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Executive Trade Secrets

Tom C. W. Lin

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ARTICLES

EXECUTIVE TRADE SECRETS

*Tom C.W. Lin**

The law discriminates among a corporation's secrets. In the eyes of the law, commercial secrets of corporations are legitimate secrets that deserve legal protection and nondisclosure, but personal secrets of executives are not as deserving of legal protection and nondisclosure. This divergent treatment of secrets has resulted in a legal landscape of perplexing, paradoxical paths for corporations and executives concerning executive disclosures—a precarious landscape that has left corporations and investors dangerously susceptible to revelations of private facts that shock market valuation and institutional stability.

This Article explores this divergent treatment of secrets in the context of public corporations and the private individuals who manage them, and offers a new way of thinking about corporate and personal secrets. This Article conceives the concept of Executive Trade Secrets as a pragmatic theoretical framework for unlocking this paradox of secrets and addressing the challenges surrounding executive disclosures. This Article is the first to use trade secrets law to address the interdisciplinary legal issues surrounding executive disclosures. It re-conceptualizes private matters of executives as legally protectable trade secrets by unfolding the hidden symmetry between commercial secrets and personal secrets. It reveals Executive Trade Secrets as faithful to the first principles of the laws of trade secrets, privacy, securities, and corporations, and explains how such fidelity protects the privacy interests of executives and the corporate interests of shareholders. This Article, ultimately, constructs a way to think anew about executive disclosures and the larger issues at the modern nexus of secrecy, privacy, and commerce.

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* Assistant Professor of Law, University of Florida Levin College of Law. Special thanks to Anita Allen, Stephen Bainbridge, Erwin Chemerinsky, Stuart Cohn, Lisa Fairfax, Joan Heminway, Roberta Karmel, Claire Kelly, F. Scott Kieff, Kim Lane Scheppele, Adam Pritchard, Elizabeth Rowe, Michael Seigel, and participants at the Junior Faculty Business and Financial Law Workshop at George Washington University's Center for Law, Economics & Finance for helpful comments and exchanges; Univer-

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INTRODUCTION

Secrets pose vexing problems for law and society.¹ The WikiLeaks scandal that unfolded in 2010 illustrates the difficulties concerning secrets in the Information Age.² Free societies and free markets generally require openness and transparency.³ But individu-

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1 See generally KIM LANE SCHEPPELE, *LEGAL SECRETS* (1988) (surveying challenging issues for law and society that arise from secrets); David E. Pozen, *Deep Secrecy*, 62 *STAN. L. REV.* 257, 275–93 (2010) (discussing the social problems of secrecy relating to utilitarianism, liberalism, and constitutionalism).

2 See Barton Gellman, *Julian Assange*, *TIME*, Dec. 27, 2010, at 64 (“The currency of information, scattered to the four corners of the globe, is roiling not only U.S. foreign relations but also the alliances and internal politics of other nations.”); Scott Shane & Andrew W. Lehren, *Leaked Cables Offer Raw Look at U.S. Diplomacy*, *N.Y. TIMES*, Nov. 29, 2010, at A1 (reporting on the consequences of the online publication of a “cache of a quarter-million confidential American diplomatic cables”).

3 See, e.g., *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (“[Secrecy] is abhorrent to free men, because it provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play

als, states, and firms that inhabit and participate in those free societies and free markets often desire intimacy and secrecy.⁴ To satisfy these divergent goals, the law discriminates among secrets—aiding some to hide in the dark,⁵ while pushing others into the light.⁶

In the context of public corporations, the law facilitates hiding business secrets but helps expose the secrets of business executives.⁷ In the eyes of the law, commercial or trade secrets are legitimate

the role of informer undetected and uncorrected.”); COMM’N ON PROTECTING & REDUCING GOV’T SECRECY, S. DOC. NO. 105-2, at xxi (1997) (acknowledging society’s need for information, suggesting a reduction of secrecy, and noting the benefits of such actions); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 888–89 (2006) (“A fundamental attribute of democracy, a norm of human rights, [and] a tool to promote political and economic prosperity . . . transparency appears to provide such a remarkable array of benefits” (footnotes omitted)).

4 See, e.g., JEFFREY ROSEN, *THE UNWANTED GAZE* 10–23 (2000) (describing the essential nature of privacy for individuals and societies); SCHEPPELE, *supra* note 1, at 301–20 (documenting and theorizing on the legal and social interests of secrets for various stakeholders); THE FEDERALIST NO. 64, at 393 (John Jay) (Clinton Rossiter ed., 1999) (expounding on the importance of secrecy in diplomatic affairs); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) (“[N]ow the right to life has come to mean . . . the right to be let alone . . .”).

5 See, e.g., *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (holding that the law safeguards commercial secrets from corporate espionage); *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting) (“The right to be let alone is indeed the beginning of all freedom.”); *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 539 (1902) (explaining how the law protects a person’s right “to pass through this world” without his personal affairs being published); Potter Stewart, “*Or of the Press*”, 26 HASTINGS L.J. 631, 636 (1975) (“There is no constitutional right to have access to particular government information, or to require openness from the bureaucracy. . . . The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act.”).

6 See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1979) (“Without publicity, all other checks are insufficient: in comparison to publicity, all other checks are of small account.” (quoting JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (London, Hunt, & Clarke 1827))); *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) (upholding campaign finance disclosure requirements that exposed “large contributions and expenditures to the light of publicity”); *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (holding that the law encourages the press to “bare the secrets of the government and inform the people”); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 ADMIN. L. REV. 131, 170–76 (2006) (providing various examples of how courts restrain secrecy).

7 The term, “executive,” hereinafter, refers to senior managers of publicly-traded firms or firms contemplating a public offering. Such persons are identified by Rule 16a-1(f) under the Exchange Act as an “officer” of the company. See Exchange Act, Rule 16a-1(f), 17 C.F.R. § 240.16a-1 (2010) (defining terms relevant to Section 16 of the Exchange Act).

secrets that deserve legal protection and nondisclosure⁸ while personal secrets concerning private facts of executives are not as deserving of legal protection and nondisclosure. This discriminatory treatment of secrets has resulted in a muddled legal landscape of paradoxical paths concerning executive disclosures of private information—diminishing privacy protections for executives, weakening legal safeguards for investors, and leaving corporations and investors dangerously susceptible to revelations of private facts that shock market valuation and institutional stability.

Two prominent episodes involving Apple, one of the most secretive companies in the world,⁹ and its reclusive former chief executive, Steve Jobs, illustrate this dangerous discriminatory treatment of secrets:

The Mysterious Illness. In the summer of 2008, Steve Jobs's sickly appearance at a trade show sent Apple shares moving.¹⁰ Apple shareholders and the marketplace began wondering whether Mr. Jobs's pancreatic cancer, for which he was treated in 2004, had returned.¹¹ Apple refused to comment on his health condition, stating that it was a "private matter."¹² For months, the company's shares fluctuated under the uncertainty cast by Mr. Jobs's health and rumors surrounding it. At various times, Mr. Jobs was reported to have suffered a heart attack¹³ or died.¹⁴ Finally, in January of 2009, Mr. Jobs told the world in a letter that he was suffering from a "hormonal imbalance" with a "relatively simple and straightforward" remedy and that he would "continue as Apple's CEO during [his] recovery."¹⁵ About a week later, Apple announced that he was taking leave from the company

8 For an overview of U.S. trade secrets law, see *infra* Part III.

9 See Miguel Helft & Nick Bilton, *For Apple, Lost iPhone Is a Big Deal*, N.Y. TIMES, Apr. 20, 2010, at B1 ("The company [Apple] is known as the most secretive in Silicon Valley, and leaks are rare."); Brad Stone & Ashlee Vance, *Apple Obsessed with Secrecy on Product and Top Executives*, N.Y. TIMES, June 23, 2009, at B1 ("Few companies . . . are more secretive than Apple.").

10 See *Jobs's Job*, ECONOMIST, Aug. 2, 2008, at 68 (discussing the effect of Jobs's health on Apple's financial outlook); Justin Scheck & Ben Charny, *Worries Over Jobs's Health Weighs on the Stock*, WALL ST. J., July 23, 2008, at B2.

11 See *Jobs's Job*, *supra* note 10, at 68; Scheck & Charny, *supra* note 10, at B2.

12 See *Jobs's Job*, *supra* note 10, at 68; Scheck & Charny, *supra* note 10, at B2.

13 See Seth Liss, *Social Media Allows Public to Shape the News*, SUN-SENTINEL (Ft. Lauderdale), Aug. 16, 2009, at 1F (noting that Apple's stock price dropped upon false rumors that Steve Jobs had suffered a heart attack).

14 See Matthew Moore, *Steve Jobs's Obituary Published by Bloomberg*, DAILY TELEGRAPH (Aug. 28, 2010), <http://www.telegraph.co.uk/news/newstopping/howaboutthat/2638481/Steve-Jobs-obituary-published-by-Bloomberg.html>.

15 Steve Jobs, *Letter from Apple CEO Steve Jobs*, APPLE.COM (Jan. 5, 2009), <http://www.apple.com/pr/library/2009/01/05sjletter.html>.

due to health reasons.¹⁶ Following this unexpected announcement many in the legal and corporate community suggested that Mr. Jobs and Apple may have violated federal securities law and state corporate law by not timely disclosing his private health condition to investors, given his importance to the company.¹⁷ Amidst the outcry, the Securities and Exchange Commission (SEC) commenced an investigation shortly thereafter.¹⁸

As a coda, in January 2011, Mr. Jobs once again took medical leave from Apple under similarly mysterious circumstances without any meaningful disclosure from Apple or Mr. Jobs to the public.¹⁹ Apple shares again dropped precipitously upon the announcement of his leave.²⁰ In August 2011, in a short letter,²¹ Mr. Jobs resigned as chief executive of Apple.²² Shortly after the announcement, Apple shares dropped 5% during after-hours trading.²³ Mr. Jobs would pass away a few weeks later in early October 2011 at the age of fifty-six.²⁴

The Misplaced iPhone. In the spring of 2010, an Apple engineer misplaced a top secret prototype iPhone at a bar. The phone was subsequently found and sold to the consumer electronic weblog, Gizmodo.com, which examined it “as if it were an alien from another planet” and posted numerous images and commentary of the device for Apple-obsessed consumers and competitors.²⁵ Apple then

16 Yukari Iwatani Kane, *Apple's Jobs Takes Medical Leave*, WALL ST. J., Jan. 15, 2009, at A1.

17 See, e.g., *id.* at A2 (“Medical and corporate-governance experts earlier this month had challenged Mr. Jobs’s disclosure about a hormone imbalance as too general and had criticized Apple for not providing fuller background on the state of the CEO’s health.”).

18 See David Scheer & Connie Guglielmo, *Apple Disclosures About Jobs Said to Face SEC Review (Update 4)*, BLOOMBERG NEWS (Jan. 21, 2009), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aDL78iMCdOzk>.

19 Miguel Helft, *Jobs Takes Sick Leave at Apple Again; Stirs Questions*, N.Y. TIMES, Jan. 18, 2011, at A1.

20 Bloomberg News, *Euro Slips Against Dollar, and Futures Lose Ground*, N.Y. TIMES, Jan. 18, 2011, at B7 (“United States stock futures declined abroad after Apple said that its chief executive, Steve Jobs, was taking a medical leave of absence.”).

21 Steve Jobs, *Letter from Steve Jobs*, APPLE.COM (Aug. 24, 2011), <http://www.apple.com/pr/library/2011/08/24Letter-from-Steve-Jobs.html>.

22 David Streitfeld, *Jobs Steps Down at Apple, Saying He Cannot Meet Duties*, N.Y. TIMES, Aug. 25, 2011, at A1.

23 *Id.*

24 See John Markoff, *Apple's Visionary Redefined Digital Age*, N.Y. TIMES, Oct. 6, 2011, at A1.

25 See Helft & Bilton, *supra* note 9, at B1 (describing the alleged iPhone and the events preceding the finding of the phone).

reported the phone stolen.²⁶ The blogger in possession of the phone subsequently returned it after Mr. Jobs and Apple's general counsel contacted him.²⁷ Following the phone's return, a special task force of armed police officers and investigators broke down the front door of the home of Gizmodo's editor and confiscated several personal items in connection with the misplaced phone.²⁸ The iPhone 4—the ultimate iteration of the misplaced prototype—was launched in the summer of 2010 and became the most successful product launch for Apple.²⁹ In just three days, over 1.7 million units were sold.³⁰ While some questioned Apple's heavy-handed tactics,³¹ few legal commentators disputed that Apple had a right to protect the secrets of its iPhone prototype.³²

In sum, these two episodes, the *Mysterious Illness* and the *Misplaced iPhone*, highlight the contrasting legal treatments and perceptions of business secrets and the secrets of business people. While Mr. Jobs's refusal to reveal his private medical secrets incited an SEC investigation, Apple's aggressive (and armed) defense of its product secrets garnered understanding. The law must better address this divergent treatment of secrets as private lives of executives continue to attract more public attention.

26 See Connie Guglielmo & Joel Rosenblatt, *Apple's Jobs Asked Gizmodo to Return 'Stolen' iPhone (Update 1)*, BLOOMBERG NEWS (Mar. 14, 2010), <http://www.bloomberg.com/news/2010-05-14/apple-s-jobs-asked-gizmodo-to-return-stolen-iphone-court-documents-show.html> (discussing Gizmodo's refusal to return the phone until Apple claimed ownership of it).

27 See Brian Lam, *A Letter: Apple Wants Its Secret iPhone Back*, GIZMODO.COM (Apr. 19, 2010, 11:50 PM), <http://gizmodo.com/5520479/a-letter-apple-wants-its-secret-iphone-back> (displaying Apple's letter to Gizmodo requesting the return of its phone).

28 See *Lost iPhone Investigation (UPDATED): Gizmodo Editor Jason Chen's Home Searched and Computers Seized*, HUFFINGTON POST (Apr. 29, 2010), http://www.huffingtonpost.com/2010/04/26/jason-chen-gizmodo-editor_n_552572.html#s85104 (chronicling a first-hand account of the police's unique and aggressive search and seizure of the blogger's property).

29 See *iPhone 4 Sales Top 1.7 Million*, APPLE.COM (June 28, 2010), <http://www.apple.com/pr/library/2010/06/28iphone.html> (“‘This is the most successful product launch in Apple's history,’ said Steve Jobs . . .”).

30 See *id.* (describing the instant success of the iPhone 4).

31 See Kim Zetter, *Expert: Invalid Warrant Used in Raid on iPhone Reporter's Home*, WIRED (Apr. 26, 2010, 4:57 PM), <http://www.wired.com/threatlevel/2010/04/i-phone-raid/> (discussing the invalidity of the warrant to search the blogger's home because of federal laws prohibiting the seizure of certain materials from journalists).

32 See Guglielmo & Rosenblatt, *supra* note 26 (noting that Apple's sales may be harmed by the publication of details of the phone and its features).

This Article explores this divergent and paradoxical treatment of secrets, in the context of public firms and the private individuals who manage them, and introduces the concept of *Executive Trade Secrets* as a pragmatic theoretical framework for executives, investors, and regulators to address and to think anew about executive disclosures of private facts. This Article is the first to use trade secrets law to address the difficult interdisciplinary legal issues surrounding executive disclosures.³³ This Article aims to reveal that the secrets of the *Mysterious Illness* are much like the secrets of the *Misplaced iPhone*, that some personal secrets of executives are like the commercial secrets of the businesses they manage. Both are worthy of legal protection and nondisclosure. Executive Trade Secrets, as conceived here, will change conventional understandings of executive disclosures,³⁴ strengthen privacy protections for executives, and further the corporate interests of shareholders. Ultimately, it will offer a new way to think about executive disclosures and the larger issues at the modern nexus of privacy, secrecy, and commerce.

It should be noted upfront that this Article does not intend to create a heroic construct to shield all private information of executives from public disclosure, nor does it intend to elevate the privacy rights of executives. Instead, this Article inquires into the legal para-

33 The author and others have previously documented this problem concerning disclosures of material, private facts pursuant to securities law. See, e.g., Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 Hous. L. Rev. 1545, 1581–96 (2010) (discussing the obligations and constraints on disclosure of private information under federal securities laws); Jayne W. Barnard, *Sovereign Prerogatives*, 21 J. Corp. L. 307, 327–28 (1996) (reviewing CONNIE BRUCK, *MASTER OF THE GAME* (1994)) (proposing a protocol for disclosing a CEO's medical problems); Joan MacLeod Heminway, *Martha's (and Steve's) Good Faith: An Officer's Duty of Loyalty at the Intersection of Good Faith and Candor*, 11 TRANSACTIONS: TENN. J. BUS. L. 111, 118 (2009) (discussing whether a corporate officer's duty of good faith extends to public disclosures of private matters); Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 749–52 (2007) (recommending disclosure reforms relating to personal facts of executives); Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When Is a Corporation Obligated to Disclose that Illness and Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?*, 5 N.Y.U. J.L. & Bus. 827 (2009); Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383 (2009) (offering a model approach for disclosing material, private matters); Peter O'Shea, Comment, *Loyalty and Care Personified: Martha Stewart's Duty to Martha Stewart Living Omnimedia, Inc.*, 78 U. CIN. L. REV. 1129, 1150–55 (2010) (arguing that the duty of loyalty has expanded into the personal lives of corporate officers).

34 The term, "executive disclosure," hereinafter refers to the disclosure of potentially material, private matters pursuant to corporate and securities law, unless otherwise indicated.

dox between business secrets and secrets of business people, and it reveals the hidden symmetry of both types of secrets and key implications uncovered by this revelation.

This Article proceeds with this revelation in five parts. Part I starts with an exposition of the laws of corporate secret-telling. It begins by documenting the disclosure requirements of firms and executives under federal securities law.³⁵ It then explicates on the rise of executives and the fall of their privacy.³⁶

Part II exposes how the secrets of executives are shielded from the public and shown to the public. It commences with an exploration of the legal tensions arising out of executive disclosures by traversing the main fault lines at the nexus of securities law, corporate law, and privacy law.³⁷ It then examines the inconsistent executive disclosure practices of firms, as a symptom of these tensions and the lack of a workable legal framework.³⁸

Part III begins laying the foundation for creating a pragmatic theoretical framework for resolving the paradox of secrets between commercial secrets and executive secrets. It does so by surveying the smoother terrain of trade secrets law, describing how trade secrets law protects the secrets of businesses, and highlighting the importance of trade secrets to commerce.³⁹

Building on the foundation of existing trade secrets law, Part IV introduces the concept of Executive Trade Secrets as the key to unlocking the paradox of secrets and addressing problematic issues of executive disclosures.⁴⁰ It re-conceptualizes certain private matters of executives as legally protectable trade secrets by revealing the hidden symmetry between the commercial secrets of businesses and the personal secrets of executives. Part IV also studies how Executive Trade Secrets is faithful to the first principles of the laws of trade secrets, privacy, securities, and corporations. It proceeds to reveal how such fidelity creates a pragmatic, interdisciplinary legal framework for executives, investors, and regulators to think anew about executive disclosure. To explicate further on the concept of Executive Trade Secrets, Part IV closes with an examination of the inlegant—but instructive—political analogue of executive privilege.⁴¹

35 See *infra* Part I.A–B.

36 See *infra* Part I.C.

37 See *infra* Part II.A–C.

38 See *infra* Part II.D.

39 See *infra* Part III.

40 See *infra* Part IV.

41 See *infra* Part IV.D.

Part V explores three key implications arising out of the concept of Executive Trade Secrets.⁴² First, it addresses whether such a conception creates a benign shield to protect or a malignant shield to hide.⁴³ Second, Part V suggests that executive disclosure operating within the Executive Trade Secrets framework can lead to better executive pools and more public firms.⁴⁴ Third, it discusses how such a conception of personal secrets as trade secrets coincides with and resides within the modern trend of privacy commoditization.⁴⁵

Finally, this Article closes with a brief conclusion.

I. PUBLIC FIRMS AND PRIVATE MANAGERS

The public corporation is one of the greatest inventions of mankind—an engine for the energy and ingenuity of entrepreneurs, a vehicle for incredible wealth-creation and innovation.⁴⁶ In America, in exchange for access to public funds, firms relinquish certain secrets of their affairs to the world.⁴⁷ Those secrets include information about the firms themselves and the individuals who serve as their executives. This information comes into the light through a regulatory framework established by securities regulation and corporate law.

A. *The Disclosure Obligations of Public Firms*

The federal securities regulatory framework was built on the principle of public disclosure.⁴⁸ The Securities Act of 1933⁴⁹ (the Securi-

42 See *infra* Part V.

43 See *infra* Part V.A.

44 See *infra* Part V.B.

45 See *infra* Part V.C.

46 See, e.g., 1 WILLIAM MEADE FLETCHER, *CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 21 (1917) (“[T]he limited liability corporation is the greatest single discovery of modern times” (quoting Nicholas Murray Butler, President, Columbia Univ., Address at the 143rd Annual Banquet of the Chamber of Commerce of the State of New York (Nov. 16, 1911))); JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY* xv (2003) (“[The corporation is] the basis of the prosperity of the West and the best hope for the future of the rest of the world.”).

47 *In re Franchard Corp.*, 42 S.E.C. 163, 174 (1964) (“An insider of a corporation that is asking the public for funds must, in return, relinquish various areas of privacy.”).

48 See Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa (2006)). The purpose of the Securities Act of 1933 is “to provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof, and for other purposes.” *SEC v. Searchlight Consol. Mining & Milling Co.*, 112 F. Supp. 726 (D. Nev. 1953). See also *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186

ties Act) and the Securities Exchange Act of 1934⁵⁰ (the Exchange Act) serve as the legal bases of that framework. Firms that choose to make public offerings of securities in the U.S. capital markets must comply with the disclosure requirements of the Securities Act and the Exchange Act.⁵¹ Despite the recent financial crisis,⁵² the U.S. capital markets remain one of the largest pools of capital for firms.⁵³ Absent proper compliance, the SEC can restrict a firm's access to the U.S. capital markets.⁵⁴ Absent access to such funding, firms would have to incur significant costs in raising capital for future investments, talent retention, and ongoing operations.⁵⁵ Therefore, many businesses aspire to become public firms and, thus, comply with the disclosure requirements of both the Securities Act and the Exchange Act.⁵⁶

(1963) (stating that federal securities regulation "substitute[s] a philosophy of full disclosure for the philosophy of *caveat emptor*").

49 15 U.S.C. § 77 (originally enacted as Act of May 27, 1933, ch. 38, § 1, 48 Stat. 74).

50 *Id.* § 78 (originally enacted as Act of June 6, 1934, ch. 404, § 1, 48 Stat. 881).

51 *See supra* notes 49–50.

52 *See* FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT (2011) (studying the recent financial crisis); Tom C.W. Lin, *Too Big to Fail, Too Blind to See*, 80 *Miss. L.J.* 355, 355–67 (2010) (reviewing ANDREW ROSS SORKIN, *TOO BIG TO FAIL* (2009)) (summarizing key episodes of the recent financial crisis).

53 *See, e.g.*, MCKINSEY GLOBAL INST., GLOBAL CAPITAL MARKETS 9 (2009) (graphing the value of U.S. capital markets at the end of 2008), available at http://www.mckinsey.com/mgi/reports/pdfs/gcm-sixth-annual-report/gcm_sixth_annual_report_full_report.pdf.

54 *See* 15 U.S.C. § 781(k); *see also* Whispering Oaks Int'l, Inc., d/b/a BioCurex, Inc., Trading Suspension, Exchange Act Release No. 34-49546 (Apr. 8, 2005), available at <http://www.sec.gov/litigation/suspensions/34-49546.htm> (announcing the temporary suspension of trading of the securities of Whispering Oaks International, Inc., d/b/a BioCurex, Inc.).

55 During the recent financial crisis, many firms like the three largest domestic automakers—Ford, General Motors, and Chrysler—became paralyzed by the lack of liquidity in the credit and commercial paper markets. As access to such public capital became more expensive and difficult to obtain, many firms faced the prospects of temporary shutdowns and bankruptcies. *See, e.g.*, STEVEN RATTNER, *OVERHAUL* 1–32, 100–15 (2010) (chronicling the dire straits of domestic automakers as a result of the financial crisis); Jim Henry, *Credit Freeze Plunges Detroit 3 into Cash Crisis*, *FIN. WEEK*, Sept. 29, 2008, ¶ 20, available at <http://www.financialweek.com/article/20080929/REG/809299985/-1/FWDailyAlert01> (“[S]ome analysts wonder whether the domestic automakers can hang on until then [2010] without running out of cash.”).

56 *See, e.g.*, JASON DRAHO, *THE IPO DECISION* 2–5 (2004) (noting the large number of initial public offerings in the United States and abroad over the last four decades); Jason Zweig, *The Demise of the IPO—and Ideas on How to Revive It*, *WALL ST. J.* (June 25, 2010), <http://online.wsj.com/article/SB10001424052748704569204575328784069347058.html> (stating that there were more than 6000 publicly-traded companies in 2009 despite a significant decline over the previous decade); *see also* Eric L.

The Securities Act requires the registration of any offering or sale of securities using the “means or instruments of transportation or communication in interstate commerce.”⁵⁷ The Securities Act, through the registration process and its antifraud provisions,⁵⁸ attempts to ensure that investors receive accurate information about firms and the securities being offered to the public. The Securities Act mandates compliance with rules concerning certain line-item disclosures⁵⁹ and narrative disclosures.⁶⁰ For example, when Google decided to take itself public, it was required to disclose in its registration statement its contractual obligations, pursuant to the mandatory line-item disclosure requirements,⁶¹ and its significant risks, pursuant to the narrative disclosure requirements.⁶²

To complement the Securities Act, which governs the issuance of securities, the Exchange Act governs the subsequent trading of those securities.⁶³ The Exchange Act, through its broad antifraud provision in Section 10⁶⁴ and its periodic reporting requirements,⁶⁵ attempts to ensure that investors in secondary markets for securities receive accurate information about such securities and their underlying firms.

As a result of both the Securities Act and the Exchange Act, firms are required to make timely disclosures and periodically update them for the “proper protection of the investors and to insure fair dealing in the security.”⁶⁶ These timely disclosures occur at minimum on a quarterly basis⁶⁷ and consist of information such as a firm’s financial data,⁶⁸ its material legal proceedings,⁶⁹ and the professional back-

Talley, *Cataclysmic Liability Risk Among Big Four Auditors*, 106 COLUM. L. REV. 1641, 1694 n.167 (2006) (noting that there are “well over 10,000” publicly traded firms).

57 15 U.S.C. § 77e(a)(1).

58 *See id.* §§ 77k, 77q, 77l.

59 *See id.* § 77aa (setting forth the various line-item disclosures that are required for inclusion in the disclosure statement).

60 *See* 17 C.F.R. § 229 (2010) (setting forth the required narrative disclosures).

61 Google Inc., Registration Statement Under the Securities Act of 1933 (Amendment No. 9 to Form S-1) (Aug. 18, 2004) at 66, *available at* news.findlaw.com/hdocs/docs/google/ipo/dsl.pdf.

62 *Id.*

63 *See* 15 U.S.C. §§ 78a–mm.

64 *See* 17 C.F.R. § 240.10b-5 (outlining SEC Rule 10b-5).

65 *See* 15 U.S.C. § 78m(a)(1) (requiring companies to “keep reasonably current the information and documents required to be included in or filed with an application or registration statement”).

66 *Id.* § 78m.

67 17 C.F.R. §§ 240.13a-13, 240.15d-13.

68 *Id.* § 229.301.

69 *Id.* § 229.103.

ground of its key executives.⁷⁰ Because of the expansion and diversification of the investor base, the SEC generally has favored more disclosure as a means to protect less sophisticated investors.⁷¹

B. Disclosure Obligations Relating to Executives

In connection with their disclosure obligations, firms are required to disclose certain private information related to their executives in public filings to the SEC. Regulation S-K, specifically Items 401 through 404, provides instruction and guidance on such executive disclosures.⁷²

First, Item 401 requires firms to disclose the identity, age, and the preceding five years of business background of their executives.⁷³ Additionally, firms are mandated to disclose family relationships between or amongst the executives and other officers of the firm,⁷⁴ and legal proceedings involving an executive during the preceding ten years "that are material to an evaluation of the [executive's] ability or integrity."⁷⁵ These legal proceedings include sensitive matters like personal bankruptcy filings and criminal proceedings, which are directly related to the firm.⁷⁶ Second, Item 402 requires firms to disclose and discuss their compensation to their executives.⁷⁷ This includes monetary and nonmonetary compensation.⁷⁸ Third, Item 403 requires firms to disclose the ownership of securities by their executives in the firm.⁷⁹ For example, Berkshire Hathaway is required to disclose the number of company shares owned by its chief executive officer, Warren Buffett. Finally, Item 404 requires firms to disclose transactions between the firm and its executives that exceed \$120,000.⁸⁰

In addition to the disclosure requirements articulated by Regulation S-K, the antifraud and gap-filling provisions under the Securities

⁷⁰ *Id.* § 229.401(e)(1).

⁷¹ *See, e.g.*, *SEC v. Ralston Purina Co.*, 346 U.S. 119, 124–27 (1953) (holding that the purpose of federal securities legislation is to protect unsophisticated investors "by promoting full disclosure of information thought necessary to informed investment decisions").

⁷² 17 C.F.R. § 229.401–404.

⁷³ *Id.* §§ 229.401(a), 229.401(e).

⁷⁴ *Id.* § 229.401(d).

⁷⁵ *Id.* § 229.401(f).

⁷⁶ *Id.*

⁷⁷ *Id.* § 229.402.

⁷⁸ *Id.*

⁷⁹ *Id.* § 229.403.

⁸⁰ *Id.* § 229.404.

Act and the Exchange Act also mandate disclosures relating to executives. For example, Rule 408 of Regulation C under the Securities Act mandates that “[i]n addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.”⁸¹ This gap-filling rule is intended to capture disclosures that are not specifically delineated by Regulation S-K.

Similarly, Rule 10b-5 under the Exchange Act makes it unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact . . . in connection with the purchase or sale of any security.”⁸² The antifraud provisions, especially Rule 10b-5, compel additional executive disclosures because courts have vastly expanded Rule 10b-5’s scope, and plaintiffs’ lawyers have greatly increased their utilization of it as a basis for securities litigation.⁸³

C. *The Rise of Executives/The Fall of Executive Privacy*

In the decades since the creation of the SEC, the influence of firms on economic life has grown exponentially,⁸⁴ and so too, has the influence of the executives who manage them.⁸⁵ The rise of executives during this period has been fueled, in part, by two macroeconomic trends: (1) an expansion and diversification of investors⁸⁶ and (2) advances in information technology.⁸⁷ The confluence

81 *Id.* § 230.408(a).

82 *Id.* § 240.10b-5.

83 *See, e.g.,* SEC v. Zandford, 535 U.S. 813, 818–35 (2002) (noting that Section 10b should be construed flexibly); Julie A. Herzog, *Fraud Created the Market: An Unwise and Unwarranted Extension of Section 10(b) and Rule 10b-5*, 63 GEO. WASH. L. REV. 359, 367–70 (1995) (discussing the breadth in application of Rule 10b-5); William K.S. Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217, 1217–71 (1981) (explicating on the increase of Rule 10b-5 actions).

84 *See* STEPHEN M. BAINBRIDGE, *CORPORATION LAW AND ECONOMICS* 1–2 (2002) (stating that corporate firms are the dominant form of business organizations and account for an overwhelming majority of all economic revenue).

85 *See, e.g.,* Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 987–95 (2010) (alluding to the enormous influence of CEOs and predicting a decline in their influence); Tom C.W. Lin, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 354–57 (2011) (discussing the wide spheres of influence of prominent corporate executives).

86 *See, e.g.,* Abril & Olazábal, *supra* note 33, at 1551 (citing “higher investment by average folk” as a cause of celebrity CEOs); Lin, *supra* note 33, at 389–92 (discussing the expansion and diversification of the investor base in America).

of these two macroeconomic trends has resulted in an appreciation of executives in the socioeconomic hierarchy and a depreciation of their individual privacy.

Over the last few decades, the number of institutions and individuals investing directly or indirectly in the stock market has grown exponentially.⁸⁸ In the 1920s, approximately twenty million individual investors existed.⁸⁹ Today, more than half of all U.S. households are invested in the stock market in one form or another.⁹⁰ This expansion of investors coincided with a diversification of investors. A greater number of less wealthy and less financially-sophisticated individuals became investors.⁹¹

These individual investors, and some institutional investors, often viewed executives as doppelgangers of their firms.⁹² The executive

87 See, e.g., Abril & Olazábal, *supra* note 33, at 1552–53 (explicating on the proliferation of business news); Lin, *supra* note 33, at 392 (explicating on the growth of business media); Press Release No. 2008-158, U.S. Sec. & Exch. Comm’n, SEC Provides Guidance to Open Up Use of Corporate Web Sites for Disclosures to Investors (July 30, 2008) [hereinafter Press Release, SEC], available at <http://www.sec.gov/news/press/2008/2008-158.htm> (“Ongoing developments in technology have increased both the markets’ and investors’ demand for more timely company disclosure on the Web” (quoting SEC Chairman Christopher Cox)).

88 See JOINT ECON. COMM., THE ROOTS OF BROADENED STOCK OWNERSHIP I (2000), available at <http://www.house.gov/jec/tax/stock/stock.htm> (“Recent data released by the Federal Reserve shows that nearly half of all U.S. households are stockholders.”); Arthur B. Kennickell et al., *Recent Changes in U.S. Family Finances: Results from the 1998 Survey of Consumer Finances*, 86 FED. RES. BULL. 1, 1–29 (2000); John Sabelhaus et al., *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet in 2011*, 19 INVESTMENT CO. INST. 1 (2011) (showing that an estimated 45.3% of U.S. households owned mutual funds in 2011 compared to 5.7% in 1980).

89 See *The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC & EXCHANGE COMM’N, <http://sec.gov/about/whatwedo.shtml> (last updated Oct. 24, 2011) (“During the 1920s, approximately 20 million large and small shareholders took advantage of post-war prosperity and set out to make their fortunes in the stock market.”).

90 See JOINT ECON. COMM., *supra* note 88, at 1 (“Recent data released by the Federal Reserve shows that nearly half of all U.S. households are stockholders.”).

91 See, e.g., Abril & Olazábal, *supra* note 33, at 1551 (discussing “higher levels of investment by average folk” in the stock market in recent years); David Barboza, *Why Big Firms are Courting Day Traders*, N.Y. TIMES, Aug. 13, 1999, at C1 (reporting on the large number of individual investors who trade online).

92 See, e.g., Lin, *supra* note 33, at 393–94 (“It would be hard for one to imagine Martha Stewart Living Omnimedia without Martha Stewart, Apple without Steve Jobs, Starbucks without Howard Schultz, or Berkshire Hathaway without Warren Buffett. Consequentially, it would be hard—rightly or wrongly—for one to imagine the continued success of these companies without their founders or CEOs.” (citations omitted)); Joe Nocera, *Apple’s Culture of Secrecy*, N.Y. TIMES, July 26, 2008, at C1 (discussing the indispensable nature of Steve Jobs in the eyes of Apple investors).

became a primary factor, if not *the* primary factor, in an investor's investment calculus.⁹³ Many modern executives, especially chief executive officers, are perceived not as temporary stewards of business enterprises, but as saviors of industry, alter-egos of firms, and celebrities of society.⁹⁴

Many CEOs, in particular, became their respective firm's most valuable asset in the eyes of investors and their boards of directors.⁹⁵ This exalted view is evidenced, in part, by an unparalleled increase in executive compensation over the last few decades.⁹⁶ For just the eight-year period between 1992 and 2000 alone, "the average real (inflation-adjusted) pay of chief executive officers (CEOs) of S&P 500 firms more than quadrupled, climbing from \$3.5 million to \$14.7 million."⁹⁷ After a slight decline during the height of the financial crisis in 2008 and 2009, executive compensation bounced back in 2010.⁹⁸

93 See GIDEON HAIGH, *FAT CATS* 98 (2005) ("A . . . survey found that 95 percent of respondents were influenced in stock selection by the CEO's profile and reputation."); Eduardo Porter, *How Superstars' Pay Stifles Everyone Else*, N.Y. TIMES, Dec. 26, 2010, at B4 ("As corporations have increased in size, management decisions at the top have become that much more important, measured in terms of profits or losses.").

94 See RAKESH KHURANA, *SEARCHING FOR A CORPORATE SAVIOR* 51–81 (2002) (documenting the rise of the "charismatic CEO"); JEFFREY SONNENFELD, *THE HERO'S FAREWELL* 5–10 (1988) (explicating the view of corporate executives as "mythical heroes"); Adam Lashinsky, *The Decade of Steve*, FORTUNE, Nov. 23, 2009, at 93 (calling Steve Jobs of Apple "the rare businessman with legitimate worldwide celebrity"). *Contra* Harris Collingwood, *Do CEOs Matter*, ATLANTIC, June 2009, at 54–59 (questioning the value of large company CEOs).

95 See, e.g., Heminway, *supra* note 33, at 120 ("The press builds these executives up and, when provoked, tears them down, in each case reinforcing public notions (accurate and inaccurate) that shareholder value is tied to the executives' every move." (footnote omitted)); Lashinsky, *supra* note 94, at 93 (noting the unique value of Steve Jobs to Apple). *But see* Stanley Lieberman & James F. O'Connor, *Leadership and Organizational Performance: A Study of Large Corporations*, 37 AM. SOC. REV. 117 (1972) (theorizing that the CEOs are not as valuable to their firms as may be believed by investors).

96 See, e.g., HAIGH, *supra* note 93, at 11 ("CEO compensation in the U.S. surged . . . another 535 percent in the 1990s."); Porter, *supra* note 93, at B4 ("A study of pay in the 1970s found that executives in the top ten percent made about twice as much as those in the middle of the pack. By the early 2000s, the top suits made more than four times the pay of the executives in the middle."); Raghuram G. Rajan & Julie Wulf, *Are Perks Purely Managerial Excess?*, 79 J. FIN. ECON. 1 (2006) (noting the rise of executive perks).

97 LUCIAN A. BEBCHUK & JESSE M. FRIED, *PAY WITHOUT PERFORMANCE* 1 (2004).

98 Daniel Costello, *The Drought Is Over (at Least for C.E.O.'s)*, N.Y. TIMES, Apr. 10, 2011, at BU1.

“The median pay for top executives at 200 major companies was \$9.6 million [in 2010],” which was “a twelve percent increase over 2009.”⁹⁹

The elevated pedestal of the modern executive coupled with a larger and more diverse investor base resulted in greater demand for information about executives. This greater demand was met by a marketplace more than willing to satisfy it with advances in information technology.¹⁰⁰ Today, countless sources exist for business information spanning all types of media, from radio to television to websites to blogs to tweets to smartphone applications that are dedicated primarily to gathering business information—which encompasses everything from financial data to personal tidbits about executives.¹⁰¹

The confluence of a high demand for executive information and advances in information technology that sought to satisfy that demand has diminished the privacy of executives.¹⁰² This is evidenced, in part, by intimate revelations about prominent executives over the last decade. In 2000, the business press reported on Warren Buffett’s surgery to remove benign polyps from his colon.¹⁰³ In 2001, the world was made privy to a personal investment of Martha Stewart, the ubiquitous CEO of her namesake firm.¹⁰⁴ In 2004 and 2005, the media reported on the health conditions of two successive CEOs of McDonald’s, both of whom passed away for health reasons (unrelated to the company’s products, as the company noted).¹⁰⁵ In 2007, a spotlight was shone

99 *Id.*

100 See HAIGH, *supra* note 93, at 97 (“New business media, like CNNfn, CNBC, and Bloomberg Television, seemed to be willing the market higher on behalf of the eager new investment generation.”); Press Release, SEC, *supra* note 87 (“Ongoing developments in technology have increased both the markets’ and investors’ demand for more timely company disclosure on the Web, and in turn, raised new securities law issues for public companies to consider.” (quoting SEC Chairman Christopher Cox)).

101 Abril & Olazábal, *supra* note 33, at 1552–53 (discussing the proliferation of media dedicated to business information).

102 See Heminway, *supra* note 33, at 120 (“With our current information-overloaded society, the corporate and personal lives of founding and otherwise iconic executives—like Martha Stewart and Steve Jobs—are far more public.”).

103 See *Jobs’s Job*, *supra* note 10, at 68.

104 See *United States v. Stewart*, 305 F. Supp. 2d 368, 370 (S.D.N.Y. 2004) (“The criminal charges against Stewart . . . arose from Stewart’s December 27, 2001 sale of 3,928 shares of stock in ImClone Systems, Inc . . .”).

105 See, e.g., Margaret Webb Pressler, *McDonald’s CEO Dies at 60*, WASH. POST, Apr. 20, 2004, at E1 (covering the death of McDonald’s CEO, James Cantalupo, due to a heart attack from stress, as suggested by the company); Leslie Wayne & Eric Dash, *Citing Cancer, Chief Resigns at McDonald’s*, N.Y. TIMES, Nov. 23, 2004, at C1 (reporting on the resignation of Charles H. Bell as “chief executive . . . to devote all of his time and energy to his courageous battle against cancer” (quoting McDonald’s Chairman Andrew J. McKenna)).

on the sex life of British Petroleum's then CEO, Lord John Browne, who was forced to resign after a British tabloid publicized his secret affair with a male companion.¹⁰⁶ That same year the media also uncovered the online habits of Whole Foods CEO, John Mackey, who thrashed competitors in chat rooms using an alias.¹⁰⁷ In 2008, the media delved into the drug use and sexual peccadilloes of former Broadcom CEO, Henry Nicholas, who had an affinity for prostitutes, drugs, and secret lairs.¹⁰⁸ During the recent financial crisis, the golf scores and outings of one Wall Street executive were made public.¹⁰⁹ During the British Petroleum oil crisis in 2010,¹¹⁰ its then CEO, Tony Hayward, was reported to be fraternizing with a woman, who was not his wife;¹¹¹ and Hewlett Packard's former CEO, Mark Hurd, was ousted from his position and investigated for actions stemming from a

106 See Alex MacDonald et al., *BP's CEO to Resign Immediately Amid Revelations of Private Life*, WALL ST. J., May 1, 2007, available at <http://tech.groups.yahoo.com/group/safepipelines/message/10107> ("The storied tenure of John Browne, the CEO who turned BP PLC into one of the world's most-valuable oil companies, came to an unceremonious end today, after a British court allowed a U.K. newspaper group to publish a set of articles about the executive's long relationship with a young man.").

107 See David Kesmodel, *Whole Foods Sets Probe As CEO Apologizes*, WALL ST. J., July 18, 2007, at A3 ("Whole Foods Chairman and Chief Executive John Mackey apologizes for 'error in judgment' in posting anonymous messages to Internet stock forums lauding Whole Foods and disparaging rival Wild Oats Markets for roughly eight years.").

108 See Bethany McLean, *Dr. Nicholas and Mr. Hyde: Sex, Lies, and Underground Lairs*, VANITY FAIR, Nov. 2008, at 216 (investigating "allegations about Nicholas's out-of-control world: the parade of prostitutes, the spiking of clients' drinks with Ecstasy, and the secret lair he built underneath the Orange County mansion he shared with his wife and kids").

109 In 2007, Dealbreaker.com posted the golf outings and scores of then Merrill Lynch CEO, Stanley O'Neal. See Bess Levin, *Stan O'Neal Has Got His Priorities Straight*, DEALBREAKER.COM (Oct. 26, 2007, 2:37 PM), <http://dealbreaker.com/2007/10/stan-oneal-has-got-his-priorities-straight/>.

110 See, e.g., Clifford Krauss, *Oil Spill's Blow to BP's Image May Eclipse Out-of-Pocket Costs*, N.Y. TIMES, Apr. 30, 2010, at B1 ("BP says that the offshore drilling accident that is spewing thousands of barrels of oil a day into the Gulf of Mexico could cost the company several hundred million dollars."); Campbell Robertson & Leslie Kaufman, *Days After Rig Explosion, Well Is Pouring Thousands of Gallons of Oil into Gulf*, N.Y. TIMES, Apr. 26, 2010, at A11 (reporting on the "about 42,000 gallons of oil a day pouring into the Gulf of Mexico" that resulted from the sunken BP oil rig).

111 See Adrian Chen, *Tony Hayward Gets Full-On TMZ Treatment*, GAWKER.COM (July 10, 2010), <http://gawker.com/5583933/tony-hayward-gets-the-full+on-tmz-treatment>; TMZ Staff, *Tony Hayward - Fish and Chicks*, TMZ (July 10, 2010), <http://www.tz.com/2010/07/09/tony-hayward-houston-bar-fish-chips-woman-b-british-petroleum-seafood-photo-picture-receipt/>.

personal relationship with a female independent contractor in 2010.¹¹²

In an age where anyone with a phone can record news and anyone with a computer can “report news” on a global scale,¹¹³ the penumbra of privacy¹¹⁴ has shrunk for all private individuals. This is especially true for prominent figures like executives who are entrusted with the public’s money.¹¹⁵ Some executives simply have accepted their diminished privacy as a price of their positions and the modern media culture. For example, in discussing contemporary privacy norms, Scott McNealy, the former CEO of Sun Microsystems, famously declared, “Privacy is dead. Get over it.”¹¹⁶ Others, like Mr. Jobs, believed that managing a public firm in the modern era does not necessarily mean a wholesale abdication of personal privacy.¹¹⁷ Regardless of the divergent executive views, the modern reality is that while their influence has increased, the privacy of executives has diminished.

112 See Ashlee Vance, *S.E.C. Is Investigating Hurd’s Departure as Chief of H.P.*, N.Y. TIMES, Dec. 21, 2010, at B4 (reporting that Hewlett Packard and its former CEO, Mark Hurd, were being investigated by the SEC for actions relating to an inappropriate personal relationship).

113 See, e.g., THOMAS L. FRIEDMAN, *THE WORLD IS FLAT 3.0*, at 176–79 (2007) (opining on how the Internet has facilitated the global exchange of information at unparalleled velocity and volume); Thomas L. Friedman, Op-Ed., *The Whole World is Watching*, N.Y. TIMES, June 27, 2007, at A23 (“[E]veryone is a reporter and can talk back and be heard globally.”).

114 See *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965) (“[There exists a] penumbra where privacy is protected from governmental intrusion.”).

115 See Friedman, *supra* note 113 (“When everyone has a blog, a MySpace page or Facebook entry, everyone is a publisher. When everyone has a cellphone with a camera in it, everyone is a paparazzo. When everyone can upload video on YouTube, everyone is filmmaker. When everyone is a publisher, paparazzo or filmmaker, everyone else is a public figure. We’re all public figures now.”). The privacy rights of public figures are generally analyzed under the rubric articulated in *New York Times Co. v. Sullivan*. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964); see also *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 163 (1967) (Warren, C.J., concurring) (applying “the New York Times standard” for public officials to public figures).

116 See GLOBAL PRIVACY PROTECTION 78 (James B. Rule & Graham Greenleaf eds., 2008); see also Alex Crippen, *Warren Buffett: Apple Withheld “Material Fact” on Steve Jobs*, CNBC (June 24, 2009), <http://www.cnbc.com/id/31526814> (“If I have any serious illness, or something coming up of an important nature . . . I think the thing to do is just tell . . . the Berkshire shareholders about it. . . . Some people might think I’m important to the company. . . . So it’s a material fact. . . . [S]o I think that’s important to get out. They’re going to find out about it anyway so I don’t see a big privacy issue or anything of the sort.” (quoting Warren Buffett)).

117 See Nocera, *supra* note 92, at C1 (alluding to Steve Jobs’s strong desires to protect his personal privacy).

Part I discussed the laws of corporate secret-telling, namely the disclosure obligations under federal securities laws, and perceptions about executives and their privacy. Next, Part II will examine the legal tensions that arise in disclosing the secrets of executives, and how those tensions lead to inconsistent practices.

II. LEGAL TENSIONS & INCONSISTENT PRACTICES

A long held legal axiom is that “[a]n insider of a corporation that is asking the public for funds must, in return, relinquish various areas of privacy” in his life.¹¹⁸ However, the law has never clearly defined the terms of that bargain. This ambiguity has created tensions between an executive’s desires for privacy and the crosscutting obligations of securities law, corporate law, and privacy law.¹¹⁹ As a result, firms have engaged in inconsistent practices when it comes to the disclosure of material, private matters of executives.

A. *Tensions Under Federal Securities Law*

Legal tensions arise when securities law’s principle of “full disclosure”¹²⁰ clashes with the human desires for secrecy and privacy.¹²¹ Current federal securities law offers no clear guidance on the disclosure of an executive’s material, private matters.¹²² Aside from the

118 *In re Franchard Corp.*, 42 S.E.C. 163, 174 (1964).

119 *See, e.g.*, Heminway, *Personal Facts*, *supra* note 33, at 771 (“Rights to privacy . . . are implicated in and challenged by disclosures compelled under federal securities law.”); Andrew K. Glenn, Note, *Disclosure of Executive Illnesses Under Federal Securities Law and the Americans with Disabilities Act of 1990: Hobson’s Choice or Business Necessity?*, 16 CARDOZO L. REV. 537, 541–44 (1994) (explicating on the contradictions of privacy rights protections under the Americans with Disabilities Act and federal securities law).

120 *See SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (stating that the objective of securities regulation is to “substitute a philosophy of full disclosure for the philosophy of caveat emptor”); *see also* *Aaron v. SEC*, 446 U.S. 680, 705 (1980) (noting that securities legislation should be construed flexibly to effectuate their remedial purposes of protecting investors).

121 *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (“[Privacy is] the most comprehensive of rights and the right most valued by civilized men.”); ROSEN, *supra* note 4, at 11 (“Privacy is necessary for the formation of intimate relationships, allowing us to reveal parts of ourselves to friends, family members, and lovers that we withhold from the rest of the world.”).

122 *See* Barnard, *supra* note 33, at 323 (“The law governing a corporation’s affirmative obligation to disclose an executive’s medical condition is unclear. Federal law does not require companies to make timely disclosure of executive illness.”); Heminway, *Personal Facts*, *supra* note 33, at 774 (“Unfortunately, current federal securities disclosure rules do not apparently recognize the tension they create with privacy rights or provide a concrete basis or process for performing the requisite balancing of

mandated line-item disclosures under Regulation S-K,¹²³ much of the disclosure relating to executives is driven by gap-filling and antifraud rules that require the disclosure of all “material” information.¹²⁴ The Supreme Court initially defined the standard for materiality for securities litigation in the landmark case, *TSC Industries, Inc. v. Northway, Inc.*¹²⁵ The Court held that:

An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the “total mix” of information made available.¹²⁶

Twelve years later, in *Basic, Inc. v. Levinson*,¹²⁷ the Supreme Court expressly adopted this definition for securities litigation under the antifraud provisions of Section 10, particularly Rule 10b-5.¹²⁸

Determinations of materiality usually require “delicate assessments” based on how a fact would affect the “total mix” of information available to investors.¹²⁹ The sensitivity of these delicate assessments is usually ratcheted up when private information concerning executives is the information in question. While voluminous precedents in securities litigation, specifically those under Rule 10b-5,¹³⁰ exist, case law, like the SEC, offers no clear guideposts for materiality of an executive’s private facts.¹³¹

governmental (or public) and individual interests.”); Chris Dolmetsch & Peter Burrows, *Apple May Not Need to Reveal Details of Steve Jobs Medical Leave*, BLOOMBERG BUSINESSWEEK (Jan. 18, 2011, 12:04 AM), <http://www.businessweek.com/news/2011-01-18/apple-may-not-need-to-reveal-details-of-steve-jobs-medical-leave.html> (quoting various legal scholars who noted that securities law in this area is gray and leaves much to be desired).

123 17 C.F.R. § 229.401–404 (2011).

124 See, e.g., *id.* § 240.10b-5.

125 426 U.S. 438, 448 (1976).

126 *Id.* at 449.

127 485 U.S. 224 (1988).

128 *Id.* at 231–32.

129 *TSC Indus., Inc.*, 426 U.S. at 450; see *Basic, Inc.*, 485 U.S. at 231–32.

130 See, e.g., *SEC v. Zandford*, 535 U.S. 813, 819–25 (2002) (noting the growth of securities litigation under Rule 10b-5); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975) (observing how Rule 10b-5 is “a judicial oak which has grown from little more than a legislative acorn”); Herzog, *supra* note 83, at 366–73 (discussing the broad and growing application of Rule 10b-5).

131 Courts, however, have offered some interpretative guidance on materiality, in general, over the years. See, e.g., *Chambers v. AMDOCS Ltd.*, 390 F.3d 542, 548 (8th Cir. 2004) (“Alleged misrepresentations can be immaterial as a matter of law if they . . . are so vague and of such obvious hyperbole that no reasonable investor would rely

Deciding what information to publicly disclose and when to disclose it can be difficult and complicated for firms.¹³² However, even more difficult and complicated is deciding what and when to disclose potentially material, private information of executives.¹³³ Such decisions must be made on a case-by-case basis because no two firms and no two executives are identical.¹³⁴ It involves measurable and immeasurable factors and a great deal of judgment.¹³⁵ Does a CEO's divorce settlement merit disclosure?¹³⁶ What about health issues concerning a CFO?¹³⁷ Is an executive's asymptomatic genetic mutation worthy of disclosure?¹³⁸ How about an executive's home purchases, furnishings,

upon them"); *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 466 (S.D.N.Y. 2000) (holding statements "that are essentially mere 'puffery'" as immaterial); *Recupito v. Prudential Secs., Inc.*, 112 F. Supp. 2d 449, 454 (D. Md. 2000) ("[I]f the alleged misstatements or omissions 'are so obviously unimportant to an investor that reasonable minds cannot differ on the question of materiality, the court may rule them immaterial as a matter of law.'" (quoting *Klein v. Gen. Nutrition Cos.*, 186 F.3d 338, 342 (3d Cir. 1999))).

132 See Heminway, *Personal Facts*, supra note 33, at 761 ("Materiality determinations are open-textured; the wording of the relevant antifraud rules is quite broad and susceptible to multiple interpretations, even with SEC and federal court guidance."); Donald C. Langevoort, *Capping Damages for Open-Market Securities Fraud*, 38 ARIZ. L. REV. 639, 644 (1996) ("Matters of materiality . . . are often difficult to work through confidently" (footnote omitted)).

133 See Heminway, supra note 33, at 117 ("Omissions to state personal facts raise different, thornier issues." (footnote omitted)).

134 See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (recognizing that different firms may make different determinations on questions of business without breaching their duty of care); Lin, supra note 33, at 407 (acknowledging that material executive disclosure require a case-by-case analysis).

135 See John M. Fedders, *Qualitative Materiality: The Birth, Struggles, and Demise of an Unworkable Standard*, 48 CATH. U. L. REV. 41, 45-49 (1998) (discussing the complex judgments involved in securities disclosures); Heminway, *Personal Facts*, supra note 33, at 761 ("Materiality analyses also involve consideration of both quantitative and qualitative factors.").

136 See Liz Benston & Jeff German, *Wynns' Breakup Won't Break Up Company*, LAS VEGAS SUN, Mar. 18, 2009, available at <http://www.lasvegassun.com/news/2009/mar/18/breakup-wont-break-company> ("Steve and Elaine Wynn are ending their marriage, but the business partnership that built Wynn Resorts into a Strip powerhouse is not breaking up."); Katherine Yung, *Dean Foods Keeps Move in the Open: Company Says Its CEO Will Sell Stock to Help in Divorce Settlement*, DALLAS MORNING NEWS, Aug. 28, 2003, at 2D (reporting on the disclosure of Dean Foods Company's CEO to sell his shares in the company to facilitate his divorce settlement).

137 See Peter Elkind & Doris Burke, *The Trouble with Steve Jobs*, FORTUNE, Mar. 17, 2008, at 88 ("[T]here are no specific guidelines governing health issues, and the SEC has never taken action against a company in this area.").

138 See Thomas Goetz, *Sergy's Search*, WIRED, July 2010, at 108 (discussing disclosure by Google's co-president of a genetic mutation that increases his chances for Parkinson's disease).

or renovations?¹³⁹ What about the death of an executive's spouse or child? Are these facts "material" to a reasonable investor? If so, should corporations disclose all these facts?

Absent guidance from the law and regulators, legal tensions in securities law will persist for these difficult questions.

B. *Tensions Under Corporate Law*

An executive's fiduciary duties under corporate law to disclose material, private information can conflict with privacy concerns, thus, creating tensions and complexities regarding the disclosure of such information.¹⁴⁰ It is generally understood that executives owe both their boards and their corporations the duty of care and the duty of loyalty, which encompasses an obligation to consistently act in the best interests of the corporation.¹⁴¹ Therefore, executives' nondisclosure of material, private information to their firms' directors and shareholders can result in legitimate concerns about breaches of their fiduciary duties.¹⁴²

1. Duty of Care

The duty of care under corporate law obligates executives to exercise "that amount of care which ordinarily careful and prudent men

139 See McLean, *supra* note 108 (reporting on the secret lair an executive built underneath his mansion); Crocker H. Liu & David Yermack, *Where are the Shareholders' Mansions? CEOs' Home Purchases, Stock Sales, and Subsequent Company Performance* (Working Paper, 2007), available at <http://ssrn.com/abstract=970413> (measuring and analyzing the effect of home purchases and stock sales by CEOs on the performance of their firms); Daniel Schorn, *Dennis Kozlowski: Prisoner 05A4820*, 60 MINUTES (July 23, 2007), <http://www.cbsnews.com/stories/2007/03/22/60minutes/main2596123.shtml> (reporting on the lavish corporate apartment furnishings of the then-chief executive officer of Tyco International, Dennis Kozlowski).

140 See Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1194 (2003) ("There are many fascinating angles to an inquiry into whether corporate agents have an affirmative duty to disclose information to their superiors, a category that includes—at the very top of the corporate pyramid—the board of directors.").

141 See *Gantler v. Stephens*, 965 A.2d 695, 708–09 (Del. 2009) (holding that executives owe their firms the duties of care and loyalty); MODEL BUS. CORP. ACT ANN. § 8.42(a)(2) (3d ed. Supp. 2005) (stating the obligation of executives to exercise due care); Aaron D. Jones, *Corporate Officer Wrongdoing and the Fiduciary Duties of Corporate Officers Under Delaware Law*, 44 AM. BUS. L.J. 475, 479 (2007) (acknowledging the fiduciary duties of corporate officers under Delaware law).

142 See, e.g., Heminway, *supra* note 33, at 112 (exploring the breaches of fiduciary duties by executives for nondisclosure of personal facts).

would use in similar circumstances.”¹⁴³ Tensions arise in this area concerning executive disclosures because it is often difficult to determine how an “ordinarily careful and prudent” executive would behave in similar circumstances. Compounding the problem is the fact that no clear regulatory guidance and no consensus industry “best practices” exist for such disclosures.

The absence of bright-line rules in this area may be frustrating but also may be necessary, given that each executive and each company is different.¹⁴⁴ Courts historically have recognized the individualized nature of duty of care decisions and, therefore, generally have protected the judgments of directors and executives under the doctrine of the business judgment rule.¹⁴⁵ The business judgment rule can be understood as an abstention doctrine that “establishes a presumption against judicial review of duty of care claims.”¹⁴⁶ As a result,

143 See *Graham v. Allis-Chalmers Mfg. Co.*, 188 A.2d 125, 130 (Del. 1963); see also MODEL BUS. CORP. ACT ANN. § 8.42(a)(2) (3d ed. Supp. 2005) (stating the obligation of executives to exercise due care).

144 See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (recognizing that firms may make different determinations on questions of business without breaching their duty of care); Lin, *supra* note 33, at 407 (acknowledging that executive disclosures require a case-by-case analysis).

145 See, e.g., *Joy v. North*, 692 F.2d 880, 885 (2d Cir. 1982) (“Whatever the terminology, the fact is that liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labelled [sic] the business judgment rule.”); *Shlensky*, 237 N.E.2d at 779 (“In a purely business corporation . . . the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors.” (quoting *Toebelman v. Mo.-Kan. Pipe Line Co.*, 41 F. Supp. 334, 339 (D. Del. 1941))); *Leslie v. Lorillard*, 18 N.E. 363, 365 (N.Y. 1888) (“Mere errors of judgment are not sufficient as grounds for equity interference, for the powers of those intrusted with corporate management are largely discretionary.”); *Kamin v. Am. Express Co.*, 383 N.Y.S.2d 807, 810–11 (N.Y. Sup. Ct. 1976) (“The directors’ room rather than the courtroom is the appropriate forum for thrashing out purely business questions.”).

146 See Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 90 (2004); see also *Shlensky*, 237 N.E.2d at 778 (“[C]ourts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued.” (quoting *Wheeler v. Pullman Iron & Steel Co.*, 32 N.E. 420, 423 (Ill. 1892))); Lyman Johnson, *The Modest Business Judgment Rule*, 55 BUS. LAW. 625, 632 (2000) (understanding “the business judgment rule as a policy of non-review” (emphasis omitted)).

There exists a competing view of the business judgment rule as a standard of liability. See *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 927 (Del. 2003) (holding “[t]he business judgment rule, as a standard of judicial review” (quoting *MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003))); William T. Allen et

many executives may see themselves as the sole and final arbiter of whether to disclose a material, private fact because of the broad shield of the business judgment rule.¹⁴⁷

Despite the presumption against judicial review, a breach of the duty of care is nonetheless possible for faulty executive disclosures because the shield of the business judgment rule is not omnipotent.¹⁴⁸ Business decisions that implicate acts of illegality, fraud, or bad faith do not warrant the protection of the business judgment rule.¹⁴⁹ Additionally, unconsidered inactions arguably are not protected by the business judgment rule.¹⁵⁰ Thus, for example, a CEO and chairwoman of a firm who, because of her personal desires for privacy, fails to disclose to her board and shareholders a serious debilitating cognitive disease that materially affects her daily judgment is likely to have breached her duty of care. Tensions arise in such scenarios because the private facts under consideration are often deeply personal and sensitive, and the business import or materiality of such facts is often subject to legitimate disagreement.¹⁵¹

2. Duty of Loyalty

The duty of loyalty “mandates that the best interest of the corporation and its shareholders take precedence over any interest pos-

al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 Nw. U. L. REV. 449, 449–50 (2002) (discussing the business judgment rule as a standard of liability).

147 See, e.g., Heminway, *Personal Facts*, *supra* note 33, at 765–71 (opining that “the existing disclosure regime places too much discretion in the hands of executive officers”).

148 See, e.g., *Joy*, 692 F.2d at 886 (“Whatever its merit, however, the business judgment rule extends only as far as the reasons which justify its existence.”).

149 See *id.* at 886 (“[The business judgment rule] does not apply in cases, e.g., in which the corporate decision lacks a business purpose, is tainted by a conflict of interest, is so egregious as to amount to a no-win decision, or results from an obvious and prolonged failure to exercise oversight or supervision.” (internal citations omitted)); *Shlensky*, 237 N.E.2d at 778–79 (holding that the business judgment rule does not protect decisions that implicate illegality, fraud, or bad faith).

150 See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 813 (Del. 1984) (“[T]he business judgment rule operates only in the context of director action.”); *In re Caremark Int’l Inc. Deriv. Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (“The second class of cases in which director liability for inattention is theoretically possible entail circumstances in which a loss eventuates not from a decision but, from unconsidered inaction.”).

151 See Heminway, *Personal Facts*, *supra* note 33, at 767–71 (discussing the “highly stressful and emotionally charged” nature of such decisions).

sessed by [an] . . . officer.”¹⁵² The duty of loyalty obligations are usually considered when executives’ actions implicate bad faith or self-dealing.¹⁵³ Tensions arise in this area concerning executive disclosures because the personal privacy interests of executives may run contrary to the best interests of their firms. Further complicating the matter is that, similar to determinations of materiality and due care, no clear standard exists in this area. As the Delaware Supreme Court explained, “The occasions for the determination of honesty, good faith, and loyal conduct are many and varied, and no hard and fast rule can be formulated. The standard of loyalty is measured by no fixed scale.”¹⁵⁴

Matters concerning executive disclosures create an especially complex calculus because the conflicted interests arguably are jointly and severally personal and professional, exposing the executive and the firm to charges ranging from insider trading to corporate waste. Unlike straightforward duty of loyalty cases where executives steal corporate assets for private purposes, executive disclosure cases often blur the line between the personal and the professional. For example, Martha Stewart, the CEO of her namesake firm, was indicted for securities fraud because prosecutors believed that actions relating to her personal sale of shares in ImClone defrauded her own stockholders.¹⁵⁵ And as previously noted, the SEC investigated Steve Jobs and Apple for failing to timely disclose his personal medical condition.¹⁵⁶

152 *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150, 191 (Del. Ch. 2005) (quoting *Cede & Co. v. Technicolor Inc.*, 634 A.2d 345, 361 (Del. 1993)).

153 *See, e.g., United States v. De La Mata*, 266 F.3d 1275, 1293 (11th Cir. 2001) (“[The] duty of loyalty[] obligates officers and directors to avoid fraud, bad faith, usurpation of corporate opportunities, and self-dealing.” (footnote omitted)); *Benihana of Tokyo, Inc.*, 891 A.2d at 169 (considering a duty of loyalty breach relating to alleged conflicted dealings among directors).

154 *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939); *see also Heminway*, *supra* note 33, at 117 (“Delaware law regarding corporate disclosure duties does not contemplate or endorse a cause of action against a director for an omission to state facts, except in the context of a request for a shareholder vote or other action.”).

155 *See United States v. Stewart*, 305 F. Supp. 2d 368, 370 (S.D.N.Y. 2004) (“Count Nine of the Indictment charges that defendant Stewart made materially false statements of fact regarding her sale of ImClone securities with the intention of defrauding and deceiving investors by slowing or stopping the erosion of the value of the securities issued by her own company, Martha Stewart Living Omnimedia.”).

156 *See Scheer & Guglielmo*, *supra* note 18 (noting the pressure from investors for the SEC to investigate Apple’s disclosure of Mr. Jobs’s health problems); Nicolas Thompson, *The SEC Reportedly Investigates Apple’s Candor About Jobs’s Health*, WIRE (Jan. 21, 2009, 12:02 PM), <http://www.wired.com/epicenter/2009/01/the-sec-investi/> (reporting that an investigation was being conducted).

These tensions regarding obligations of loyalty will persist absent some legal guidance and a workable framework.

C. *Tensions Under Privacy Laws*

The crosscutting and, sometimes, contrary objectives of privacy laws, securities regulation, and corporate law give rise to serious tensions concerning executive disclosures of private facts.

Federal securities regulation and state corporate law give limited consideration to privacy concerns. This limited consideration stems, in part, from a belief that firms that ask the public for funds must forego some secrecy and institutional privacy.¹⁵⁷ The natural extension of this belief is that executives who manage public firms must similarly forego some personal privacy.¹⁵⁸

While securities regulation and corporate law offer little privacy protection, a number of major federal and state statutes were designed specifically to protect the privacy rights of individuals.¹⁵⁹ For example, federal legislation exists to protect private matters concerning an individual's financial information,¹⁶⁰ medical records,¹⁶¹ and health status.¹⁶²

Therefore, an executive with a serious illness like Steve Jobs may be required to disclose his ailment to his board and shareholders under securities and corporate law but be protected by privacy laws

157 See, e.g., *In re Franchard Corp.*, 42 S.E.C. 163, 174 (1964); see also David S. Levine, *Secrecy and Unaccountability: Trade Secrets in Our Public Infrastructure*, 59 FLA. L. REV. 135, 135 (2007) (arguing that firms that receive public dollars for public infrastructure project should disclose trade secrets for transparency and accountability purposes).

158 See, e.g., *In re Franchard Corp.*, 42 S.E.C. at 174 ("An insider of a corporation that is asking the public for funds must, in return, relinquish various areas of privacy with respect to his financial affairs which impinge significantly upon the affairs of the company.").

159 See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a (2006); Fair Credit Reporting Act, 15 U.S.C. § 1601 (2006); Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501-6506; Electronic Communications Privacy Act, 18 U.S.C. §§ 2510-2520, 2701 (2006); Video Privacy Protection Act, 18 U.S.C. § 2710; Drivers' Privacy Protection Act of 1994, 18 U.S.C. § 2721.

160 See Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as 15 U.S.C. §§ 6801-6809) (safeguarding privacy rights in consumer finance).

161 See Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified as amended in scattered sections of 18, 26, 29, and 42 U.S.C.) (protecting privacy rights relating to medical information).

162 See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006)) (protecting health information of individuals from employers).

safeguarding medical information.¹⁶³ The firm's mere inquiry as to such personal matters may run afoul of certain privacy laws. For example, the American with Disabilities Act of 1990 (ADA) prohibits firms from obtaining medical information about their employees unless it is "shown to be job-related and consistent with business necessity."¹⁶⁴ Additionally, the ADA prohibits the sharing and public disclosure of any such health information that a firm gains from its employees.¹⁶⁵ Similar legal conflicts and crosscutting obligations exist with other private matters of executives that may warrant public disclosure.¹⁶⁶

Absent legal guidance, executive disclosure will reside uncomfortably in the uneasy intersection of securities law, corporate law, and privacy law.

D. *Inconsistent Practices*

The myriad of crosscutting legal obligations, the absence of clear legal guidance, and the lack of a pragmatic theoretical framework have resulted in inconsistent disclosure practices that frustrate boards, executives, and shareholders. To date, the SEC has never punished any firm for failing to disclose private information about an executive's health condition regardless of its materiality.¹⁶⁷ While the SEC most recently investigated Apple's nondisclosures concerning Mr. Jobs's health condition, it still has not issued any formal guidance for firms.¹⁶⁸

The resulting effect is that firms and executives act in an arbitrary manner concerning executive disclosures. When former Time Warner CEO, Steve Ross, was battling prostate cancer, he and his firm intentionally released arguably misleading information virtually until

163 See Glenn, *supra* note 119, at 537–43 (discussing the conflicts between securities law and the Americans with Disabilities Act); see also Americans with Disabilities Act of 1990.

164 42 U.S.C. § 12112(d)(4)(A).

165 *Id.* § 12112(d)(3)(B)–(C).

166 Depending on the subject matter of the private information various privacy laws may be implicated with executive disclosures. See, e.g., Privacy Act of 1974, 5 U.S.C. § 552a (2006); Fair Credit Reporting Act, 15 U.S.C. § 1601 (2006); Electronic Communications Privacy Act, 18 U.S.C. §§ 2510–2520, 2701 (2006); Video Privacy Protection Act, 18 U.S.C. § 2710; Drivers' Privacy Protection Act of 1994, 18 U.S.C. § 2721.

167 See Nocera, *supra* note 92, at C4 ("No company has ever been held to account by the SEC for failing to disclose information about its chief executive's health . . .").

168 See Harvey Silverglate, *The SEC Should Leave Steve Jobs Alone*, WALL ST. J., Feb. 2, 2009, at A15 ("And so the feds will investigate whether Apple misled investors by not disclosing the intimate details of Mr. Jobs's latest health scare.").

his death.¹⁶⁹ When Intel's former CEO, Andy Grove, was diagnosed with prostate cancer in 1995, he made no formal disclosure to shareholders and instead decided to publicly disclose this serious health condition a year later to *Fortune* magazine.¹⁷⁰ Alternatively, in June of 2000, Warren Buffett issued a press release after learning that he needed routine surgery to remove polyps from his colon.¹⁷¹ Similarly, in 2004, Charles Bell, the then-CEO of McDonald's, promptly issued a press release after being diagnosed with colorectal cancer.¹⁷² Shortly thereafter, Mr. Bell resigned from the firm and passed away.¹⁷³

For every candid executive like Mr. Buffett and Mr. Bell, there are many more secretive executives like Mr. Grove and Mr. Jobs.¹⁷⁴ The net result is a corporate landscape where shareholders are poorly served by the executives and the firms they invest in, both of whom are legally bound to protect their interests with candor and disclosure.¹⁷⁵ Furthermore, in this landscape, board members cannot properly govern if executives do not timely inform them about potentially material, private matters.

An additional complicating factor is that board members can be overly deferential to senior executives, especially a powerful and influential chief executive officer who played a significant role in their placement on the board.¹⁷⁶ "[I]n the United States, where the board

169 See Barnard, *supra* note 33, at 309–10.

170 See Elkind & Burke, *supra* note 137 (“When Intel CEO Andy Grove was diagnosed with prostate cancer in 1995, he made no formal disclosure—Grove chose to write about it instead in a 1996 article for *Fortune*.”); Nocera, *supra* note 92, at C4 (“The world found out about Mr. Grove’s illness only when he wrote about it the following year.”).

171 See Elkind & Burke, *supra* note 137 (“Warren Buffet . . . issued a press release in June 2000 days after he learned he would need surgery to remove benign polyps along with part of his colon, even though the procedure was considered routine.”).

172 See Nocera, *supra* note 92, at C4 (“[W]hen Charles H. Bell received a diagnosis of colorectal cancer shortly after he became the chief executive of McDonald’s in 2004, the company quickly released the news.”); Pressler, *supra* note 105 (“Within hours of [McDonald’s CEO’s] death, McDonald’s elevated his right-hand man, president and chief operating officer Charles H. Bell, to the position of chief executive.”).

173 See Nocera, *supra* note 92, at C4 (“Mr. Bell resigned from the company that November, and died two months later.”); Pressler, *supra* note 105 (reporting Charles Bell as McDonald’s CEO in April of 2004).

174 See, e.g., Thomas C. Hayes, *Brinker Names New Chief*, N.Y. TIMES, Jan. 25, 1993, at D1 (reporting on the delayed publication by a firm of its CEO’s serious brain injury).

175 See, e.g., Kelly v. Bell, 254 A.2d 62, 71 (Del. Ch. 1969), *aff’d*, 266 A.2d 878 (Del. 1970) (“[D]irectors owe a duty to honestly disclose all material facts when they undertake to give out statements about the business to stockholders.”).

176 See Barry Baysinger & Robert E. Hoskisson, *The Composition of Boards of Directors and Strategic Control: Effects on Corporate Strategy*, 15 ACAD. MGMT. REV. 72, 72–73 (1990) (“[M]anagers dominate their boards by using their de facto power to select and com-

chairmen of 70 percent of public companies serve concurrently as CEO of the company, challenging senior management may be viewed as insubordinate.”¹⁷⁷ This internal dynamic can make it difficult for boards to motivate senior executives to make private disclosures, even if such disclosure is in the best interests of the firm and its shareholders.

While much of the literature on the issue of executive disclosures focuses on “celebrity” executives of large public firms—the Steve Jobses, the Martha Stewarts, and the Warren Buffetts of the business world¹⁷⁸—the issue actually may be more salient to the “anonymous” executives—the uncelebrated executives of smaller firms. Despite the attention lavished on “celebrity” executives, the “anonymous” executives actually may prove to be more important and material to their firms. Notwithstanding all the emphasis on the likes of Steve Jobs, Martha Stewart, and Warren Buffett, their firms will likely survive and thrive in their absence because large enterprises like theirs are less reliant on one individual.¹⁷⁹ The same cannot be said for the “anonymous” chief executive who is also the founder of a small company with a few employees. Those executives are arguably much more material to their firm’s ultimate success or failure given the scale and resources of their small firm. Therefore, these problems of inconsistent executive disclosure practices are not only an issue for large firms, but for all firms, regardless of size.

Part II offered an overview of the map-less, tense geography of executive disclosures. Part III will survey the smoother landscape of

pensate directors and by exploiting personal ties with them.”); Steven A. Ramirez, *The End of Corporate Governance Law: Optimizing Regulatory Structures for a Race to the Top*, 24 YALE J. ON REG. 313, 332 (2007) (“CEOs of public companies have the unique privilege of picking their own nominal supervisors—the board of directors.”).

177 See JONATHAN R. MACEY, CORPORATE GOVERNANCE 62 (2008).

178 See, e.g., Abril & Olazábal, *supra* note 33, at 1551–57 (tracing the rise of celebrity executives in America); Lin, *supra* note 33, at 393 (chronicling the ascent of executives in the context of prominent executives like “Howard Schultz, Martha Stewart, Warren Buffett, and Bill Gates” (footnotes omitted)).

179 See Abril & Olazábal, *supra* note 33, at 1600, 1602–04 (arguing that “celebrity CEOs” do not “single-handedly affect corporate performance”); Lieberman & O’Connor, *supra* note 95, at 128–29 (concluding that CEOs had limited influence on a company’s performance based on a study of large firms). *But see, e.g.*, Miguel Helft & Claire Cain Miller, *Despite Anxiety over Leave at Apple, a Deep Bench of Leadership at Apple*, N.Y. TIMES, Jan. 18, 2011, at B1 (discussing the unique significance of Steve Jobs to Apple despite the firm’s deep bench of senior executives); Bethany McLean, *Mr. Warren’s Confession*, VANITY FAIR, Jan. 2011, at 108–15 (discussing the irreplaceable role of Warren Buffett to his company).

trade secrets law as a foundation for building a better framework for executive disclosures.

III. INTRODUCTION TO TRADE SECRETS

American law has long recognized the concept of trade secrets.¹⁸⁰ The Uniform Trade Secrets Act (UTSA),¹⁸¹ which most states have adopted, defines a trade secret as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁸²

Plainly stated, a trade secret is any confidential information that confers a competitive advantage and value to its holder by virtue of its secrecy. Most statutes and courts require the keepers of the secret information to make reasonable efforts to maintain the information's secrecy.¹⁸³ This is because once a trade secret is revealed to the public or an unprivileged third party, it loses its protected status and others can exploit it for their own purposes.¹⁸⁴ This loss of protection even

180 See *Peabody v. Norfolk*, 98 Mass. 452, 458 (Mass. 1868) ("If he invents or discovers, and keeps secret, a process of manufacture, whether a proper subject for a patent or not, he has not indeed an exclusive right to it as against the public, or against those who in good faith acquire knowledge of it . . ."); *Vickery v. Welch*, 36 Mass. (19 Pick.) 523, 525 (Mass. 1837) ("The defendant was to transfer to the plaintiff, for his exclusive use, the secret manner which the defendant had of making chocolate.").

181 14 U.L.A. 538 (2005).

182 UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538 (2005).

183 See, e.g., *id.*; see also *Surgidev Corp. v. Eye Tech., Inc.*, 828 F.2d 452, 455 (8th Cir. 1987) ("Surgidev was required to take efforts 'reasonable under the circumstances' to maintain the secrecy of its customer information."); *FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 62-64 (2d Cir. 1984).

184 See *Lockridge v. Tweco Prods., Inc.*, 497 P.2d 131, 134 (Kan. 1972) ("Once the secret is published to the 'whole world,' . . . it loses its protected status and becomes available to others for use and copying without fear of legal reprisal from the original possessor." (quoting *Underwater Storage, Inc. v. U.S. Rubber Co.*, 371 F.2d 950, 954 (1966))); Elizabeth A. Rowe, *Saving Trade Secret Disclosures on the Internet Through Sequential Preservation*, 42 WAKE FOREST L. REV. 1, 46 (2007) ("By virtue of the fact that it has been posted, it becomes public and, consequently, loses its trade secret protection.").

applies to instances where trade secrets submitted to the government are subsequently disclosed by the agency.¹⁸⁵

The UTSA's definition and modern legal understanding of trade secrets is expansive and nimble. Trade secrets encompass information as varied as contracts,¹⁸⁶ marketing strategies,¹⁸⁷ pricing data,¹⁸⁸ production methods,¹⁸⁹ recipes, and salaries.¹⁹⁰ Furthermore, "a trade secret does not need to be in use to be protected."¹⁹¹ In sum, as one legal scholar noted, "So long as the information is capable of adding economic value to the plaintiff, it can be protected by trade secret law."¹⁹²

Trade secret law is incredibly appealing to firms because, in addition to its legal dexterity, it is easier to utilize relative to other methods of intellectual property protection.¹⁹³ Whereas copyright law and pat-

185 See Elizabeth A. Rowe, *Striking a Balance: When Should Trade-Secret Law Shield Disclosures to the Government?*, 96 IOWA L. REV. 791, 800 (2011) ("If a company submitted trade-secret information to the government and that information was disclosed by the government to the public, it is the trade-secret owner who would ultimately bear the cost of the government's misguided action.")

186 See, e.g., *ConAgra, Inc. v. Tyson Foods, Inc.*, 30 S.W.3d 725, 728–30 (Ark. 2000) (conferring trade secret protections to contracts).

187 See, e.g., *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1265–70 (7th Cir. 1995) (holding that marketing strategies can be trade secrets).

188 See, e.g., *McFarland v. Brier*, No. 96-1007, 1998 WL 269223, at *5 (R.I. Super. Ct. May 13, 1998), *vacated on other grounds*, 769 A.2d 605 (R.I. 2001) (stating that customer data and pricing information can be protected under trade secrets doctrine).

189 See, e.g., *Norbrook Labs. Ltd. v. G.C. Hanford Mfg. Co.*, 297 F. Supp. 2d 463, 482–83 (N.D.N.Y. 2003); *ConAgra, Inc.*, 30 S.W.3d at 728–30 (conferring trade secret protections to production methods).

190 See, e.g., Frank J. Cavico, *Business Plans and Strategies as Legally Protected Trade Secrets: Florida and National Perspectives*, 9 U. MIAMI BUS. L. REV. 1, 11–15 (2001) (enumerating the various types of business information that can be considered as trade secrets).

191 See Rowe, *supra* note 185, 799–800; see also Michael P. Simpson, *The Future of Innovation: Trade Secrets, Property Rights, and Protectionism—An Age-Old Tale*, 70 BROOK. L. REV. 1121, 1151 (2005) (discussing how one firm withheld product research under trade secrets doctrine in the tobacco industry).

192 Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets as IP Rights*, 61 STAN. L. REV. 311, 317 (2008).

193 See, e.g., David D. Friedman et al., *Some Economics of Trade Secret Law*, 5 J. ECON. PERSP. 61, 62–66 (1991) (articulating the economic efficiency of trade secrets protection); Elizabeth A. Rowe, *Introducing a Takedown for Trade Secrets on the Internet*, 2007 WIS. L. REV. 1041, 1050 (2007) (explaining the attractiveness of trade secrets to businesses as a form of intellectual property protection); Brooks W. Taylor, *You Can't Say That!: Enjoining Publication of Trade Secrets Despite the First Amendment*, 9 COMPUTER L. REV. & TECH J. 393, 394–95 (2005) (discussing the corporate affinity for trade secret protection).

ent law limit their protection to only certain types of information,¹⁹⁴ and such protection generally requires the government's imprimatur, trade secrets law has a broader protective shield and requires no government approval.¹⁹⁵ For example, copyright law only protects "original works of authorship" such as music lyrics, books, and movie scripts, but it does not extend to information like business methods and processes.¹⁹⁶ Individuals seeking copyright protection frequently make filings and registrations with the U.S. Copyright Office.¹⁹⁷ Similarly, patent law only protects novel, non-obvious inventions of utility.¹⁹⁸ This protection generally does not extend to intangible innovations and abstract ideas.¹⁹⁹ Moreover, such protection is only obtained after an applicant has successfully endured the long and

194 See Andrew Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection*, 84 J. PAT. & TRADEMARK OFF. SOC'Y 371, 377-80 (2002) (discussing limitation on patentable information).

195 See Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs?*, 50 B.C. L. REV. 1425, 1432 (2009) ("Trade secret protection is attractive relative to other kinds of intellectual property protection in part because of the broad scope of information that is protectable and [because a] . . . business can . . . protect trade secrets without complying with a government registration system.").

196 See 17 U.S.C. § 102(b) (2006) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . ."); *United States Copyright Office: A Brief Introduction And History*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/circs/circ1a.html> (last visited Nov. 18, 2011) [hereinafter *United States Copyright Office*] ("Copyright protection does not extend to any idea, procedure, process, slogan, principle, or discovery.").

197 *United States Copyright Office*, *supra* note 196 ("The Copyright Office examines all applications and deposits presented for the registration of original and renewal copyright claims to determine their acceptability for registration under the provisions of the copyright law and Copyright Office regulations.").

198 See 35 U.S.C. § 103(a) (2006) (denying the patentability of a subject matter if "the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains"); *Graham v. John Deere Co.*, 383 U.S. 1, 14 (1966) ("Patentability is to depend, in addition to novelty and utility, upon the 'non-obvious' nature of the 'subject matter sought to be patented' to a person having ordinary skill in the pertinent art.").

199 See 35 U.S.C. §§ 100-103; *KSR Int'l Co. v. Teleflex, Inc.*, 550 U.S. 398, 403 (2007) (ruling that a claim was not protected because it was obvious); *Diamond v. Chakrabarty*, 447 U.S. 303, 309 (1980) ("The laws of nature, physical phenomena, and abstract ideas have been held not patentable."); *State St. Bank & Trust Co. v. Signature Fin. Grp., Inc.*, 149 F.3d 1368, 1375 (Fed. Cir. 1998) (explaining that there is no "business method" exception to patentability); Beckerman-Rodau, *supra* note 194, at 378; Lemley, *supra* note 192, at 313 ("[Trade secret law] extends to protection of types of business and process information that likely would not be patentable.").

cumbersome²⁰⁰ patent process dictated by the United States Patent and Trademark Office.²⁰¹

That said, for all their strengths, trade secrets are not without weaknesses. The Achilles heel of a trade secret is that once it is publicly revealed or made known to an unprivileged party, it loses its protected status.²⁰² Moreover, third parties can legitimately reveal trade secrets via reverse engineering or independent research, thereby destroying a trade secret's protected status.²⁰³ Patents and copyrights, for all their other disadvantages, are not susceptible to the swords of reverse engineering and public disclosure. Nonetheless, given the restrictions and costs of other methods of legal protections, trade secret doctrine remains an incredibly attractive form of protection for a firm's economically valuable information.

In the final analysis, trade secrets play an important role not only in protecting economically valuable information, but also in fostering innovation and growth for the economy-at-large.²⁰⁴ The shield of

200 See John R. Allison & Mark A. Lemley, *Who's Patenting What? An Empirical Exploration of Patent Prosecution*, 53 VAND. L. REV. 2099, 2101 (2000) (noting that patent applications can take years to process).

201 See Lemley, *supra* note 192, at 313 (opining that trade secret protection is easier and cheaper to obtain relative to patent protection because it does not require government approval); *Process for Obtaining a Utility Patent*, U.S. PATENT & TRADEMARK OFF., <http://www.uspto.gov/patents/process/index.jsp> (last visited Nov. 18, 2011) (explaining the patent process graphically).

202 See *Lockridge v. Tweco Prods., Inc.*, 497 P.2d 131, 134 (Kan. 1972) ("Once the secret is published to the 'whole world,' . . . it loses its protected status and becomes available to others for use and copying without fear of legal reprisal from the original possessor." (quoting *Underwater Storage, Inc. v. U.S. Rubber Co.*, 371 F.2d 950, 954 (D.C. Cir. 1966))); *Rowe, supra* note 184, at 46 ("By virtue of the fact that it has been posted, it becomes public and, consequently, loses its trade secret protection.").

203 See, e.g., *DVD Copy Control Ass'n v. Bunner*, 116 Cal. Rptr. 3d 185, 194 (Ct. App. 2004) (affirming reverse engineering as a legitimate means to obtain a trade secret).

204 See *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174, 180 (7th Cir. 1991) (noting the economic significance of trade secrets protection); U.S.-CHINA ECON. & SEC. REVIEW COMM'N, 111TH CONG., 2010 REPORT TO CONGRESS 259 (Comm. Print 2010) (reporting China's issuance of new trade secrets regulations to protect and enhance its economic interests); JOHN R. THOMAS, CONG. RESEARCH SERV., THE ROLE OF TRADE SECRETS IN INNOVATION POLICY, at summary (2010) ("As the United States continues its shift to a knowledge- and service-based economy, the strength and competitiveness of domestic firms increasingly depends upon their know-how and intangible assets. Trade secrets are the form of intellectual property that protects this sort of confidential information."). *But see* Robert G. Bone, *A New Look at Trade Secret Law*, 86 CALIF. L. REV. 241, 243-44 (1998) (questioning the purpose of trade secrets law in light of other more established legal concentrations working towards similar ends).

trade secret law protects small start-ups as well as large enterprises, from the garage operation in Silicon Valley to the global conglomerate on Wall Street.²⁰⁵ By some estimates, trade secrets account for a significant portion of business assets.²⁰⁶ Some of the most valuable and popular products in the global economy exist as such primarily because of trade secrets. The formula for Coca-Cola,²⁰⁷ the recipe for KFC's fried chicken,²⁰⁸ the constitution of WD-40 lubricant,²⁰⁹ and the ingredients of a Twinkie²¹⁰ are prominent examples of trade secrets. For every prominent example, there are probably thousands of examples less prominent (for obvious reasons) but no less valuable or important.

Parts II and III surveyed the uncharted landscape of executive disclosures and the mapped terrain of trade secrets, respectively. Part IV will utilize the charted terrain of trade secrets as the legal cartography for the map-less landscape of executive disclosures by conceiving the concept of Executive Trade Secrets as a pragmatic theoretical framework for executive disclosures.

IV. THE EXECUTIVE TRADE SECRETS FRAMEWORK

A. *An Introduction to Executive Trade Secrets*

The theory of Executive Trade Secrets re-conceptualizes and expands traditional understandings of trade secrets to capture competitively valuable, private information of executives. Executive Trade Secrets creates a pragmatic, theoretical framework for safeguarding competitively valuable, private information of executives in the pres-

205 See ALAN HYDE, *WORKING IN SILICON VALLEY* 30–32 (2003) (discussing the use of established firms' trade secrets by startup high-tech firms).

206 See, e.g., ROBERT P. MERGES ET AL., *INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE* 33–37 (4th ed. 2006) (discussing the growing importance of trade secrets to companies, particularly to small businesses driving innovation); Rowe, *supra* note 193, at 1049 (“Trade secrets encompass approximately eighty percent of the assets of some companies.”).

207 *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 107 F.R.D. 288, 289 (D. Del. 1985) (“The complete formula for Coca-Cola is one of the best-kept trade secrets in the world.”); MARK PENDERGRAST, *FOR GOD, COUNTRY & COCA-COLA* 456–57 (2000) (reporting on the lengths that Coca-Cola goes to protect the secrecy of its formula).

208 See *History: The Secret Recipe*, KFC, <http://www.kfc.com/about/secret.asp> (last visited Nov. 18, 2011) (describing the history of the “secret recipe”).

209 See *Fascinating Facts You Never Learned in School*, WD-40, <http://www.wd40.com/about-us/history/> (last visited Nov. 18, 2011) (“[T]he original secret formula for WD-40 . . . is still in use today.”).

210 See STEVE ETLINGER, *TWINKIE DECONSTRUCTED* i–v (2007).

ence of SEC mandates for disclosure.²¹¹ Additionally, it provides stronger protection for the privacy interests of executives²¹² and the economic interests of investors.

Under this theory, Executive Trade Secrets are defined as:

Private information concerning executives that: “(i) derives independent economic value, actual or potential,” for the firm from not “being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts” by the firm “that are reasonable under the circumstances to maintain its secrecy.”²¹³

This re-imagining of private matters of executives as trade secrets is neither a radical nor unfaithful departure from traditional understandings of trade secrets.²¹⁴ This conception is consistent with the organizational behavior of many firms towards such private matters. Many firms already treat certain private matters of their executives as if they were traditional trade secrets, as evidenced by their actions relating to the two elements of Executive Trade Secrets.

As to the first element, many firms already gain independent economic value from their exclusive knowledge of material, private facts pertaining to its executives. Like traditional trade secrets, exclusive knowledge of material, private executive information can often provide firms with a competitive advantage. This competitive advantage manifests in many forms such as better allocation of institutional resources or succession planning, which is one of the most important

211 See 17 C.F.R. § 200.83(c)(1) (2011) (affording “confidential treatment under the Freedom of Information Act to such information for reasons of personal privacy or business confidentiality” in SEC filings); see also 5 U.S.C. § 552(b)(7)(C) (2006) (protecting information from disclosure to governmental investigators when that information “could reasonably be expected to constitute an unwarranted invasion of personal privacy”).

212 See Rowe, *supra* note 195, at 1435 (“In general, trade secret laws appear to provide greater protection to corporations against surveillance by competitors than individuals receive under privacy torts for incursions by other individuals.”).

213 The basis of this definition is rooted in the Uniform Trade Secrets Act’s definition of a trade secret. See UNIF. TRADE SECRETS ACT § 1(4) (amended 1985), 14 U.L.A. 538 (2005).

214 Other scholars previously have written on lessons that privacy law can learn from trade secrets law. See generally Pamela Samuelson, *Privacy as Intellectual Property?*, 52 STAN. L. REV. 1125, 1125 (2000) (proposing that “certain default licensing rules of trade secrecy law may be adapted to protect personal information in cyberspace”); Sharon K. Sandeen, *Relative Privacy: What Privacy Advocates Can Learn from Trade Secret Law*, 2006 MICH. ST. L. REV. 667, 692 (2006) (arguing that “information privacy law can better protect personal information if it adopts three features of trade secret law”).

decisions of a corporation.²¹⁵ For example, Apple's exclusive, advance knowledge about Steve Jobs's health condition in 2009 gave the company incredible insights and competitive advantages about how best to plan for operations management in his temporary absence and eventual succession in the event of his permanent absence.²¹⁶ Foreknowledge of that secret information also likely better positioned Apple to retain key executives on its management team and prevent them from being poached by competitors, which is a real concern in competitive industries where specialized human and intellectual capital is scarce.²¹⁷ When Mr. Jobs resigned as CEO in August of 2011, because of such advance planning, Apple was able to transition seamlessly to Tim Cook, its then chief operating officer, as its new chief executive at the strong recommendation of Mr. Jobs.²¹⁸

As to the second element, many firms already undertake significant efforts to protect the secrecy of such information. Similar to the efforts that firms make to protect traditional trade secrets, firms undertake significant efforts to protect the private information about their executives that bestows a corporate, economic advantage. These efforts manifest themselves in forms such as private security for senior executives,²¹⁹ enhanced digital security for executive and corporate

215 WILLIAM J. ROTHWELL, *EFFECTIVE SUCCESSION PLANNING* 31–41, 131–36 (2010) (explicating the important role of chief executives and boards in advance corporate succession planning); A.G. Lafley, *The Art and Science of Finding the Right CEO*, HARV. BUS. REV., Oct. 2011, at 67–68 (“[C]hoosing the next CEO is the single most important decision a board of directors will make.”).

216 See WALTER ISAACSON, *STEVE JOBS* 557–59 (2011) (describing the fluent transition from Steve Jobs to Tim Cook as executed by Apple's board of directors); Helft & Miller, *supra* note 179, at B4 (discussing Tim Cook as a reassuring temporary steward in Steve Jobs's absence); Kane, *supra* note 16 (“The disclosure immediately sparked new concerns about how much information Apple was keeping to itself on Mr. Jobs's health.”).

217 See, e.g., Claire Cain Miller, *Google Grows, So Some Talent Takes Its Leave*, N.Y. TIMES, Nov. 29, 2010, at A1 (reporting on Google's efforts to retain key employees in the “war for talent”); Jonathan Weber, *Internet Giants Foster, and Threaten, Innovation Economy*, N.Y. TIMES, Nov. 21, 2010, at A33A (alluding to the fierce competition for talent in the high-technology industry).

218 Verne G. Kopytoff & David Streitfeld, *Big Shoes, but Maybe Not Unfillable*, N.Y. TIMES, Aug. 26, 2011, at B1 (reporting on Apple's succession plan after Mr. Jobs resignation); Scott Martin, *Apple CEO Tim Cook as Pitchman No.1*, USA TODAY, Aug. 26, 2011, at 3B (“Apple experts say that Cook takes over an all-star management team that Jobs put in place and point to a deep talent pool.”). While the verdict on Tim Cook's reign as Apple's CEO remains to be rendered, the initial reviews suggest that Steve Jobs' reign as Apple's CEO ended in a fairly smooth manner.

219 See Miguel Helft, *Google's Chief gets \$1 in Pay; His Security Costs \$532,755*, N.Y. TIMES, Apr. 5, 2007, at C3, available at <http://www.nytimes.com/2007/04/05/technology/05google.html> (“Schmidt's [Google's chief executive officer] personal secur-

communications in the face of rising cyber threats,²²⁰ and persistent defenses of the privacy rights of executives. Apple, for instance, refused to disclose specifics of Mr. Jobs's health condition despite intense public pressure and efforts to seek out that information.²²¹ Firms also have petitioned for the sealing of their executives' divorce records as a way to protect trade secrets and other sensitive business information.²²²

In sum, the economic benefits that Apple secured from its exclusive knowledge of Mr. Jobs' health condition and the efforts that it made to maintain its exclusivity of that knowledge is arguably not fundamentally so different from the economic benefits that Apple secured from its exclusive knowledge of the underlying trade secrets of the iPhone 4 and the efforts that it made to maintain its exclusivity of that knowledge. Given such symmetry, where appropriate, the law should view both types of information as trade secrets and worthy of

ity cost shareholders \$532,755."); Matt Andrejczak, *CEO Security-Tabs Fall at Google, FedEx and Disney*, MARKET WATCH (Apr. 12, 2010, 2:34 PM), <http://www.marketwatch.com/story/ceo-security-tabs-fall-at-google-fedex-and-disney-2010-04-12> (reporting on how much companies such as Kodak, Citigroup, and John Deere spend on private security).

²²⁰ Electronic security and cybersecurity efforts for executives have been ratcheted up in modern times where secrets can be readily revealed to the world with a few clicks originating from anywhere in the world. See, e.g., Rowe, *supra* note 195, at 1046–48 (discussing the problems that the Internet poses for protecting trade secrets); David Barboza & Kevin Drew, *Security Firm Sees Global Cyberspying*, N.Y. TIMES, Aug. 4, 2011, at A11 ("Cyber security is now a major international concern, with hackers gaining access sensitive corporate and military secrets, including intellectual property."); Michael Joseph Gross, *Enter the Cyber-Dragon*, VANITY FAIR, Sept. 2011, at 220 ("Because virtual attacks can be routed through computer servers anywhere in the world, it is almost impossible to attribute any hack with total certainty."); Michael Riley & Ashlee Vance, *The Code War*, BUSINESSWEEK, July 25, 2011, at 52 (reporting on the increased vulnerabilities of corporations to cyberattacks); Jeff Zeleny, *For a High-Tech President, a Hard-Fought E-Victory*, N.Y. TIMES, Jan. 23, 2009, at A18 (discussing enhanced security measures for President Barack Obama's Blackberry).

²²¹ See ISAACSON, *supra* note 216, at 481–82 (describing how Apple's board protected the privacy of Mr. Jobs); Helft, *supra* note 19, at A1 (noting the lack of details and comments from Apple relating to Mr. Jobs's medical leave in January 2011); Connie Guglielmo, *Apple's Steve Jobs Takes Medical Leave; Shares Plunge (Update 3)*, BLOOMBERG (Jan. 14, 2009, 6:35 PM), http://www.bloomberg.com/apps/news?pid=news_archive&sid=aLa7Vr5gU21A ("Apple spokesman Steve Dowling declined to comment [on Jobs's health] and said Cook and Apple's board members aren't available for interviews.").

²²² See Tresa Baldas, *Divorces Sealed as Business Priority*, NAT'L L.J., Nov. 14, 2005, at 1 ("Divorce lawyers say corporations . . . are increasingly asking judges to seal the divorce records of top executives to protect trade secrets or crucial financial information from leaking out.").

legal protection, not only as a matter of factual consistency, but also as a matter of fidelity to the laws implicated by executive disclosures.

B. Fidelity to Laws Concerning Executive Disclosures

The re-conceptualization of trade secrets to capture private facts of executives is faithful to, and consistent with, the first principles of the laws concerning executive disclosures, thereby assuaging the current tensions surrounding the executive disclosures that arise, partially, from the crosscutting legal considerations of those laws. Executive Trade Secrets, thus, offers executives, investors, and regulators a pragmatic framework for resolving some of those issues given its fidelity to the first principles of the laws of trade secrets, privacy, securities, and corporations.²²³

First, as to trade secrets law, Executive Trade Secrets is consistent with trade secrets law's first principle to allow businesses to capitalize on its economically significant, secret knowledge created or secured through their efforts.²²⁴ Executive Trade Secrets encourages businesses to protect and optimally capitalize on arguably their most valuable and irreplaceable assets in the eyes of the market—their executives.²²⁵

Second, as to privacy law, the concept of Executive Trade Secrets is consistent with privacy law's first principle to protect the informational privacy of individuals. Broadly, it also can be argued that privacy law and trade secrets law share several fundamental interests: "First, an interest in protecting the interest of the claimant to restrict access to and unauthorized uses of secret/private information; second, an interest in giving firms/individuals control over commercial

223 While Executive Trade Secrets implicates other legal fields such as contract law, property law, and labor law, this Article focuses on the laws relating to trade secrets, privacy, securities, and corporations because they are most closely intertwined with the concept of Executive Trade Secrets.

224 *Trade Secrets*, CITIZEN MEDIA L. PROJECT, <http://www.citmedialaw.org/legal-guide/trade-secrets> (last updated May 28, 2008) ("The main goal of trade secrets law is to provide a way for businesses to capitalize on their unique practices or knowledge created through their time and effort.").

225 See, e.g., Constance L. Hays, *ImClone Case Drags Martha Stewart Shares Down*, N.Y. TIMES, June 13, 2002, at C6 (reporting that Martha Stewart Living Omnimedia Inc. "depends heavily on Ms. Stewart and the name she has made for herself"); Letter from Warren E. Buffet, Chairman, Berkshire Hathaway, Inc., to the Shareholders of Berkshire Hathaway, Inc. (February 2008), available at <http://www.berkshirehathaway.com/letters/2007ltr.pdf> ("Of course, a terrific CEO is a huge asset for any enterprise, and at Berkshire we have an abundance of these managers. Their abilities have created billions of dollars of value that would never have materialized if typical CEOs had been running their businesses.").

exploitations of secret/private information; and third, an interest in setting and enforcing minimum standards of commercial morality.”²²⁶ Executive Trade Secrets offers a theoretical framework rooted in these shared interests that enhances the protection of sensitive personal information of commercial importance from the prying eyes of competitors and the public. Specifically, the framework enhances privacy protection by supplementing an executive’s individual efforts with a firm’s institutional efforts to protect personal information of competitive importance²²⁷ and to safeguard a firm’s commercial privacy.²²⁸ The Supreme Court has opined on the importance of such protection: “A most fundamental human right, that of privacy, is threatened when industrial espionage is condoned or is made profitable; the state interest in denying profit to such illegal ventures is unchallengeable.”²²⁹

Third, as to securities law, the concept of Executive Trade Secrets is faithful to securities law’s first principle of protecting the investors through meaningful disclosures without forcing a company to disclose valuable secrets.²³⁰ Counterintuitively, “trade secret law actually encourages disclosure, not secrecy. Without legal protection, companies in certain industries would invest *too much* in keeping secrets.”²³¹ Therefore, the secrecy permitted by Executive Trade Secrets actually improves disclosure practices by creating a framework that encourages

226 Samuelson, *supra* note 214, at 1151–52.

227 See Lawrence Lessig, *Privacy as Property—Part V: Democratic Process and Nonpublic Politics*, ENGLISHDISCOURSE.ORG (Spring 2002), <http://www.englishdiscourse.org/lessig.html> (arguing that a property-based rhetoric “would strengthen the rhetorical force behind privacy”).

228 See *E.I. duPont deNemours & Co. v. Christopher*, 431 F.2d 1012, 1016–17 (5th Cir. 1970) (asserting the law’s protection of commercial privacy); Charles R. McManis, *Taking TRIPs on the Information Superhighway: International Intellectual Property Protection and Emerging Computer Technology*, 41 VILL. L. REV. 207, 223 (1996) (“Historically, trade secret law . . . protects industrial and commercial privacy.”); see also *AT&T Inc., v. FCC*, 582 F.3d 490, 498 (3d Cir. 2009) (holding that a corporation may have “personal privacy” interests); SCHEPPELE, *supra* note 1, at 231–47 (discussing trade secrets in the context of corporate privacy).

229 *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 487 (1974) (footnote omitted).

230 See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 186 (1963) (articulating the purpose of federal securities regulation is to “substitute a philosophy of full disclosure for the philosophy of *caveat emptor*”); 17 C.F.R. § 200.83(c)(1) (2011) (protecting from disclosure confidential corporate matters in filings to the SEC). *But see Do Hedge Funds Hold ‘Trade Secrets’?*, BLOOMBERG BUSINESSWEEK (Sept. 12, 2006), http://www.businessweek.com/investor/content/sep2006/pi20060913_356291.htm (reporting on a hedge fund’s refusal to comply with certain disclosure requirement for fear of revealing trade secrets).

231 Lemley, *supra* note 192, at 313.

more meaningful disclosure from executives and sets clearer expectations about executive disclosures for the investors.

The current map-less terrain of executive disclosures offers no clear paths for firms and leaves investors with no clear expectations. This lack of clarity has resulted in inconsistent practices where certain firms and executives—similarly situated—reveal too much, while others reveal too little or nothing at all, at varying time horizons.

With Executive Trade Secrets, executives would be more inclined to disclose certain potentially material, private matters to their boards because a clear and sensible legal avenue for firms to maintain their secrets would exist.²³² This is possible because trade secrets law does not require absolute secrecy nor does it require a complete bar against disclosure. Instead, trade secrets law's nimbleness permits relative secrecy and privileged disclosures.²³³

Additionally, with Executive Trade Secrets, investors would be better conditioned to expect that certain private information will not be disclosed for legitimate business concerns and that other types of private information would be readily disclosed. This shift of expectation norms would allow investors to be more inclined to trust the disclosure and management of firms, instead of speculating about possible omissions, since most firms would likely be operating under similar norms.

Fourth, as to corporate law, Executive Trade Secrets is consistent with corporate law's first principle to maximize shareholder wealth through better corporate governance.²³⁴ Executive Trade Secrets

232 See *id.* at 334–37 (arguing that trade secrets protection encourages disclosure of confidential information that firms may not be willing to disclose in the absence of such protection).

233 See, e.g., *Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986) (discussing what constitutes a “limited disclosure”); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 41 cmt. b (1995) (“If the owner of a trade secret discloses information for a limited purpose that is known to the recipient at the time of the disclosure, the recipient is ordinarily bound by the limitation unless the recipient has indicated an unwillingness to accept the disclosure on such terms.”); JAMES POOLEY, TRADE SECRETS § 4.04[2][a] (2006) (“[T]he concept of ‘relative secrecy’ is actually quite simple and compelling: a secret remains protectable even when it is shared, so long as it hasn’t escaped into the mainstream of public knowledge.”).

234 See *Kreinberg v. Dow Chem. Co.*, No. 07-13235-BC, 2007 WL 2782060, at *4 (E.D. Mich. Sept 24, 2007) (“A first principle of the law addressing corporate governance is that corporations exist to maximize value for their owners, the shareholders.”); Sanjai Bhagat & Roberta Romano, *Event Studies and the Law: Part II: Empirical Studies of Corporate Law*, 4 AM. L. & ECON. REV. 380, 381–82 (2002) (“[T]he event study literature serves as a helpful arbiter of corporate law debates because all sides hold the same normative conception of corporate law, shareholder wealth maximization.”).

improves corporate governance because it encourages executives to make private disclosures to their boards without constant fear of automatic, subsequent publication. It also allows boards to process and deliberate on such private information without the vagaries of securities and corporate law. Currently, many executives are likely reluctant to disclose material, private information to their boards for fear of mandated disclosure, thereby, leaving firms and shareholders vulnerable to sudden institutional shocks.²³⁵ It is generally understood that “[t]rade secret law reduces investments in secrecy and encourages the dissemination of the secret to more people who can make productive use of it.”²³⁶ Executive Trade Secrets creates a path for privileged disclosures to firms that allows boards to be better informed and to better plan and act in the long term interests of shareholders.

In sum, Executive Trade Secrets alleviates some of the crosscutting legal tensions in executive disclosures because it is faithful to the first principles of the laws of trade secrets, privacy, securities, and corporations.

C. *Executive Disclosures with Executive Trade Secrets*

Executive Trade Secrets will improve executive disclosures because it creates a pragmatic framework for firms and regulators to consider and safeguard material, private information of executives. This will likely encourage more timely disclosures by executives of such information to their boards, and their shareholders, where appropriate.²³⁷ Because of this effect, Executive Trade Secrets will aid firms in preventing and managing crises that arise from the disclosure of disruptive private facts relating to its executives.

Under the current legal framework, executive disclosures are haphazard and arbitrary. For a host of mixed motives, many of which concern privacy, some executives chose to disclose potentially material, private information to their boards and the public;²³⁸ others

²³⁵ See, e.g., Scheer & Guglielmo, *supra* note 18 (articulating that the SEC was investigating Mr. Jobs and Apple because when he became ill, he belatedly disclosed it to the company's board).

²³⁶ Lemley, *supra* note 192, at 353.

²³⁷ Admittedly, even with Executive Trade Secrets, disclosure of sensitive private facts such as a serious health condition will remain difficult for many executives.

²³⁸ It should be noted that not all executives are secretive about sensitive private matters. For example, Sergey Brin, the co-founder and president of Google, voluntarily revealed to the world that he had “a genetic mutation that has been associated with higher rates of Parkinson’s.” Goetz, *supra* note 138, at 108.

choose to disclose only to their boards;²³⁹ and some simply chose to remain silent to all parties. While the motivations of executives to reveal or conceal private facts remain varied and unclear, what is singularly clear is that this arbitrary practice leaves firms and shareholders dangerously susceptible to revelations that shock market value and institutional stability.²⁴⁰

Under the Executive Trade Secrets framework, executive disclosures take on greater clarity because the institutional and personal concerns of the firm and the executive are taken into better consideration. To illustrate how this would operate in practice, consider the following hypothetical scenarios involving Anne Arcanum, the founder, chairwoman, and CEO of Acme Inc. who was recently diagnosed with Stage III liver cancer—first, under the current framework; then, under the Executive Trade Secrets framework.

Under the current framework, Ms. Arcanum, a very private individual, may be reluctant to share her diagnosis with the board for fear of immediate public disclosure and because she feels it is irrelevant to her job performance. This would be an understandable sentiment given the lack of clear guidance on executive disclosures. As months pass, Ms. Arcanum's condition deteriorates and affects her job performance.²⁴¹ But no disclosure is made to her board or shareholders. Eventually, Ms. Arcanum and Acme publicly disclose her condition after her cancer has advanced to Stage IV, her prognosis for survival is low, and she is forced to resign from her company. As a result of the abrupt disclosure, Acme's stock falls precipitously and the board scrambles to find a suitable successor.²⁴²

Under the Executive Trade Secrets framework, Ms. Arcanum would be more inclined to timely disclose her diagnosis to the board because she knows that reflexive, immediate disclosure is unlikely and because she knows that her board may make reasonable efforts to pro-

239 Steve Jobs, for instance, only disclosed the gravity of health condition to Apple's board in 2008. See ISAACSON, *supra* note 216, at 479–82.

240 See SCHEPPELE, *supra* note 1, at 21–22, 75–76 (discussing the general dangers posed by secrets of varying depths); Barnard, *supra* note 33, at 309, 321 (making similar argument in advocacy of having directors examine the personal expenditures of top-level executives as a safeguard against “real corporate harm”).

241 See, e.g., Barnard, *supra* note 33, at 325 (“Preoccupation with serious illness and pain, or the results of medication, may cloud an executive's judgment, impair her concentration, distract her from previously established priorities, limit her ability to interact with subordinates, inhibit travel, interrupt ongoing negotiations, or, in cross-cultural settings, interrupt the establishment of business relationships.”).

242 See, e.g., W. Bruce Johnson et al., *An Analysis of the Stock Price Reaction to Sudden Executive Deaths*, 7 J. ACCT. & ECON. 151, 152 (1985) (studying shocks to stock price precipitating from sudden executive death).

tect this competitively advantageous information under trade secrets law without the fear of securities law violations. Assuming that Ms. Arcanum timely discloses her diagnosis to her board and the board decides that this secret information is of significant economic value to Acme, the firm would then likely take reasonable efforts to ensure the secrecy of this information.²⁴³ Practically, this timely disclosure would allow Acme to better support Ms. Arcanum, given her health condition; strategically, this timely disclosure would allow the firm to plan for her deterioration or departure, thereby better positioning the firm to succeed in the absence of its founder. The firm would eventually make public disclosures concerning Ms. Arcanum and those disclosures would, nonetheless, likely shock the market, but that shock may be preemptively mitigated by the remedial steps that the firm had taken to ensure its stability.²⁴⁴ Because securities law makes allowances for firms regarding the nondisclosure of trade secrets and other sensitive information, firms are better positioned to act in the shareholders' long-term interests.²⁴⁵

Ultimately, executive disclosures existing within an Executive Trade Secrets framework will lead to more internal transparency in boardrooms between executives and directors because the framework creates a safeguarded path for internal disclosures and discussions with diminished fear of publication and litigation. Simultaneously, it could also lead to better and more executive disclosures to the public as firms would be inclined to protect only private information of significant economic value, and not all private information.²⁴⁶ The net

243 It may also be plausible that the firm could determine that such private information is of insignificant economic value relative to other factors arising from its secrecy, and decide to publicly disclose Ms. Arcanum's condition.

244 See, e.g., Johnson et al., *supra* note 242, at 151–52, 172–74 (discussing sharp changes in share price associated with unexpected executive death in correlation with the executive's perceived importance to the company); Matt Krantz, *Investors Steadfast, for Now*, USA TODAY, Aug. 26, 2011, at 1B (reporting on Apple's small losses given its smooth CEO transition).

245 See, e.g., Instructions to Item 402(b), 17 C.F.R. § 229.402 (2011) ("Registrants are not required to disclose . . . confidential trade secrets or confidential commercial or financial information, the disclosure of which would result in competitive harm for the registrant."); *id.* § 230.406 (allowing for confidential treatment of certain information filed with the commission); *id.* § 240.24b-2 (allowing for nondisclosure of certain information filed with the SEC); Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 865–66 (1995) ("The need for confidentiality was, in fact, a credible argument in the formative years of the securities laws. . . . A section was added to the Exchange Act specifically addressing trade secrets.").

246 See Lemley, *supra* note 192, at 313 (discussing how in the absence of trade secrets protection, firms would be less forthright and "invest *too much* in keeping secrets").

result will be better corporate governance for shareholders and better privacy protections for executives.

D. *A Political Analogy: Executive Privilege*

The re-conception of trade secrets law to confer protected status to executive information, as articulated, may appear unprecedented, but it is not *sui generis* in American law. The concept of executive privilege in constitutional law serves as an inelegant, but instructive political analogue to understanding Executive Trade Secrets.

Executive privilege refers to the legal doctrine that permits the president and members of the executive branch to withhold information from the legislative and judicial branches.²⁴⁷ “It is, thus also a power that enables presidents to keep information secret from the media and the public.”²⁴⁸ Presidential administrations often have defended their use of executive privilege based on the demands of secrecy in national security matters and the necessity for confidential, candid deliberations.²⁴⁹

In terms of national security and secrecy, the interests of the public’s right to know must be balanced against protecting the nation-state.²⁵⁰ Historically, courts have shown great deference to the executive branch’s desires for secrecy and nondisclosure of information relating to national security.²⁵¹ Courts have viewed such secrecy as

247 See Mark J. Rozell, *Executive Privilege in the Clinton Scandal*, in THE CLINTON SCANDAL 81, 81 (Mark J. Rozell & Clyde Wilcox eds., 2000) (“[E]xecutive privilege is an implied power that enables presidents and high-level executive branch officers to withhold information from Congress, the courts, and ultimately the public.”).

248 Mark J. Rozell, *Executive Privilege in an Era of Polarized Politics*, in EXECUTING THE CONSTITUTION 91, 91 (Christopher S. Kelley ed., 2006).

249 See MARK J. ROZELL, EXECUTIVE PRIVILEGE 6 (2002) (noting that President George W. Bush had to defend his use of executive privilege in the first two years of his term); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1386 (1974) (“The Executive Branch, on the other hand, has an undeniably legitimate interest, at least under some circumstances, in preserving the confidentiality of internal communications in order to perform its duties under article II.”).

250 See *In re Sealed Case*, 121 F.3d 729, 742 (D.C. Cir. 1997) (“[A]pplication of Executive privilege depends on a weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in a particular case.” (quoting *Nixon v. Sirica*, 487 F.2d 700, 716 (D.C. Cir. 1973))); ROZELL, *supra* note 249, at 43 (“Congress’s and the public’s ‘right to know’ must be balanced with the requirements of national security.”).

251 See, e.g., *Haig v. Agee*, 453 U.S. 280, 309–10 (1981) (deferring to the Secretary of State on a national security matter); *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (permitting the concealment of evidence by the executive branch for national security interest); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 333 (1936) (submitting to executive judgment on an economic issue in the national security con-

necessary “for the President to carry out many of his constitutional duties,” especially in the interrelated areas of national security and foreign affairs.²⁵²

In terms of the need for confidential, candid deliberation and secrecy, the interests of the public’s right to know must be balanced against the president’s interest in receiving the best counsel to execute his constitutional duties.²⁵³ As presidential historian, Theodore H. White, succinctly stated, “Executive privilege is a matter of vital importance to the conduct of the American Presidency. Unless the President can talk frankly, and listen to frank advice, he cannot think clearly enough to act effectively.”²⁵⁴ Arguably, “[i]f officers of the executive branch believed that their confidential advice could eventually be disclosed, the quality of that advice would be seriously damaged.”²⁵⁵ The Supreme Court has recognized the importance of secrecy as a prerequisite for frank communications and deliberations. In the seminal executive privilege case, *United States v. Nixon*,²⁵⁶ the Court held that “[t]he privilege is fundamental to the operation of Government.”²⁵⁷

text); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) (“The conduct of the foreign relations of our Government is committed by the Constitution to the Executive . . . [and it] is not subject to judicial inquiry or decision.”); *In re Terrorist Attacks* on September 11, 2001, No. 03 MDL 1570, 03 Civ. 6978(RCC), 2004 WL 1348996, at *2 (S.D.N.Y. June 14, 2004) (“This Court defers to the judgment of the executive branch with respect to issues of national security.”).

252 Mark J. Rozell, *Restoring Balance to the Debate over Executive Privilege*, 8 WM. & MARY BILL RTS. J. 541, 561 (2000); *see also* *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.”); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world.”).

253 *See Executive Privilege: The Withholding of Information by the Executive: Hearing Before the S. Subcomm. on Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 353 (1971) (statement of Averell Harriman, former ambassador to Great Britain and the Soviet Union) (“The President is entitled to receive the frank views of his advisors and therefore must be able to protect the personal or confidential nature of their communications with him.”); *id.* at 320–21 (statement of William P. Bundy, Massachusetts Institute of Technology Center for International Studies) (testifying in support of the need for secrecy as a precondition for “honesty, candor, courage, and frankness within the executive branch”).

254 THEODORE H. WHITE, *BREACH OF FAITH* 203 (1975).

255 Rozell, *supra* note 249, at 46–47.

256 418 U.S. 683 (1974).

257 *Id.* at 708.

Executive privilege has several parallels with Executive Trade Secrets. The role of the president as the chief executive of the country is in many ways similar to the role of a CEO of a corporation, especially a large complex corporation.²⁵⁸ In fact, President Calvin Coolidge famously stated, “the business of America is business.”²⁵⁹ Furthermore, the need for secrecy as justification for executive privilege in the political context is analogous to the need for secrecy as justification for Executive Trade Secrets in the commercial context.

First, the national security rationale in the political context is logically similar to the economic advantage rationale in the business context.²⁶⁰ The paramount importance of protecting the nation’s general welfare by securing certain secrets is akin to the significance of protecting a company’s economic advantage by safeguarding its trade secrets from public disclosure.

Furthermore, the judicial proclivity for deference to presidential decisions in the area of national security and the judicial proclivity for deference to executive decisions in the area of business add another layer of symmetry between executive privilege and Executive Trade Secrets. Courts do not extend such deferential courtesies to other complex subjects like medicine or engineering.²⁶¹ Courts, however, appear to give special deference to executive decisions concerning national security and business.

Second, the confidential deliberations rationale in the political context is similar to the candid disclosure rationale in the business context. The president’s ability to receive frank and sage counsel in matters of political governance is akin to a board or an executive’s ability to receive candid advice in matters of corporate governance. Absent legally protected secrecy, both political and business deliberations at the highest levels would lack candor to the detriment of citizens and shareholders, respectively, thereby, making it more difficult

258 See, e.g., Richard A. Epstein, *Executive Power in Political and Corporate Contexts*, 12 U. PA. J. CONST. L. 277, 282–83 (2010) (analogizing the president of the United States to the chief executive officer of a corporation); James Bennet, *The Bush Years; C.E.O., U.S.A.*, N.Y. TIMES MAG., Jan. 14, 2001, at 24, available at <http://www.nytimes.com/2001/01/14/magazine/the-bush-years-ceo-usa.html?pagewanted=print> (reporting on the perception of President George W. Bush as the CEO of the country).

259 JOHN STEELE GORDON, *THE BUSINESS OF AMERICA* 247 (2002).

260 See *supra* Part III.

261 See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 94 (1991) (inquiring as to why judges are permitted to judge controversies involving engineering design but not business decisions); Bainbridge, *supra* note 146, at 120 (“[N]o ‘medical judgment’ or ‘design judgment’ rule precludes judicial review of malpractice or product liability cases.”).

for presidents to uphold their constitutional duties and executives to uphold their fiduciary duties.

In addition to their symmetrical rationales, the challenges and controversies relating to executive privileges also would be instructive for Executive Trade Secrets. Critiques of executive privilege are often rooted in the public's right to know and the fear of abuse.²⁶² For many, governmental secrecy and executive privilege are anathemas to a free democratic society and political accountability.²⁶³ Moreover, some fear that presidents may abuse executive privilege to cover up inappropriate activities and embarrassing information.²⁶⁴ These arguments are legitimate and must be carefully weighed by presidents and courts in matters concerning executive privilege.

Similarly, arguments against Executive Trade Secrets will likely be rooted in the investing public's right to know and the fear of abuse. Such arguments would also be legitimate and would require careful consideration by firms, regulators, and courts.

In sum, executive secrecy in both the political and corporate contexts is frequently rife with controversies and challenges that must be duly balanced against the benefits of secrecy for the sake of the country and its citizens, or the firm and its shareholders, as the case may be. Ultimately, the outcomes of such balancing in both the political and corporate contexts will depend largely on the facts of each case.

Part IV introduced the theoretical framework of Executive Trade Secrets as a mechanism to address the problems and tensions surrounding executive disclosures. Next, Part V will explore three key implications of the introduced framework.

262 See Saikrishna Bangalore Prakash, *A Critical Comment on the Constitutionality of Executive Privilege*, 83 MINN. L. REV. 1143, 1153–69 (1999) (challenging the legitimacy of executive privilege); Rozell, *supra* note 248, at 7–18 (enumerating some critiques of executive privilege such as, lacking constitutional foundation, public's right to know, and abuse of power). See generally RAOUL BERGER, *EXECUTIVE PRIVILEGE* (1974).

263 See MORTON HALPERIN & DANIEL HOFFMAN, *TOP SECRET 2* (1977) (“Not only has secrecy undermined the constitutional prerogatives of Congress and the electorate, it has also led directly to substantial infringements of civil liberties.”); Rozell, *supra* note 249, at 12–15 (surveying arguments against executive privilege based on the public's right to know); Bruce Miroff, *Secrecy and Spectacle: Reflections on the Dangers of the Presidency*, in *THE PRESIDENCY IN AMERICAN POLITICS* 151, 157 (Paul Brace et al. eds., 1989) (“[T]he American people cannot judge what they do not know.”).

264 See ROZELL, *supra* note 249, at 15–18 (chronicling misuses of executive privilege); see also Mark J. Rozell, *Executive Privilege Revived? Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 403 (2002) (alleging abuses of executive privilege in the Nixon and Clinton administrations).

V. KEY IMPLICATIONS OF EXECUTIVE TRADE SECRETS

A. *A Shield to Protect or a Shield to Hide?*

A concern about Executive Trade Secrets is that it can be used as a malignant shield to hide all personal information about executives from shareholders, in addition to being used as a benign shield to protect the economically-sensitive business secrets of a firm. While this concern is legitimate, the law provides a number of safeguards against abuse and the creation of an omnipotent, villainous shield.

First, corporate law states that executives owe fiduciary duties to their firms, including the duties of candor and disclosure.²⁶⁵ Therefore, executives arguably must disclose material or potentially material information—personal or otherwise—to their boards. Executive Trade Secrets encourages such internal disclosure, which then allows boards to decide whether external disclosure is appropriate and whether reasonable efforts need to be taken to protect the information if it is deemed of economic value to the firm.²⁶⁶

The disclosure decision concerning an executive's private information is often a complex and sensitive business decision. That decision, like most other business decisions made on behalf of the shareholders, ultimately rests with a firm's directors and executives,²⁶⁷ who are best equipped to make such judgments.²⁶⁸ Shareholders who

265 See, e.g., *Malone v. Brincat*, 722 A.2d 5, 9 (Del. 1998) (finding a duty to not make materially misleading or false statements); *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1286–87 (Del. 1994) (discussing the personal liability of directors that fail to disclose information); *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992) (“As the majority shareholder, [Shell] bears the burden of showing complete disclosure of all material facts relevant to a minority shareholders’ decision whether to accept the short-form merger consideration or seek an appraisal.”); *Stroud v. Grace*, 606 A.2d 75, 85 (Del. 1992) (holding that directors have the duty to disclose material facts at a shareholder meeting); *Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (finding a duty of full disclosure in the context of actions requiring shareholder approval); see also Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor*, 41 VAL. U. L. REV. 269, 300 (2006) (concluding that senior officers possess a duty to inform); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1652 (2005) (“[Officers’] core responsibilities are supplemented by duties of good conduct, disclosure, and obedience.”).

266 For a more detailed discussion of this argument, see *supra* Part IV.C.

267 See DEL. CODE ANN. tit. 8, § 141(a) (2010) (“[The corporation] shall be managed by or under the direction of a board of directors”); Bainbridge, *supra* note 146, at 105 (“[T]he vast majority of corporate decisions are made by the board of directors or by managers acting under delegated authority.”).

268 See, e.g., Barnard, *supra* note 33, at 327–28 (arguing that decisions about disclosure of executive private facts should be made by the board of directors); Eric A.

own the firm do not have managerial rights or powers.²⁶⁹ This is inherent in the fundamental agency relationship between corporate managers and corporate shareholders, as players in the modern corporation.²⁷⁰

While some uneasiness may exist about granting such deference to the judgment of directors and other executives, given the personal nature of the information,²⁷¹ courts historically have not substituted their judgment for the judgment of business people.²⁷² The law generally presumes that directors act in the interests of their shareholders.²⁷³ However, this judicial deference is not absolute. Courts have not abstained in overruling the business judgment of directors or executives in cases where they held that such parties have acted in a grossly negligent manner, in bad faith, or have breached their duty of

Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 Nw. U. L. REV. 749, 758 (2000) (“[C]ourts have trouble understanding the simplest of business relationships. This is not surprising. Judges must be generalists, but they usually have narrow backgrounds in a particular field of the law.”).

269 See *McCall v. Scott*, 239 F.3d 808, 816 (6th Cir. 2001) (“A basic premise of corporate governance under Delaware law is that the directors, rather than the shareholders, manage the business and affairs of the corporation.”); ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 112–16 (rev. ed. 1967) (describing the separation of ownership and management in corporations); Bainbridge, *supra* note 146, at 105 (“Shareholders, who are said to ‘own’ the firm, have virtually no power to control either its day-to-day operation or its long-term policies.” (footnotes omitted)).

270 See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 248 (1999) (“[C]orporations are little more than bundles of assets collectively owned by shareholders (principals) who hire directors and officers (agents) to manage those assets on their behalf.”); Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290 (1980) (discussing the separation of risk-bearing and management in firms).

271 See, e.g., Lisa M. Fairfax, *Spare the Rod, Spoil the Director? Revitalizing Directors’ Fiduciary Duty Through Legal Liability*, 42 HOUS. L. REV. 393, 414 (2005) (suggesting that directors worry little about liability for breaches of their duty of care because they are personally protected by corporate mechanisms such as insurance and indemnification); Heminway, *Personal Facts*, *supra* note 33, at 765–71 (opining that “[t]he existing disclosure regime places too much discretion in the hands of executive officers”).

272 See, e.g., *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919) (“[J]udges are not business experts.”); *Leslie v. Lorillard*, 18 N.E. 363, 365 (N.Y. 1888) (“[C]ourts will not interfere unless the [directors’] powers have been illegally or unconscientiously executed; or unless it be made to appear that the acts were fraudulent or collusive, and destructive of the rights of the stockholders.”).

273 See *Dodge*, 170 N.W. at 684 (“A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.”).

loyalty to the firm.²⁷⁴ Therefore, fiduciary obligations under corporate law serve as a safeguard against a sinister shield.

Second, securities law mandates that firms disclose only material information in addition to other specified line-item disclosures. The truth of the matter is that many, if not most, private facts of executives are often not relevant or material to investors.²⁷⁵ “Not all information that is interesting to investors and analysts is material to the financial condition of a company.”²⁷⁶ Additionally, securities law’s prohibitions against insider trading help protect against insiders and others from illicitly profiting with their exclusive knowledge of material private information relating to executives.²⁷⁷ Therefore, the concern of creating an over-inclusive, sinister shield, while legitimate, is less worrisome given the narrow scope of relevant, private information worthy

274 See, e.g., *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993) (“[A] decision made by a loyal and informed board will not be overturned by the courts unless it cannot be ‘attributed to any rational business purpose.’”); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985) (“Under the business judgment rule there is no protection for directors who have made ‘an unintelligent or unadvised judgment.’” (quoting *Mitchell v. Highland Western Glass Co.*, 167 A. 831, 833 (Del. 1933))).

275 See, e.g., *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993) (“[A] corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact.”); *Milton v. Van Dorn Co.*, 961 F.2d 965, 969 (1st Cir. 1992) (“The mere fact that an investor might find information interesting or desirable is not sufficient to satisfy the materiality requirement.”). It can also be argued that investors may not be able to properly process voluminous and frequent disclosures of private information that they are interested in without any meaningful benchmarks or guidance. See, e.g., Tom C.W. Lin, *A Behavioral Framework for Securities Risk*, 34 SEATTLE U. L. REV. 325, 336–49 (2011) (discussing various cognitive limitations that affect investors); see also *Abril & Olazábal*, *supra* note 33, at 1586 (“[D]isclosure of such health information would unfairly tax investors with the responsibility of acquiring medical knowledge to be able to interpret corporate disclosures.”).

276 David Monsma & Timothy Olson, *Muddling Through Counterfactual Materiality and Divergent Disclosure: The Necessary Search for a Duty to Disclose Material Non-Financial Information*, 26 STAN. ENVTL. L.J. 137, 142 (2007); see also *United States v. Heron*, 525 F. Supp. 2d 729, 751–52 (E.D. Pa. 2007) (stating that just because investors may “want to know” some information, does not render that information material for securities law purposes).

277 See, e.g., *United States v. Chiarella*, 445 U.S. 222, 227 (1980) (“[A] corporate insider must abstain from trading in the shares of his corporation unless he has first disclosed all material inside information known to him.”); *SEC v. Tex. Gulf Sulphur Co.*, 401 F.2d 833, 848 (1968) (opining that “anyone in possession of material inside information” must either “disclose it to the investing public, or, if he is disabled from disclosing it in order to protect a corporate confidence, or he chooses not to do so, must abstain from trading in or recommending the securities concerned while such inside information remains undisclosed”).

of disclosure consideration under the Executive Trade Secrets framework.

Third, in addition to the safeguards of corporate law and securities law, trade secrets law offers protections against a sinister shield. Recall that Executive Trade Secrets, as conceptualized here, only applies to private executive information that (1) derives independent economic value, actual or potential, for the firm from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (2) is the subject of efforts by the firm that are reasonable under the circumstances to maintain its secrecy.²⁷⁸ Arguably, only a limited number of private facts concerning a limited number of executives would satisfy the first prong, which would serve as a channeling mechanism.²⁷⁹ Moreover, even when the first prong is satisfied, a firm could still decide that the economic value gained from the secret knowledge of such information is not worth costly efforts—financial or otherwise—to maintain its secrecy.²⁸⁰

It is also crucial to note that trade secrets are not absolutely protected from disclosure. Third parties can undertake various efforts to reveal trade secrets, and government regulators can compel disclosure as well.²⁸¹ For example, congressional investigators can request trade secrets from firms under the Freedom of Information Act or through congressional subpoenas.²⁸² Similarly, enterprising, investigative

278 The basis of this definition is rooted in the Uniform Trade Secrets Act's definition of a trade secret. See UNIF. TRADE SECRETS ACT § 1 (amended 1985), 14 U.L.A. 538 (2005). For a more robust description of Executive Trade Secrets, see *supra* Part IV.A.

279 See Lemley, *supra* note 192, at 313 (arguing that the secrecy requirement of trade secrets serves as a channeling and gatekeeping function for firms when deciding what to disclose); Michael Risch, *Why Do We Have Trade Secrets?*, 11 MARQ. INTELL. PROP. L. REV. 1, 42–43 (2007) (opining that the secrecy requirement of trade secrets law leads to less overall secrecy because of the existence of legal protection).

280 For example, a firm could decide that securing the economic value of a certain private fact of its executive is not worth the regulatory and public scrutiny of nondisclosure.

281 See *Franke v. Wiltschek*, 209 F.2d 493, 495 (2d Cir. 1953) (opining that a trade secret can be legitimately revealed “from a study of the expired patent and plaintiffs’ publicly marketed product”). *Contra* Robert Block, *Bush Antiterror Plans Irk Big Business*, WALL ST. J., Nov. 28, 2005, at A4 (discussing how anti-terror laws permit government agencies to request for confidential business information); *Do Hedge Funds Hold ‘Trade Secrets?’*, *supra* note 230 (discussing the SEC compelling the disclosure of a hedge fund’s proprietary information).

282 See 5 U.S.C. § 552(d) (2006) (“This section [of the Freedom of Information Act concerning the exemption of trade secrets from public request] is not authority to withhold information from Congress.”); 15 U.S.C. § 78x(e)(2) (2006) (stating the

reporters can legitimately disclose valuable commercial secrets and private information about newsworthy figures.

Ultimately, while concerns about Executive Trade Secrets creating an inappropriate shield for hiding executive information are legitimate, the laws of corporations, securities, and trade secrets provide meaningful safeguards for the interests of the investing public.

B. Better Executive Pools & More Public Firms

Two significant, interrelated positive consequences of Executive Trade Secrets are (1) better executive pools and (2) more public firms. By creating a safer pathway, Executive Trade Secrets encourages individuals with sensitive private issues to be more inclined to become public company executives, thereby, expanding the pool of qualified candidates for executive positions. Under the same logic, entrepreneurs with sensitive private issues who lead private companies may be more inclined to become public companies if they knew that some of their private information could be legitimately and sensibly safeguarded in the business context.

The current executive disclosure practices and the intrusive media environment surrounding prominent public company executives may deter qualified private individuals from wanting to serve as executives and deter private companies from wanting to go public.²⁸³ Under the current framework, qualified candidates with sensitive private issues may be reluctant to subject themselves to the scrutiny and disclosures that comes with being a public company executive. These sensitive private issues could include matters such as health conditions, familial problems, domestic disputes, religious affiliations, sexual orientation, and personal finances.

The deterrent burdens of disclosure and publications are not unique to the corporate context. In the political and judicial arenas, many qualified individuals remove themselves from consideration for political office or judicial appointments for fear of losing their privacy as a part of an increasingly intrusive electoral and confirmation

same for SEC filings); 21 U.S.C. § 331-(j) (2006) (stating the same under the Federal Food, Drug, and Cosmetic Act).

283 See, e.g., MCKINSEY & CO., SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP 86-89 (2007), available at http://www.nyc.gov/html/om/pdf/ny_report_final.pdf (discussing how cumbersome and intrusive securities regulation could deter companies from conducting initial public offerings in the United States); see also Lin, *supra* note 33, at 421 ("That cost, while unquantifiable in financial terms, may be significant enough to have a chilling effect on qualified, but very private, people who are considering becoming public company executives . . .").

processes.²⁸⁴ As a result of the diminished talent pool, the public is deprived of superior public servants.²⁸⁵

While the political and judicial spheres offer few easy solutions to the problems of public disclosures of privacy facts,²⁸⁶ Executive Trade Secrets offers a better path for the business sphere. Executive Trade Secrets alleviates some of these problems by creating a pragmatic framework for qualified private individuals to manage public firms without completely abdicating their personal privacy or breaching their duties. This will likely encourage more qualified individuals to enter the pool for executive positions and encourage private company executives with sensitive personal issues to consider an initial public offering.

The expansion of executive talent pools and the growth of public firms are critically important to shareholder wealth creation and economic progress.²⁸⁷ First, talented executives are often the key difference between a successful firm and a failed firm.²⁸⁸ By creating conditions that encourage the expansion of the executive talent pool, Executive Trade Secrets increases the likelihood for firms to get better managers. Second, access to the public capital markets is often a key to the growth and success of startup enterprises. Startup businesses and other private firms often “go public” because the public capital markets represent one of the best sources of financing for talent

284 For a definitive exposition on this matter, see STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994) (discussing problems and solutions of the federal appointments process); see also Jackie Calmes, *For a Washington Job, Be Prepared to Tell All*, N.Y. TIMES, Nov. 14, 2008, at A1 (discussing the invasive nature of the Obama administration’s job application); Deborah Solomon, *Top Treasury Candidates Pull Out*, WALL ST. J., Mar. 6, 2009, at A3 (reporting on the withdrawal of political office candidates “in part because of the long vetting process, which had dragged on for weeks and included several rounds of intense questioning”).

285 See CARTER, *supra* note 284, at 3–10 (arguing that the government is deprived of qualified individuals because of an increasingly intrusive media culture); Mark Landler, *Clinton Says Candidate for Aid Agency is Tangled in Vetting*, N.Y. TIMES, July 13, 2009, at A10 (noting that individuals declined to be considered for federal posts “because the financial and personal reporting requirements were so onerous”).

286 See CARTER, *supra* note 284, at 187–206 (articulating various workable, but difficult to implement proposals to fix the federal appointments process).

287 See, e.g., MCKINSEY & CO., *supra* note 283, at 36 (opining on the importance of IPOs to economic growth).

288 See Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105, 1105 (2009) (“Undeniably, corporate executives wield great power and are critical to company success, and they generally play central roles in corporate failure and scandal as well.” (footnotes omitted)); see also SONNENFELD, *supra* note 94, at 3–9 (providing examples of failing companies being turned around by talented executives).

recruitment, personnel retention, business expansion, and research and development.²⁸⁹ By removing a sensitive hurdle for some enterprising individuals, Executive Trade Secrets, makes it easier for businesses to contemplate an initial public offering.

In sum, Executive Trade Secrets incentivizes shareholder wealth-creation and economic growth by expanding executive talent pools and encouraging private firms to become public ones.

C. *The (Further) Commoditization of Personal Privacy*

A final key implication of Executive Trade Secrets is that it expands the contemporary practice of commoditizing personal privacy rights and private facts because a subject's trade secrets protection arises, in part, from its proprietary property interests.²⁹⁰ The conceptualization of executive private facts as economically valuable trade secrets further expands on the macroeconomic trend of privacy commoditization.²⁹¹ Such an expansion advances and challenges

289 See, e.g., DRAHO, *supra* note 56, at 1 ("The IPO can be used to raise capital for expansion of operations, increase liquidity for the shareholders, improve the company's reputation and to create a valuable currency—the stock—that can be used to make acquisitions and compensate employees."); SIMON C. PARKER, *THE LIFE CYCLE OF ENTREPRENEURIAL VENTURES* 571 (2006) (noting that IPOs are more prevalent as a method of capital raising in "R&D intensive industries and industries with significant intangible resources"). See generally Marco Pagano et al., *Why Do Companies Go Public?*, 53 J. FIN. 27, 61 (1998) (finding that companies conduct IPOs as a way to replenish corporate accounts).

290 See *Ruckelshaus v. Monsanto Co.*, 467 U.S. 985, 1001–04 (1984) (opining on whether compelled disclosure of trade secrets amounts to a government takings of private property); Richard A. Epstein, *The Constitutional Protection of Trade Secrets Under the Takings Clause*, 71 U. CHI. L. REV. 57, 59–60 (2004) (denoting certain trade secrets as property); Lemley, *supra* note 192, at 324–26 (discussing how trade secrets can be considered property); Patricia Mell, *Seeking Shade in a Land of Perpetual Sunlight: Privacy as Property in the Electronic Wilderness*, 11 BERKELEY TECH. L.J. 1, 26–41 (1996) (discussing the relationship between privacy and property); Richard S. Murphy, *Property Rights in Personal Information*, 84 GEO. L.J. 2381, 2384 (1996) ("[I]nformation, is property.").

291 See, e.g., Samuelson, *supra* note 214, at 1134 ("[A] creation of new property rights seems almost inevitable. Granting individuals property rights in their data would seem consistent with this general trend." (footnotes omitted)); Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2056, 2057 (2004) ("A strong conception of personal data as a commodity is emerging in the United States, and individual Americans are already participating in the commodification of their personal data."); see also Rochelle Cooper Dreyfuss, *Information Products: A Challenge to Intellectual Property Theory*, 20 N.Y.U. J. INT'L L. & POL. 897, 897–98 (1988) (discussing the need for corporations to secure legal protections in the face of "the emerging importance of information as a commodity"); Adam Mossoff, *What is Property? Putting the Pieces Back Together*, 45 ARIZ. L. REV. 371, 415–16 (2003) ("Although Courts today

our traditional understanding of privacy as only an individual right.²⁹²

As previously discussed, issues concerning executive disclosure arise, in part, because of advances in information technology; Executive Trade Secrets serves as a partial legal response to these new issues.²⁹³ This action-reaction dynamic between technology and privacy concerning executive disclosures is consistent with other responses in privacy law to new technology. Historically, the advent of new technology has often disrupted conventional and legal understandings of privacy, thereby, requiring new legal conceptions.²⁹⁴ “Privacy law has traditionally developed in tandem with technology”²⁹⁵ The law has often played tortoise to technology’s hare.²⁹⁶ The proliferation of the telephone, for example, in the 1900s pushed the evolution of our expectations and conceptions of privacy. In

recognize trade secrets as ‘property’ many commentators find that this amounts to placing a round peg in a square hole.” (footnotes omitted)).

292 There exist many articulations and understandings of the right to privacy. See, e.g., 62A AM. JUR. 2D *Privacy* § 1 (2005) (outlining privacy as the right of a person to be free from unwarranted publicity); ANITA L. ALLEN, *UNEASY ACCESS* 34 (1988) (“[P]rivacy denotes a degree of inaccessibility of persons, their mental states, and information about them to the senses and surveillance devices of others.”); SISSELA BOK, *SECRETS* 10–11 (1983) (“[P]rivacy [i]s the condition of being protected from unwanted access by others—either physical access, personal information, or attention.”); Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 428 (1980) (“[P]rivacy is a limitation of others’ access to an individual.”); Warren & Brandeis, *supra* note 4, at 193 (articulating the right to privacy for the first time).

293 For a more detailed discussion about how advances in information technology have affected the influence and privacy of executives, see *supra* Part I.C.

294 See Gaia Bernstein, *When New Technologies are Still New: Windows of Opportunity for Privacy Protection*, 51 VILL. L. REV. 921, 922–24 (2006) (discussing shifts in privacy norms from introduction of new technologies); Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 283 (2003) (“As digital technology renders obsolete the theories on which the laws are based, the legal protections themselves become at best incomplete and at worst perverse.”); Michael H. Shapiro, *Is Bioethics Broke? On the Idea of Ethics and Law “Catching Up” with Technology*, 33 IND. L. REV. 17 (1999) (discussing whether the law needs to “catch up” to science and technology); Miguel Helft & Claire Cain Miller, *Web Outruns Privacy Law*, N.Y. TIMES, Jan. 10, 2011, at A1 (discussing how the Electronic Communications Privacy Act of 1986 “is outdated” and needs updating).

295 DeVries, *supra* note 294, at 283.

296 See Lyria Bennett Moses, *Recurring Dilemmas: The Law’s Race To Keep Up With Technological Change*, 2007 U. ILL. J.L. TECH. & POL’Y 239, 239 (2007) (“It is often stated that the law lags behind technology. As technology changes and creates new possibilities, lawyers and legal scholars struggle to deal with the implications.”); Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 514–22 (1999) (discussing how the creation of cyberspace demands new legal conceptions).

1928, the Supreme Court held that telephone wiretaps did not amount to an unreasonable breach of one's privacy.²⁹⁷ Nearly four decades later, in *Katz v. United States*,²⁹⁸ the Court's position changed, when it held that there was a "reasonable expectation of privacy" in phone conversations.²⁹⁹

More recently, the proliferation of the Internet and digital devices in the twenty-first century has again pushed and changed our expectations and conceptions of privacy not just for executives but for all individuals.³⁰⁰ Modern advances in information technology have made privacy, specifically informational privacy,³⁰¹ both scarce and valuable.³⁰² In 1966, Justice William O. Douglas presciently lamented that, "We are rapidly entering the age of no privacy . . ."³⁰³ Today, a multi-billion dollar industry exists to facilitate the aggregation and analysis of private information for profit.³⁰⁴ Today, "[o]ur wherea-

297 *Olmstead v. United States*, 277 U.S. 438, 464 (1928).

298 389 U.S. 347 (1967).

299 *Id.* at 360 (Harlan, J., concurring).

300 See STEVEN A. HETCHER, *NORMS IN A WIRED WORLD* 243, 245, 250 (2004) ("There is a burgeoning privacy crisis caused in large part to the explosive growth of the Internet."); Bernstein, *supra* note 294, at 931-43 (discussing the impact of the Internet on changes in privacy norms); see also DeVries, *supra* note 294, at 285 ("Digital technology—computing, databases, the Internet, mobile communications, and the like—thus calls for further evolution of privacy rights, both conceptually and in law."); Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 *STAN. L. REV.* 1393, 1394 (2001) ("The small details that were once captured in dim memories or fading scraps of paper are now preserved forever in the digital minds of computers, vast databases with fertile fields of personal data.").

301 See *Whalen v. Roe*, 429 U.S. 589, 599 (1977) (recognizing informational privacy interests); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (defining information privacy as the "claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"); Jerry Kang, *Information Privacy in Cyberspace Transactions*, 50 *STAN. L. REV.* 1193, 1205 (1998) (defining information privacy as "an individual's claim to control the terms under which personal information—information identifiable to the individual—is acquired, disclosed, and used" (quoting INFO. INFRASTRUCTURE TASK FORCE, *PRIVACY AND THE NATIONAL INFORMATION INFRASTRUCTURE* (1995), available at <http://aspe.hhs.gov/datacncl/niiprivp.htm>)).

302 See J. Howard Beales, III & Timothy J. Muris, *Choice or Consequences: Protecting Privacy in Commercial Information*, 75 *U. CHI. L. REV.* 109, 109 (2008) ("Information exchange is the currency of the modern economy."); Samuelson, *supra* note 214, at 1126 ("Information privacy is a scarce commodity in cyberspace.").

303 *Osborn v. United States*, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting).

304 See Beales & Muris, *supra* note 302, at 109 ("A multi-billion dollar industry with dozens of firms compiles and resells information."); William J. Fenrich, *Common Law Protection of Individuals' Rights in Personal Information*, 65 *FORDHAM L. REV.* 951, 959-64 (1996) (documenting the personal data collection industry in America); Schwartz, *supra* note 291, at 2056 ("The monetary value of personal data is large and still grow-

bouts, our financial transactions, our uses of the World Wide Web, and countless other data routinely register in the automated consciousness of corporate and state bureaucracies.”³⁰⁵ In the last few decades alone, new technology (along with other factors) has seemingly transformed the concept of privacy from merely an individual right into also a property right.³⁰⁶

This property conception of privacy is filled with promise and peril both in terms of Executive Trade Secrets and in general. As a practical example of its promise, the commoditization of private facts arguably has made commerce more efficient. Digital cookies that store consumer preferences in their web browsers, for instance, has made it easier for consumers to find goods online that satisfy their preferences, and easier for firms to market to those consumers.³⁰⁷ At the same time, the collection of such data is often without the informed consent or knowledge of individuals,³⁰⁸ and may

ing, and corporate America is moving quickly to profit from this trend.”); Ashlee Vance, *Data Analytics: Crunching the Future*, BUSINESSWEEK, Sept. 12, 2011, at 71 (reporting on the proliferation of data aggregation and data analysis for commercial purposes.).

305 James B. Rule, *The Whole World Is Watching*, 22 DEMOCRACY J. 58, 59 (2011).

306 Warren and Brandeis presciently saw the potential of privacy as property in their seminal work. See Warren & Brandeis, *supra* note 4, at 193 (“[T]he term ‘property’ has grown to comprise every form of possession—intangible, as well as tangible.”). For a general survey of privacy as a property right, see generally Mell, *supra* note 290, at 9–10 (“[T]here is a general consensus that individuals do have a right to some degree of privacy, even in the electronic wilderness.”); Murphy, *supra* note 290, at 2381 (discussing a property right to “informational privacy”); Samuelson, *supra* note 214, at 1125 (conceptualizing privacy as intellectual property); Schwartz, *supra* note 291, at 2055–58 (seeking a model for propertization of personal data that safeguards information privacy).

307 See IAN AYRES, SUPER CRUNCHERS 129 (2007) (“More and more information is digitalized in binary bytes. Mail is now email. From health care files to real estate and legal filings, electronic records are everywhere.”); Beales & Muris, *supra* note 302, at 112 (describing how consumer data collection has resulted in more effective marketing); Kang, *supra* note 301, at 1199 (“[T]he data collected in these various domains can be aggregated to produce telling profiles of who we are, as revealed by what we do and say. . . . The information we generate as a by-product of this activity is quite valuable. The private sector seeks to exploit it commercially, but individuals resist.”).

308 See, e.g., Neil Weinstock Netanel, *Cyberspace Self-Governance*, 88 CALIF. L. REV. 395, 476 (2000) (“[M]ost users are not even aware that the web sites they visit collect user information, and even if they are cognizant of that possibility, they have little conception of how personal data might be processed.”); Daniel J. Solove, *Access and Aggregation: Public Records, Privacy, and the Constitution*, 86 MINN. L. REV. 1137, 1195 (2002) (warning of the growing threat to privacy arising from “increased access and aggregation” of private information); Editorial, *Protecting Online Privacy*, N.Y. TIMES, Dec. 5, 2010, at WK7 (“Most [people] don’t understand how much information they are sharing about their online lives.”).

be subject to breaches and violations of commercial norms and laws.³⁰⁹

On a more fundamental level, a property conception of privacy offers the promise that individuals can better capture and bargain for the rents that other market participants gain from their private information.³¹⁰ Nonprofit and for-profit enterprises are both attempting to create workable mechanisms that would allow individuals to better extract monetary gains from their personal data.³¹¹

Additionally, a property conception of privacy offers the promise of some of the robust protections afforded to traditional property.³¹² For example, by conceptualizing certain private facts of executives as trade secrets, it affords such private facts some of the added protections afforded to chattel such as quasi-intellectual property protections, in conjunction with traditional privacy protections.

On the other hand, privacy as property presents some perils rooted in notions of alienability and morality. Personal information

309 See *Trans Union Corp. v. FTC*, 81 F.3d 228, 229 (D.C. Cir. 1996) (holding that the sale of consumer credit reports under certain circumstances violated the Fair Credit Reporting Act); PRESIDENT'S IDENTITY THEFT TASK FORCE, *COMBATING IDENTITY THEFT 11* (2007), available at www.identitytheft.gov/reports/StrategicPlan.pdf (discussing the cost and prevalence of identity theft); Beales & Muris, *supra* note 302, at 120–25 (surveying various statistics on data breaches and identity theft).

310 See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 212–13 (1996) (advocating for the recognition of electronic property rights to encourage bargaining for rents); Samuelson, *supra* note 214, at 1126–30 (discussing the economic appeal of conceptualizing privacy and property); Somni Sengupta & Evelyn M. Rusli, *Personal Data's Value? Facebook Is Set to Find Out*, N.Y. TIMES, Feb. 1, 2012, at A1 (reporting on Facebook profiting from the personal data of its users). However, it can legitimately be argued that the creation of such property rights in personal information can lead to an inefficient market with serious negative externalities. See Mark A. Lemley, *Private Property: A Comment on Professor Samuelson's Contribution*, 52 STAN. L. REV. 1545, 1551 (2000) (“If we want privacy, we must be willing to accept the fact that there is no good ‘market solution’ and endorse some government regulation of the behavior of data collectors . . . it is not a ‘free market’ solution, because we cannot expect the market to allocate those billions of rights efficiently.”).

311 See Joshua Brustein, *Start-Ups Seek to Help Users Put a Price on Their Personal Data*, N.Y. TIMES, Feb. 13, 2012, at B3; Carol Matlack, *Who Do You Trust More: Facebook or a Bank*, BUS. WK., Jan. 16, 2012, at 36 (“Now SWIFT (the Society for Worldwide Interbank Financial Telecommunication), the nonprofit global cooperative that handles wire transfers between financial institutions is working on a system that would let Web surfers store and manage their own data.”).

312 See *id.* at 1132 (“Thus, however intuitively powerful the notion of property rights in one’s data may be, it is clear that in the United States the existence of some legally protectable interests in personal data in certain circumstances is not equivalent to a legal rule that a person has a property interest in one’s personal data.”).

presents particular problems relating to the fundamental property tenet of alienability.³¹³ For an executive whose personal information has been deemed a trade secret, who owns and controls the use of such information—the firm, the executive, or both of them?³¹⁴ How can one secure the private information of an individual after purchasing it to the exclusion of others? Who can exploit it? Who owns that private information?³¹⁵ For chattel, these questions are easier; for private personal information, they are much more difficult.³¹⁶

Additionally, conceptualizing and commoditizing privacy as property may threaten our moral sensibilities and lead to dangerous consequences.³¹⁷ What happens to an individual or executive's personhood once they have sold off their personal information? What is a "fair" bargain for one's personal information and privacy?³¹⁸ What is to prevent the commoditization of other privacy rights including decisional privacy matters such as marriage and voting? Ultimately, these are complicated and important questions for modernity, where personal

313 See, e.g., *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 (1984) ("The right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting *Kaiser Aetra v. United States*, 444 U.S. 164, 176 (1979))); see also Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1295–1302 (2000) (discussing problems concerning alienability of treating personal information as property).

314 See Rule, *supra* note 305, at 69 (lamenting the permanent alienability of an individual's private information).

315 See Lev Grossman, *2010 Person of the Year Mark Zuckerberg*, TIME, Dec. 27, 2010, at 44, 52–56 (raising similar privacy concerns relating to Facebook).

316 Despite these difficulties, a large number of courts and legal scholars have accepted the conception of trade secrets as a property. See ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS 73–98 (2006) (cataloguing cases where trade secrets are recognized as property); see also *Teller v. Teller*, 53 P.3d 240, 247–49 (Haw. 2002) (finding trade secrets as a property right in relation to distribution of marital assets). Even one of the earliest trade secrets cases acquiesced to the conception of trade secrets as property. See *Peabody v. Norfolk*, 98 Mass. 452, 459–60 (1868) ("In this court, it is settled that a secret art is a legal subject of property . . .").

317 See Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 147 (2004) (raising concerns about the "over-propertization of information in the digital age"); Samuelson, *supra* note 214, at 1142–47 (discussing the risks of treating the right to privacy as a property from a moral and civil liberties perspective); Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1391 (2000) ("Recognizing property rights in personally-identified data risks enabling more, not less, trade and producing less, not more, privacy.").

318 See, e.g., Paul M. Schwartz, *Beyond Lessig's Code for Internet Privacy: Cyberspace Filters, Privacy Control, and Fair Information Practices*, 2000 WIS. L. REV. 743, 763 (2000) ("[P]roperty rights in personal data may systematically lead to bad bargains—and ones in areas of great social importance.").

facts and privacy are frequently treated like chattel.³¹⁹ There are no easy answers; instead, the promises and perils of privacy as property must be carefully considered and balanced by individuals, executives, and policymakers.³²⁰

Executive Trade Secrets, like previous legal reactions to the impact of new information technology on privacy, in part, is a legal response to the modern reality of executive privacy, a partial legal response to the evolving nature of privacy as both an individual right and a form of property.³²¹ In the final analysis, Executive Trade Secrets does not fully capture the promises of privacy as both right and property for firms and executives, nor does it fully shield them from the perils of this Janus conception of privacy. What it does, or what it hopes to do is to advance the discourse on privacy as form of protectable, secret property as a way to address anew problematic issues concerning executive disclosures.

CONCLUSION

This Article began with a straightforward claim. It claimed that the law discriminates among a corporation's secrets. Namely, it accused the law of favoring business secrets over the secrets of business people, thereby creating a paradox of secrets with complicated consequences for firms, executives, and investors. This Article then documented the disclosure obligations of firms and their executives, and explained how these obligations lead to legal fault-lines and inconsistent practices. Specifically, it highlighted the tensions under

319 See Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1152 (2002) ("Life in the modern Information Age often involves exchanging information with third parties, such as phone companies, Internet service providers, cable companies, merchants, and so on. Thus, clinging to the notion of privacy as total secrecy would mean the practical extinction of privacy in today's world.")

320 See, e.g., Beales & Muris, *supra* note 302, at 135 ("Wise choices about privacy protection can be made only after careful consideration of the particular uses of information, the problems they may pose for consumers, and the benefits those uses may offer to other consumers and the economy as a whole."); Schwartz, *supra* note 291, at 2094 (proposing a "hybrid inalienability" model for trading personal information); see also Mark A. Lemley, *Private Property*, 52 STAN. L. REV. 1545, 1554 (2000) ("[T]here is no good market solution [for private information based in property law]"); Lipton, *supra* note 317, at 144 ("Increasingly, proprietization of information . . . leads to obvious concerns about appropriately balancing competing interests in valuable information."); Rowe, *supra* note 185, 826–28 (proposing a multi-factored balancing approach to considering the disclosure of trade secrets to governmental agencies).

321 See generally Shapiro, *supra* note 294, at 17 (explicating on the need for timely legal responses to technological advances).

the cross-cutting obligations in the laws concerning securities, corporations, and privacy. To address those tensions and conflicts, this Article moved from the laws of secret-telling to the laws of secret-keeping. This pivot started with an overview of trade secrets law. Then, using the foundation of trade secrets, this Article introduced the concept of Executive Trade Secrets as the key to unlocking the paradox of secrets and addressing the problems of executive disclosures. This pivot concluded with a discussion of three key implications of Executive Trade Secrets—the limitations of its shield, its larger impact on commerce, and where it resides in the modern discourse on privacy commoditization.

In the end, it must be confessed that this Article does not perfectly resolve all the issues and tensions concerning executive disclosures. Instead, it offers Executive Trade Secrets as a pragmatic theoretical framework for working through those issues, as a new construct to re-think, re-imagine, and re-examine how one should understand business secrets and the secrets of business people. In a world where privacy has grown both more valuable and more vulnerable, Executive Trade Secrets challenges our traditional understandings of privacy and business secrets. And in re-thinking about how best to protect the secrets and privacy of firms and their executives, it will perhaps cause us to re-think how we could better safeguard our secrets and our privacy against advances in modernity.

