korea Securities Dealers Association that is in charge of over-the-counter market in Korea. See *supra* text accompanying notes 94 & 98.

156. Under the KSEA Section 190-2, a stock-listed corporation or an Association-registered company shall report their intentions to merge with other corporations to the FSC.

157. Under the KSEA Section 200-2, any person who holds voting stocks of a stock-listed corporation or Association-registered company in large quantities, i.e., 5/100 shall report his holdings to the FSC and the KSE within 5 days of from holdings.

stocks issued by public corporation,<sup>159</sup> filing of tender offer statement to the FSC.<sup>160</sup> These special disclosures directly concern the public market because they may effect market prices due to potential change of stock ownership.

### **3. Disclosure of Forward-looking Information**

Until Feb.1, 1999, the KSEA did not contain any provision about soft information. The KSEA Section 8 defined soft information as “information on the predictions or prospects for the issuer’s future financial status or results of operation.”<sup>161</sup> Section 8 describes the criteria of soft information: (1) information on the issuer’s results of operation such as size in sales and revenues, or other predictions or prospects for results of operation; (2) information on the predictions or prospects for the issuer’s financial status such as the size in capital stock and funds flows; (3) information on the issuer’s results of operation or changes in financial status, and targeted levels at a certain point due to the occurrence of a particular event or the establishment of a particular plan; and (4) other information on the predictions or prospects for the issuer’s future as determined by the Presidential Decree.

Section 8 , referring to forward-looking information, shall apply

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158. The KSEA Section 188 states: Any officer or major shareholders of a stock-listed or Association-registered company shall report holding situations of such stocks of the corporation concerned, held by him for his own account regardless of the title to the KSE and the Securities Futures Commission or the Association.

159. Under the KSEA Section 200-2 , there are some restrictions on stock ownership of public corporation prescribed under the KSEA Enforcement Rule. “Public corporation” means a corporation that is managing the national key industry. See Section 199 of the KSEA and the KSEA Presidential Decree 85-2.

160. The KSEA Section 21-2 states: A person who intends to make tender offer shall file with the FSC a statement which contains purpose of tender offer, details of funds for purchase, conditions such as period, price and settlement day of purchase, and other matters as prescribed by the KSEA Enforcement Rule.

161. This Section is newly inserted into the KSEA by Act No. 5736, Feb.1, 1999.

mutatis mutandis to the above-mentioned cases as the annual<sup>162</sup> and semi-annual reports<sup>163</sup> under Section 186-5. Therefore, forward-looking information may be included in periodic reports as well as in a registration statement and prospectus.<sup>164</sup> However, the KSEA does not contain a duty to correct or update forward-looking information in connection with any specific circumstances, unlike the judicially established duty to correct or update in the United States.

In conclusion, the KSEA has tried to put more disclosure duties on issuers, but the work has yet to be completed. There has, historically, been no discussion, by either the courts or legal academia, on issuers' duty to correct or update regarding material information in disclosure documents of corporations. However, consideration of those duties is necessary for investor protection.

To keep step with disclosure in initial public offering under Section 8 and periodic reporting under Section 186-5, it is necessary to prescribe duty to correct, or update, rather than duty to disclose, material corporate information and forward-looking information pursuant to Section 14, because Korea has a civil law system and thus codifying a certain duty may support putting liabilities on potential defendants. In addition, it would improve investor protection when investors suffer loss from securities transactions due to false statements or omissions of material information in corporate disclosure documents. Further, the items listed under Section 186, which must be hard facts, should not be the basis of forward-looking information because those facts are already available to the market through other sources.<sup>165</sup> Even if the issuer fails to disclose that information, it may not be the basis of determining liability for

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162. See the KSEA Section 186-2.

163. See the KSEA Section 186-3.

164. See the KSEA Sections 8 and 186-5.

165. See *In re World of Wonders Sec. Litig.*, 35 F.3d 1407, 1417 (9th Cir. 1994); *Hanon v. Data products Corp.*, 976 F.2d 497, 505 (9th Cir. 1992); *In re Convergent Tech. Sec. Litig.*, 948 F.2d 507, 513 (9th Cir. 1991); *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1115 (9th Cir. 1989).

nondisclosure of forward-looking information.

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