

Case Demonstrates Risks of Selectively Providing Details of an Executive's Biographical Information

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A [recent decision](#) by the U.S. District Court for the Northern District of Illinois Eastern Division indicates that companies should be careful about providing some, but not all, of an executive's background.

The Court decided on a class action complaint against Textura Corporation, its CEO and Chair and its CFO, alleging violation of Section 10(b) of the Exchange Act and Rule 10b-5, and control person liability for the CEO and CFO. These alleged misstatements were revealed in reports issued by a short seller Citron Research, and included omitted material information about the CEO's background, failure to report related party transactions and misleading analysts with respect to the basis points it earned from certain fees.

The Court denied the defendants' motion to dismiss only with respect to the claim regarding the CEO's biography. The biography was published in prospectuses and registration statements issued in connection with the company's IPO, registration statements and a proxy statement. It described the CEO's business positions prior to co-founding the company and other jobs held earlier in his career.

The disclosure did not state that immediately before starting Textura, he was CEO and acting CFO of Patron Systems. In that position, he was involved with "notorious convicted stock fraudsters," including a boiler room firm that was co-founded by the self-proclaimed "Wolf of Wall Street." In addition, during his tenure at Patron, the plaintiffs alleged that the auditor accused him of providing it with false information and later announced it could no longer reply on Patron's representations.

The Court noted that Item 401(e) of Regulation S-K requires a description of "business experience during the past five years" of directors and officers. Since the CEO had worked for Textura for over eight years at the time of IPO, the Court agreed that the company had no duty to disclose any of his business experience before Textura, and would have complied with the regulation if it had simply described the CEO's experience with Textura.

However, the company chose to elaborate, and set out most, if not all, of his other business experience except for his tenure at Patron, which immediately preceded Textura. The way the biography was worded suggested that he was instead at PwC prior to Textura. The Court stated that "[t]he failure to list his immediately preceding position when it is the lone 'negative' in his background suggests an intent to deceive."

The Court found that having elected to disclose his business experience beyond five years and prior to his eight years with Textura, then the company had a duty to do in a manner that was not misleading. The company's omission of his time with Patron is a materially misleading omission because they touted his prior experience, and therefore had a duty to disclose all of the experience, including any negative experience.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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