



307 Roundtable: Environmental Management & Social Responsibility

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Faculty Biographies

Debra Sabatini Hennelly

Debra Sabatini Hennelly is vice president & general counsel of Integrity Interactive Corporation, specializing in internet-based corporate compliance and ethics programs. Ms. Hennelly is an experienced lawyer who spent the last nine years in the corporate legal departments of AT&T Corp., Lucent Technologies Inc. (AT&T spin-off), and Avaya Inc. (Lucent spin-off).

Until early this year, Ms Hennelly was corporate counsel for regulatory and compliance at Avaya, a \$7 billion company with more than 20,000 employees. Prior to her role at Avaya, Ms. Hennelly served as corporate counsel for Lucent's Business Communications Systems, where she was the company's Y2K counsel and provided commercial legal support for parts of the business, and as corporate counsel for environment and safety for Lucent and AT&T. Before joining AT&T, she practiced environmental law with Bryan Cave and with Riker, Danzig, Scherer, Hyland & Perretti. Originally trained as an engineer, Ms. Hennelly began her career as a construction and tank engineer for Exxon Company, USA..

Ms. Hennelly has written and lectured extensively on environmental and compliance issues and is currently chair of the American Corporate Counsel Association's Environmental Law Committee. She is also a member of the board of trustees of the Electronic Industries Foundation, which fosters science and math education to help develop the technology workforce of the future.

Ms. Hennelly earned a bachelor of science magna cum laude from Duke University. She then attended the University of Virginia Law School, where she earned her law degree, and has been active for more than 10 years with its Alumni Council.

Clair E. Krizov

Clair E. Krizov is AT&T's environment, health, and safety (EH&S) executive director, environment and social responsibility. She oversees AT&T's internal and external EH&S communications as well as AT&T's endeavors with non-government and government organizations regarding environment, health, and safety initiatives.

Prior to this position, Ms. Krizov managed building engineering, real estate, support services, financial assurance and computer centers at AT&T. She began her professional career with Southwestern Bell Telephone Company where she managed installation, maintenance, customer connectivity, and architectural design activities in Texas.

Ms. Krizov is chair of the Board of Directors of Friends of the High School for Environmental Studies in New York City and serves on the Board of the National Association for Environmental Management. She is cofounder of the Women's Sustainability Network and a member of The Conference Board Environment, Health & Safety Council, the National Environmental Education and Training Foundation Institute for Corporate Mentoring Steering Committee, the World Environment Center International Environmental Forum, and the Junior League of Atlanta and the Nature Conservancy International Leadership Council. In 1998, Ms. Krizov was appointed to the

Clinton-administration President's Council on Sustainable Development National Town Meeting Planning Committee.

Ms. Krizov graduated with a BS from the University of Texas at Austin. She received her MBA through the Executive MBA program at Georgia State University. Ms. Krizov is currently pursuing a PhD at Georgia Tech.

Erik J. Meyers

Erik J. Meyers is vice president and general counsel of the Environmental Law Institute (ELI), an independent and nonprofit center for education and research on environmental law, policy, and management based in Washington, DC. Mr. Meyers is also assistant corporate secretary serving the ELI Board of Directors. In addition to managing the Institute's corporate legal affairs, he directs ELI's external affairs programs. He initiated ELI's work on private sector environmental management and has directed a number of projects on techniques and practice.

Prior to his employment at ELI, Mr. Meyers was engaged in private legal practice, worked as a consultant to Action (the Federal volunteer agency), was president and general counsel of the Public Committee on Mental Health, and served as legal counsel and program officer for the Drug Abuse Council, Inc.

Mr. Meyers is a member of USEPA's National Advisory Committee for Environmental Policy and Technology, the Chairman's Advisory Group for the U.S. Technical Advisory Group for TC-207 and NGO Task Force for TC-207 [the International Organization on Standardization's environmental management standards committee] Group, ACCA's Environmental Law Steering Committee, and the IUCN Commission on Environmental Law.

He earned a bachelors of science from the Georgetown University and his law degree at Fordham University School of Law.

7/1/02

**Useful Web References on Environmental Standards
and
Elements of Corporate Social Responsibility**

(compiled for American Corporate Counsel Association
Annual Meeting, Roundtable #307 [Environmental Track]
October 21, 2002)

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Management standards and global codes of conduct

International Organization for Standardization (ISO) [American National Standards Institute is the American member of ISO.] See generally
<<http://www.iso.ch/iso/en/iso9000-14000/tour/magical.htm>> and

- ISO 14001 Environmental Management Systems standard and related standards/ guidance/ technical reports in the 14000 environmental management series)
 - See information about ISO 14001 at
<<http://www.ansi.org/public/iso14000/default.htm>>
 - Proposed new ISO strategic advisory group to examine whether to develop new voluntary international standards for Corporate social responsibility under ISO/Committee for Consumer Quality (ISO/COPOLCO). See
<<http://www.iso.ch/iso/en/commcentre/pressreleases/2002/Ref826.html>>
 - Proposed new international Management System Standard for Business Conduct See <www.eoa.org>

Social Accountability (SA) 8000 (administered by Social Accountability International)
See <<http://www.cepaa.org/>>

Conformity Assessment related to Voluntary Standards

- ISO/CASCO. See for general information, issues related to accreditation and certification (conformity assessment functions) at
<<http://www.iso.org/iso/en/comms-markets/conformity/iso+conformity.html>>

- See ANSI and RAB Web sites about joint National Accreditation Program for registrars (certifiers) for ISO 14001 EMS standard and ISO CASCO on international accreditation requirements.
 - ANSI <http://www.ansi.org/public/ca/ca_3.html> and <http://www.ansi.org/public/ca/ca_5.html>
 - RAB <http://www.rabnet.com/ab_nap.shtml>
- New proposed program for 14001 and Responsible Care verification/certification. See <http://www.americanchemistry.com/> and click on “Responsible Care” for some information.

Business Association Codes of Conduct

WBSCD/ ICC Charter

- See <www.wbcd.org>
- Industry sector specific initiatives:
 - Mining, Minerals and Sustainable Development Project
 - Toward A Sustainable Cement Industry Project

American Chemistry Council's “Responsible Care”

See <<http://www.americanchemistry.com/>>

American Forest & Paper Association “Sustainable Forestry Initiative”

See <www.afandpa.org>

American Petroleum Institute “Strategies for Environmental Partnership (STEP)”

See <www.api.org>

Chocolate Manufacturers Association (stds/code on child slavery in West Africa)

See <http://www.CandyUSA.org/Press/New/labor_release_070102.shtml>

United Egg Producers

See <<http://www.epa.gov/projectxl/uep/index.htm>>

Non-governmental Organization Codes of Conduct/Certification Programs

CERES

- CERES Principles. See <www.ceres.org/about/principles.html>
- See also Global Reporting Initiative at <www.globalreporting.org>

Forest Stewardship Council

- See <<http://www.fscoax.org/principal.htm>>
- See also comparison of FSC and AF&PA's SFI at <www.greenbiz.com/toolbox/report_third.cfm?LinkAdvID=20919>

Rainforest Alliance (certification program for tropical hardwoods)

See <http://www.smartwood.org/> and <http://www.rainforest-alliance.org>

Sustainable Agricultural

See Rainforest Alliance at <http://www.rainforest-alliance.org/programs/cap/program-description.html>

Workers Rights Consortium (US)/ Clean Clothes Campaign (Europe)

See <http://www.workersrights.org/coc.asp>

Global Sullivan Principles

See <http://globalsullivanprinciples.org/principles.htm>

Governmental or mixed governmental/ non-governmental

World Bank - See

<http://lnweb18.worldbank.org/essd/essdext.nsf/43ByDocName/CorporateSustainability>

European Commission (“Green Paper Promoting European Framework for Corporate Social Responsibility”) at http://europa.eu.int/lex/en/com/gpr/2001/com2001_0366en01.pdf

OECD (*OECD Guidelines for Multinational Enterprises*)

See www.oecd.org/daf/investment/guidelines

International Labor Organization (ILO), guidance on occupational health and safety management

See www.ilo.org/public/english/protection/safework.htm

Seven Principles of Environmental Stewardship for the 21st Century (Border Environment Cooperation Commission) See:

<http://yosemite.epa.gov/oia/MexUSA.nsf/61906db6f41456608825679f006db802/5ee550774c952231882567a00000c441?OpenDocument>

US EPA National Environmental Performance Track

<http://www.epa.gov/performancetrack>

Project XL (US EPA) - See <http://www.epa.gov/projectxl/>

Sample Corporate Environmental/Social Responsibility Reports, Related Information

Alcoa http://www.alcoa.com/site/news/features/2001/Dow_Sustainability_Index.asp

Anheuser-Busch <http://www.abehsreport.com/>

AT&T <www.att.com/ehs/annual_reports/ehs_report/>

Chiquita Brands International, Inc. <www.chiquita.com/chiquitacr2/default.asp>

ExxonMobil http://www.exxonmobil.com/news/publications/c_she_01/c_index.html

General Motors

http://www.gm.com/company/gmability/environment/env_annual_report/index.html

Georgia Pacific <<http://www.gp.com/enviro/2000esrep/index.html>>

Honda http://www.hondacorporate.com/environ_tech/index.html?subsection=overview

IBM <<http://www.ibm.com/ibm/environment/annual/index.shtml>>

McDonalds Corp. www.sustainablebusiness.com/features/feature_template.cfm?ID=820

Pfizer <<http://www.pfizer.com/ehs/>>

United Technologies <<http://www.utc.com/profile/environment/index.htm>>

Legal Considerations in Voluntary Corporate Environmental Reporting

David W. Case

An earlier version of this Dialogue was presented at a two-day workshop entitled "Corporate Environmental Reports: The State of the Art and Beyond" sponsored by the Vanderbilt Center for Environmental Management Studies (VCEMS) on January 26-27, 2000, in Nashville, Tennessee. The workshop included presentations by companies (such as General Motors and Baxter International) at the leading edge of environmental reporting discussing unique aspects of their reports, and by participants involved in the Global Reporting Initiative and other environmental measurement, reporting, and standardization efforts. The workshop sponsor, VCEMS, is an interdisciplinary research center jointly led by the Vanderbilt Institute for Public Policy Studies, the School of Engineering, the Owen Graduate School of Management, and the Law School.

Mr. Case is a Bridgestone/Firestone Fellow, Vanderbilt Center for Environmental Management Studies (VCEMS). The author is also a Ph.D. candidate (Environmental Law, Management, and Policy) at Vanderbilt University. Mr. Case received a B.A. in 1985, a J.D. in 1988, University of Mississippi, and received an LL.M. in 1993, Columbia University.

[30 ELR 10375]

Formal corporate environmental reports—voluntary periodic communication by companies of information about their environmental activities and performance in a single document generally analogous to an annual report—began to appear at the end of the 1980s.¹ By 1995, over 100 Fortune 500 companies issued formal environmental reports.² Some companies embrace these reports as a useful internal management tool and external stakeholder communication vehicle. Others have been reluctant to produce such reports, with reasons varying from perceptions that little "demand" exists for such information, questions about the report's usefulness, and lack of evidence that the benefits of producing such a report outweigh its costs. Once the company has made the decision to produce a formal report, however, a number of critical concerns in determining the substance of the report come into play. Included among these are various legal considerations and issues.

Although countries recently have begun to impose such requirements (notably Denmark and the Netherlands),³ no legal requirement in the United States mandates preparation and release of such reports. Nonetheless, the past decade witnessed a significant increase in the number of American companies voluntarily joining the growing worldwide trend toward producing and publicly releasing formal corporate environmental reports on a periodic basis.⁴ Even absent compulsory regulation, several factors motivate companies to periodically produce formal environmental reports. In the United States, the impetus to voluntarily prepare and release such reports is at least partially attributed to mandatory legal requirements to release certain environmental data for public consumption.⁵

For example, § 313 of the Emergency Planning and Community Right-To-Know Act (EPCRA)⁶ requires covered companies to submit annual data to the U.S. Environmental Protection Agency (EPA) on levels and amounts of certain toxic chemicals released into the air, water, land, or transferred off-site. EPA maintains this data in a national computer database—the toxic release inventory (TRI)—accessible by the public, primarily through the Internet.⁷ Further, federal securities statutes and regulations require publicly held companies to disclose environmental information on regulatory compliance, judicial proceedings, and liabilities in publicly available annual and quarterly financial reports filed with the U.S. Securities and Exchange Commission (SEC). For companies already required to comply with such mandatory disclosure obligations, publication of a corporate environmental report provides an internally controlled opportunity to explain publicly available information within the context of the company's overall environmental performance and management efforts.

Other factors motivating companies to produce and release corporate environmental reports include strong public awareness and concern for the environment, a phenomenon which has steadily increased since the birth of the modern environmental movement in the late 1960s and early 1970s. At the beginning of the 21st century, companies continue to face significant pressure to publicly demonstrate that they operate in a socially and environmentally responsible manner. [30 ELR 10376] This pressure is exerted by a number of diverse stakeholders, including investors, employees, customers, the local community, government regulators, environmental interest groups, and the media. As greater numbers of companies respond to these pressures by publicly disclosing information on environmental performance in formal reports, demand increases on other companies to follow suit. Similarly, as more companies commit to proactive approaches to environmental management and stewardship, the desire to communicate the positive results of such approaches to relevant stakeholder groups also encourages increased preparation of formal reports.

Because formal corporate environmental reporting is not directly regulated in this country, companies enjoy significant freedom to choose which issues or aspects of environmental performance to publicly disclose, along with the substantive content of such disclosure. The lack of restrictions has resulted in broad variation in format and content of corporate environmental reports. In an effort to promote consistency in reporting content and quality, several organizations, including notably the Global Environmental Management Initiative, the Coalition for Environmentally Responsible Economies, and the International Chamber of Commerce, have issued guidelines or suggested approaches concerning what should be reported and how.⁸ A recent development in this regard is the Global Reporting Initiative (GRI), which issued draft *Sustainability Reporting Guidelines* in March 1999, seeking to promote a common standard for company reporting of environmental, social, and ethical information.⁹ The trend toward increased standardization and promotion of "best" or "state-of-the-art" practices in voluntary corporate environmental reporting is expected to continue.¹⁰

Nonetheless, even for companies that utilize such guidelines to prepare formal reports, the public communication of information through corporate environmental reports is a voluntary act. From a legal perspective, companies should take into consideration a number of factors in deciding what information should be reported and how that information should be presented for public consumption. The failure to carefully consider legal issues and concerns before voluntarily disclosing environmental data in a formal corporate environmental report has the potential for causing serious adverse consequences to the company.

Proprietary Data

Whether following standardized guidelines or internal reporting preferences, companies typically disclose information on a wide range of topics in formal corporate environmental reports. However, as Douglas Lober emphasized in a 1996 study conducted at Duke University's Nicholas School of the Environment, certain notable characteristics in content and topics reflect "leading edge" practice in corporate environmental reporting.¹¹ Key characteristics include presentation of data on environmental releases and resource and materials utilization.¹² Numerous federal and state statutes and regulations require the reporting and/or disclosure of such information to EPA and other federal and state government agencies.¹³ Thus, reports and disclosures made by companies pursuant to these legal requirements are a core source of data that can be used for presentation in formal corporate environmental reports.

Due to widespread public dissemination in media reports and outlets such as Environmental Defense's "Scorecard" Internet site,¹⁴ perhaps the most well-known federal environmental disclosure requirement is the TRI data, reported annually by companies to EPA. Other potential sources include environmental data on spills, leaks, regulatory compliance, and related information required to be reported or disclosed by federal statutes such as the Resource Conservation and Recovery Act (RCRA),¹⁵ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹⁶ the Clean Air Act (CAA),¹⁷ the Clean Water Act (CWA),¹⁸ and the Toxic Substances Control Act (TSCA).¹⁹ Further, a majority of states have "right-to-know" laws requiring disclosure of environmental information, and at least two states—Massachusetts and New Jersey—mandate disclosure of "materials accounting" data, an inventory by companies of substances (primarily chemicals) brought into, used in, and taken out of facilities.²⁰ Disclosure of such "materials accounting" data has also been proposed and is under debate for expansion of the existing federal TRI reporting requirements—popularly known as the "Phase III expansion" of TRI.²¹

Commentators have expressed significant concern that federal and state environmental laws and regulations require private companies to disclose confidential or sensitive business information, trade secrets, and other proprietary information.²² Because information reported pursuant to legal requirements, such as TRI data, is generally publicly [30 ELR 10377] available, apprehension exists that competitors could analyze public information to reconstruct or "reverse engineer" another company's production and manufacturing processes, proprietary chemicals, or formulas.²³ Although federal environmental statutes, such as EPCRA and the Freedom of Information Act (FOIA),²⁴ ostensibly operate to prevent disclosure to the public of trade secrets, intellectual property, and other privileged and confidential information, many legal observers argue that such statutes offer inadequate protection.²⁵ For example, information about a company's processes, capacity, and plans generally do not fall within the coverage of statutory confidentiality protections.²⁶

Proprietary information concerns are perhaps most vigorously expressed regarding the proposed Phase III expansion of TRI to include "materials accounting" data. In a November 1998, report by the Reason Public Policy Institute (RPPI),²⁷ the authors describe an analysis conducted by a chemical industry consulting company that examines the effect of public availability of such information on the ability of businesses to protect sensitive, proprietary information. Utilizing FOIA and "right-to-know" regulations, the consulting company obtained all publicly available information on a certain chemical plant, including TRI data, state-level air permit filings, and "materials-accounting" information required to be disclosed by the state of New Jersey. Based on this information, the consulting company prepared a detailed profile of the targeted plant. The profile included descriptions and estimates of main production lines, consumption and operating rates, main products manufactured, chemistries used, throughput rates, operating temperatures, and yields. These estimates were eventually found to be within 10 percent of the targeted plant's actual numbers.²⁸

Accordingly, when utilizing disclosures, reports, and filings made to governmental agencies as core source material for preparation of a formal corporate environmental report, companies should exercise care to avoid inadvertent disclosure of valuable technical or other sensitive information that is either itself proprietary or could be used by competitors to understand or decipher proprietary information. As emphasized above, preparing and releasing a formal environmental report to the public is a voluntary act. Thus, any information released in a corporate environmental report is in the public domain. No legal privileges, confidentiality doctrines, or statutory provisions that might prevent public disclosure and use of information contained in reports or filings made to governmental agencies are applicable. Therefore, care should be taken to determine the appropriate level of detail included in a corporate environmental report that contains information gleaned from environmental data disclosed pursuant to federal and state legal requirements.

In this regard, however, much depends upon those in charge of preparation and publication of a company's corporate environmental report having a sufficient understanding of what data either constitutes or would lead to an ability to discern confidential, sensitive, or proprietary information of the company. Information considered proprietary obviously varies from company to company. For example, some companies consider unique environmental management and compliance programs to provide a significant advantage over competitors in their respective industries. Thus, those companies might consider many of the details of their environmental compliance processes, such as waste treatment methods or recycling programs, to constitute valuable proprietary information.²⁹ However, no matter what information a particular company considers sensitive or proprietary, knowledge of the company's institutional views or policies on the subject must be imparted to those charged with the responsibility of preparing the company's report to ensure that such information is not inadvertently and irrevocably disclosed to the world.

Depending upon a company's specific circumstances, size, and culture, one useful approach to ensuring that appropriate company knowledge of proprietary information is available and, more importantly, utilized, is to consider designating a committee to oversee preparation and publication of the company's environmental report. Optimally, the size and membership of such an oversight committee should reflect various disciplines and areas of knowledge and expertise represented within the company, including technical/scientific, financial, and legal.

Environmental Compliance, Liabilities, and Legal Proceedings

Another important "leading edge" characteristic noted by Lober's 1996 study of corporate environmental reports is disclosure of "negative information," such as environmental accidents or special problems relating to environmental performance.³⁰ KPMG's 1999 *International Survey of Environmental Reporting* suggests that the trend of disclosing "negative" information has significantly increased in the years since the Lober study.³¹ A significant criticism of voluntary corporate environmental reporting is often that the final product tends to focus solely on positive information and, thus, be "self-promoting."³² Therefore, disclosure of [30 ELR 10378] "negative" information is viewed as increasing the credibility of a company's report,³³ and is typically required by standardized reporting guidelines and "best practices" promoted by environmental organizations. Moreover, comment upon specific incidents or environmental noncompliance in corporate environmental reports allows companies to place such events in their proper context.

From a legal perspective, an important facet of negative disclosure in formal corporate environmental reports is data on environmental regulatory compliance (or noncompliance), current environmental liabilities, and pending litigation or regulatory proceedings. A thorough and candid discussion of such matters and the steps underway to resolve existing problems will certainly enhance the credibility of the report and the reporting company.

However, publication of inappropriate statements or "too much" information in this regard might damage the company's legal position in pending matters and could potentially expose the company to additional liability.

For example, assume EPA has named the company a potentially responsible party (PRP) in a remedial cleanup action under CERCLA.³⁴ The company's best interests would certainly not be advanced by statements in a corporate environmental report that could be construed as inconsistent with the company's litigation or settlement strategies in the pending matter.³⁵ Affirmative defenses to liability or legal arguments with respect to apportionment of costs or liabilities against other potential defendants could be jeopardized or even lost in such circumstances.³⁶ Moreover, environmental litigation resolved by settlement between the parties may be subject to confidentiality provisions or agreements as a condition of settlement. Disclosure of sensitive or confidential information concerning the litigation or settlement in a formal corporate environmental report may subject the company to liability or other adverse consequences (such as rescission of the settlement) for breach of a confidentiality agreement.

Similarly, assume that the company experiences an accidental release of a hazardous substance regulated under CERCLA, but in an amount that does not trigger a legal obligation to report the incident to governmental authorities under the statute's reportable quantity requirements.³⁷ A formal corporate environmental report may not be the appropriate venue to disclose such a potential violation for the first time. Disclosure might precipitate an expensive legal action and prematurely narrow the company's legitimate options for dealing with the event, such as undertaking self-corrective action prior to notification and discussion of the situation with appropriate governmental authorities.

In considering how to most appropriately craft environmental report disclosures on issues such as regulatory compliance, liabilities, and pending legal matters, companies should also be cognizant of disclosures that have already been made in annual and quarterly financial reports filed with the SEC.³⁸ This is especially true given that government agencies such as EPA are a key target audience for formal corporate environmental reports.³⁹ The SEC and EPA have an information sharing arrangement enabling both agencies to more efficiently evaluate the timeliness and adequacy of required environmental disclosures within their respective regulatory arenas.⁴⁰ Simply put, inconsistent disclosures of information to the SEC and EPA are ill-advised.

Publishing a formal corporate environmental report contradictory or inconsistent with mandatory filings or other disclosures previously made to either the SEC or EPA is similarly ill-advised. If brought to the attention of government authorities, such inconsistency would be, at best, embarrassing and require explanation satisfactory to the regulatory authority. At worst, such inconsistency may be a potential basis for fines, sanctions, or other liability for inaccurate or insufficient compliance with statutory disclosure obligations, including liability under federal securities antifraud laws as discussed below. To avoid inconsistencies in reporting, those responsible for preparation of the company's formal corporate environmental report should be aware of all relevant environmental disclosure obligations of the company. In addition to disclosures required under federal and state environmental laws as discussed in the preceding section, this includes filings and disclosures required under SEC statutes, rules, and regulations.

Under authority of the Securities Act of 1933 and the Securities and Exchange Act of 1934, the SEC promulgated Regulation S-K as part of a comprehensive disclosure system for publicly held companies.⁴¹ This regulation governs the disclosure requirements a public company must satisfy with respect to securities filings such as registration statements, quarterly reports, and annual reports. Three provisions of Regulation S-K are generally applicable to environmental disclosures:

* *Item 101 of Regulation S-K.* This item principally requires a general description of the registrant's business. With respect to environmental matters, Item 101 requires disclosure of the material effects that compliance with federal, state, and local environmental regulation may have on "capital expenditures, earnings, or the competitive position" of the company. The company must estimate capital expenditures for environmental control facilities for the current and succeeding fiscal years and any material future periods.⁴²

* *Item 103 of Regulation S-K.* This item requires disclosure of all material environmental legal proceedings, including pending litigation and administrative actions, and any such proceedings governmental [30 ELR 10379] authorities are known to be contemplating.⁴³ Instruction 5 to Item 103 defines material as any proceeding that (a) is material to the company's business or financial condition, (b) involves a claim for damages, potential monetary sanctions, or capital expenditures exceeding 10 percent of the company's current assets, or (c) involves a governmental authority as a party and sanctions are reasonably expected to be \$ 100,000 or more.⁴⁴

* *Item 303 of Regulation S-K.* This item requires companies to provide a historical and prospective analysis of financial conditions and the results of operations.⁴⁵ This is generally understood to include disclosure of contingent environmental liabilities (such as designation as a PRP under CERCLA), unless company management makes an objectively reasonable determination that a material effect on financial condition or results of operations is not reasonably likely to occur.⁴⁶

In addition to disclosures under Regulation S-K, SEC-regulated companies are also required by Regulation S-X to consider environmental liabilities in financial statements included with their SEC disclosure filings.⁴⁷ Within the framework of Regulation S-X, companies are required to disclose contingent liabilities, including environmental liabilities, in financial statements under the direction of Statement of Financial Accounting Standards (SFAS) No. 5.⁴⁸ For example, a contingent environmental liability such as a site cleanup or adverse environmental litigation is considered to fall within the reach of SFAS No. 5.⁴⁹ "Reasonably estimable" losses from environmental contingencies that the company classifies as "probable" must be accrued and charged as a reduction of income on the company's financial statements. If the environmental contingency is neither probable nor able to be reasonably estimated, but is at least reasonably possible, then SFAS No. 5 requires that a "footnote disclosure" be made on the financial statement.⁵⁰

In addition to the mandatory environmental disclosures required by Regulations S-K and S-X, the antifraud provisions of federal securities law may also create a duty of disclosure concerning environmental matters. Section 10(b) of the Securities and Exchange Act of 1934,⁵¹ along with its implementing SEC Rule 10b-5,⁵² create a broad prohibition against false or misleading disclosures, including environmental disclosures. Rule 10b-5 does not create any general duty to volunteer disclosures about environmental matters.⁵³ However, the rule is violated whenever a regulated company knowingly makes a material misrepresentation or *omission* of material fact concerning an affirmative disclosure on an environmental matter.⁵⁴

Rule 10b-5 is broadly applicable to press releases, disclosures to analysts, corporate environmental policy statements, required SEC disclosure filings, periodic financial reports, and any other communication reaching investors.⁵⁵ Thus, given that the primary target audience includes shareholders, potential investors, and the general public, companies making false or misleading disclosures in formal corporate environmental reports are also potentially subject to liability under a Rule 10b-5 cause of action. To prevail on such a claim, a defendant must be proven to have knowingly made a false statement or omission of material fact upon which a plaintiff justifiably relied and that was the proximate cause of the plaintiff's damages.⁵⁶

Therefore, whether concerning environmental disclosures mandated by SEC regulations or voluntarily disclosed through public communication pieces such as a formal corporate environmental report, care should be taken that statements made are accurate and as detailed as necessary to avoid claims that they are misleading to current and potential investors.⁵⁷

Given that environmental data disclosed as required by SEC regulations already exists in the public domain,⁵⁸ and considering the presumably significant investment incurred by the company in preparation and filing of these disclosures, advocates of fuller corporate disclosure might argue that companies, at the very least, should include this same data in their formal corporate environmental reports. Companies operating in such a manner of greater social transparency by making information more easily accessible in this way would likely stand to earn significantly increased public credibility and trust from internal and external stakeholders. At present, however, there is little empirical evidence that companies are choosing to do so. As noted in the 1996 Lober study, corporate environmental reports for the most part exclude the type of environmental data on liabilities, compliance, and pending legal matters that can be found simply by reviewing a company's quarterly and annual filings with the SEC.⁵⁹

[30 ELR 10380]

Regulation of Environmental Marketing Claims

KPMG's 1999 *International Survey of Environmental Reporting* observes that a "new kind of environmental" report may be emerging from industry's consumer products sector.⁶⁰ Citing as an example the recent corporate environmental report issued by global electronics and lighting manufacturer Philips, the KPMG survey states that this "new kind" of report "focuses on the environmental performance of products in addition to the direct impacts of the production processes."⁶¹ To the extent that corporate environmental reports include claims regarding the environmental characteristics of specific products, packaging, or services, however, consumer protection laws enforced by the Federal Trade Commission (FTC) must be taken into consideration.⁶²

The FTC oversees enforcement of the Federal Trade Commission Act,⁶³ which generally prohibits unfair or deceptive acts or practices, including false or misleading marketing claims. To provide guidance for companies engaging in environmental marketing or "green advertising," the FTC has promulgated its Guides for the Use of Environmental Marketing Claims (the Guides).⁶⁴ While not enforceable regulations, the Guides represent administrative interpretations of laws administered by the FTC regarding application of the Federal Trade Commission Act to environmental advertising and marketing practices.⁶⁵

The Guides' scope is defined as follows:

These guides apply to environmental claims included in labeling, advertising, promotional materials and all other forms of marketing, whether asserted directly or by implication, through words, symbols, emblems, logos, depictions, product brand names, or through any other means, including marketing through digital or electronic means, such as the Internet or electronic mail. The guides apply to any claim about the environmental attributes of a product, package or service in connection with the sale, offering for sale, or marketing of such product, package or service for personal, family or household use, or form commercial, institutional or industrial use.⁶⁶

As Lober's 1996 study observes, primary audiences for formal corporate environmental reports are "customers," "consumers," and the "general public."⁶⁷ As such, corporate environmental reports are clearly a "form of marketing" within the broad reach of the above definition. This is especially true for reports that include assertions about "environmental attributes" of any "product, package, or service" that the reporting company (or its subsidiaries or related companies) sells to consumers.

Section 260.5 of the FTC Guides requires that any claim that directly or by implication presents an "objective assertion" about an environmental attribute of a product, package, or service must "possess and rely upon a reasonable basis substantiating the claim" at the time the claim is made.⁶⁸ This "reasonable basis" for substantiation is defined as follows:

A reasonable basis consists of competent and reliable evidence. In the context of environmental marketing claims, such substantiation will often require competent and reliable scientific evidence, defined as tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.⁶⁹

It is important to understand that FTC regulation of environmental marketing claims focuses on the message actually conveyed to consumers, rather than the message companies might have intended to convey.⁷⁰ In this regard, former FTC Commissioner Roscoe Starek has observed:

In examining an advertisement, label, or other marketing material, the [FTC] focuses on what is conveyed to reasonable consumers. Any and all reasonable interpretations that are likely to affect consumers' conduct or decisions regarding a product or service must be substantiated, whether or not the advertiser intended to make those claims. Thus, in the environmental area, as in others, the issue often to be resolved first is identifying the claims the ad conveys to consumers.⁷¹

Accordingly, companies are liable under FTC law not only for express assertions, but also for what such assertions imply to a reasonable consumer.⁷² Each discrete assertion (direct and implied) must be substantiated by "competent and reliable evidence" as required by the Guides.

In addition to the "substantiation" requirement, the Guides set forth further general principles applicable to all environmental marketing claims. For example, § 260.6(a) states that qualifications or disclosures should be "sufficiently clear, prominent and understandable to prevent deception."⁷³ Therefore, small print, hidden, or inconspicuous qualifications or disclosures regarding claims are probably insufficient. Also, claims should not be presented so as to "overstate" [the environmental attribute or benefit] asserted.⁷⁴ Further, any claim that includes a "comparative [30 ELR 10381] statement," such as comparisons of environmental characteristics of products on the market, "must make the basis for the comparison sufficiently clear to avoid consumer deception."⁷⁵ Moreover, the comparison itself must be capable of substantiation in accordance with the requirements of the Guides.

Finally, § 260.7 sets forth specific guidelines dealing with general environmental benefit claims and seven categories of more particularized claims, such as the biodegradability or recyclability of a product or its packaging.⁷⁶ Claims that misrepresent, either directly or by implication, that a product,

package, or service offers a general environmental benefit are prohibited.— The Guides emphasize that such unqualified, general claims are "difficult to interpret" and can convey a wide range of meanings to consumers depending upon the context in which they are asserted.⁷⁸ Thus, every general assertion conveying either a direct or implied message about an environmental quality, feature, or attribute of a product or service must either be scientifically substantiated as required by the Guides, qualified to the extent necessary to prevent deception, or avoided altogether.⁷⁹

In reviewing the example of a "product performance" focused environmental report cited by the 1999 KPMG survey—Philips' *Environmental Report 1998*⁸⁰—a number of product-specific environmental assertions of the type regulated by the FTC appear to be prevalent. For example, the report includes the unqualified assertion that the packaging for its video recorders is "fully recyclable."⁸¹ According to the FTC Guides, such an assertion can be made only if the packaging "can be collected, separated or otherwise recovered from the solid waste stream for reuse, or in the manufacture of assembly of another package or product, through an established recycling program."⁸² Further, "claims of recyclability should be qualified to the extent necessary to avoid consumer deception about any limited availability of recycling programs and collection sites."⁸³ If recycling programs for this type of packaging are generally available where the product is marketed, then such a claim should not be considered deceptive. On the other hand, if the product is marketed in an area where an "established recycling program" is not generally available, then such an unqualified claim runs the risk of being considered in violation of the FTC Guides.⁸⁴

Another portion of the Philips' report asserts that a particular lighting product provides "more light for its energy consumption than its main competitors."⁸⁵ Similarly, the report states that "the environment was a major driving force behind the development of [a certain model of television set], which offers more economical energy consumption than its competitors."⁸⁶ A video recorder is likewise asserted to "consume far less energy than its competitors."⁸⁷ These are clearly "comparative statements" of the environmental attributes of products covered by the FTC Guides. As such, these comparisons must be capable of substantiation as defined by the Guides. As noted above, this requires the capacity to demonstrate that, at the time each comparative statement was made, the company possessed competent, reliable and objective scientific evidence (such as tests, studies, research, analyses, or other evidence based on the expertise of professionals in the relevant area) tending to substantiate each specific comparison.

Companies are certainly free to emphasize the environmental attributes of products or services in their formal corporate environmental reports. However, this area should be approached with the measure of caution necessitated by the FTC Guides. Affirmative statements must be qualified as necessary to avoid the conveyance of any misleading message. All express and implied claims about objective, environmental attributes of products, packaging, or services must be supported by competent and reliable evidence before they are made. If such assertions in a formal corporate environmental report are capable of substantiation by the type of evidence required under § 260.5 of the Guides, then the FTC regulations governing environmental marketing claims should not be a concern.

Regardless, these are clearly not matters for the company to evaluate only after a formal corporate environmental report has been published. Instead, those responsible for preparing the company's formal report should include the considerations raised in the FTC Guides as part of the editorial review process prior to publication of the report. The consequences for failing to do so could be extremely serious. The FTC has the authority to issue "cease and desist" orders with respect to alleged unfair or deceptive practices that violate the FTC Act, require companies to file formal reports regarding the practices under investigation, and to require corrective action. The FTC is also authorized to bring suit to redress injuries to consumers which could expose the company to liability for legal damages.⁸⁸

Conclusion

Properly determining the appropriate scope and detail for disclosure of information in a formal corporate environmental report is a challenging task. It requires a combination of technical, financial, and legal knowledge and expertise. [30 ELR 10382] To meet the challenge, companies should have a well-planned strategy for preparation and publication of their report. This strategy must include ensuring that necessary and appropriate knowledge is either included in the team responsible for preparation of the formal report, or fully accessible and available to that team. As emphasized above, a constructive approach might be to designate a committee to oversee the process and ensure that the committee membership possesses the requisite institutional and legal knowledge to deal with concerns such as those raised in this Dialogue.

In a venerable analogy, publication of a company's formal corporate environmental report is like ringing a bell. Once the bell has been rung it cannot be "un-rung." Similarly, once the company's environmental report has been published and disseminated to the public, the statements and information disclosed within its pages cannot be taken back. Considering and anticipating potential problems and legal concerns in advance of publication of the report may serve to avoid the need to address more serious worries afterwards.

1. See Douglas J. Lober et al., *The 100+ Corporate Environmental Report Study: A Survey of an Evolving Environmental Tool*, 6 BUS. STRATEGY & THE ENV'T 57, 59 (1997).

2. See *id.*

3. See KPMG ENVIRONMENTAL CONSULTING, KPMG INTERNATIONAL SURVEY OF ENVIRONMENTAL REPORTING—1999 8 (1999) [hereinafter KPMG REPORT].

4. See generally W. GARY WILSON & DENNIS R. SASSEVILLE, SUSTAINING ENVIRONMENTAL MANAGEMENT SUCCESS 148-49 (1999).

5. See Carol J. Forrest & Robert A. Axelrod, *Businesses Find Value in Environmental Report Cards*, ENVTL. SOLUTIONS, Jan. 1, 1995, at 34.

6. 42 U.S.C. §§ 11001-11050, ELR STAT. EPCRA §§ 301-330.

7. U.S. EPA, *Toxic Release Inventory* (last modified Jan. 5, 2000) http://www.epa.gov/enviro/html/tris/tris_query.html.

8. See Forrest & Axelrod, *supra* note 5, at 34.

9. GLOBAL REPORTING INITIATIVE, SUSTAINABILITY REPORTING GUIDELINES: EXPOSURE DRAFT FOR PUBLIC COMMENT AND PILOT TESTING (1999).

10. See WILSON & SASSEVILLE, *supra* note 4, at 154.
11. See Lober et al., *supra* note 1, at 57. Such characteristics include "integrating business and environmental performance, quantifying environmental costs and benefits, including environmental policy, goals, measurement systems, management and organizational structure, presentation of environmental and resource data, third party verification, disclosure of negative information, reference to sustainability and other topics." *Id.* at 68.
12. See *id.* at 71.
13. For thorough discussions of mandatory environmental reporting and disclosure duties under federal and state law, see James R. Arnold, *Environmental Reporting and Disclosure Duties*, SC18 A.L.I.-A.B.A. 571 (1997) and James R. Arnold, *Disclosure of Environmental Liabilities to Government Agencies and Third Parties*, CA47 A.L.I.-A.B.A. 381 (1995).
14. Environmental Defense, *Scorecard* (visited Mar. 31, 2000) <http://www.scorecard.org>. Environmental Defense was formerly known as the Environmental Defense Fund.
15. 42 U.S.C. §§ 6901-6992k, ELR STAT. RCRA §§ 1001-11011.
16. *Id.* §§ 9601-9675, ELR STAT. CERCLA §§ 101-405.
17. *Id.* §§ 7401-7671q, ELR STAT. CAA §§ 101-618.
18. 33 U.S.C. §§ 1251-1387, ELR STAT. FWPCA §§ 101-607.
19. 15 U.S.C. §§ 2601-2692, ELR STAT. TSCA §§ 2-412.
20. See ALEXANDER VOLOKH ET AL., ENVIRONMENTAL INFORMATION: THE TOXICS RELEASE INVENTORY, STAKEHOLDER PARTICIPATION, AND THE RIGHT-TO-KNOW: PART 1 OF 2: SHORTCOMINGS OF THE CURRENT RIGHT-TO-KNOW STRUCTURE 5 (1998).
21. See *id.*
22. See, e.g., Brian Gregg, *Setting Priorities for Phase Three of the Toxic Release Inventory: Trade Secrets or Community Right-to-Know*, 4 ENVTL. LAW. 943 (1998); Donald Stever, *The Private Sector's Need for Environmental Secrecy: Product Regulation and the Secrecy of Proprietary Information*, 2 N.Y.U. ENVTL. L.J. 224 (1993); VOLOKH ET AL., *supra* note 20, at 20-21.
23. Gregg, *supra* note 22, at 949-50.
24. 5 U.S.C. § 552.
25. See, e.g., Stever, *supra* note 22, at 228:
- While FOIA does protect some bona fide confidential business information from disclosure, the protection is not absolute, and there is always the possibility that a FOIA officer who does not read the file adequately could disclose highly confidential information. In addition, information may be released before the party seeking to protect it secures a court injunction.
- VOLOKH ET AL., *supra* note 20, at 20-21 (arguing that protection of sensitive business information under EPCRA and other federal statutes is inadequate). See also Allan Robert Adler, *Recent Developments in FOIA Law*, 11 COMM. LAW. 13 (1993) (discussing trade secret and confidential business information exception for disclosure under FOIA).
26. See VOLOKH ET AL., *supra* note 20, at 20.
27. See *id.*
28. See *id.* at 20-21. Because of the asserted usefulness of the materials-accounting information, the RPPI report states that the consulting firm also was able to prepare reasonable estimates of the targeted company's market share and growth, expansion plans, the plant's technical efficiencies, specific chemistries utilized, manufacturing costs, and the overall health and competitive strength of the company. *Id.* at 21.
29. See C. Russell H. Shearer, *Costs and Benefits of Audit Disclosure*, 11 NAT. RESOURCES & ENV'T 48, 51 (1996).
30. Lober et al., *supra* note 1, at 76.
31. KPMG REPORT, *supra* note 3, at 19.
32. See, e.g., David F. Sand & E. Ariane van Buren, *Environmental Disclosure and Performance: The Benefits of Standardization*, 12 CARDOZO L. REV. 1347, 1355 (1991).
33. Lober et al., *supra* note 1, at 76.
34. See 42 U.S.C. § 9607(a), ELR STAT. CERCLA § 107.
35. See Shearer, *supra* note 29, at 51.

[36.](#) *See id.*

[37.](#) 42 U.S.C. § 9603, ELR STAT. CERCLA § 103.

[38.](#) For good discussions of such requirements, *see* John W. Bagby et al., *How Green Was My Balance Sheet?: Corporate Liability and Environmental Disclosure*, 14 VA. ENVTL. L.J. 225 (1995); Steven L. Bray, *Sealing the Conceptual Cracks in the SEC's Environmental Disclosure Rules: A Risk Communication Approach*, 18 U. PA. J. INT'L ECON. L. 655, 661-63 (1997); E. Donald Elliott et al., *A Practical Guide to Writing Environmental Disclosures*, [25 ELR 10237](#) (May 1995); Bruce Knapp & Ted Wesolowski, *Reducing Company Risk for Inadequate Environmental Disclosure*, 41 PRAC. LAW. 31 (1995); Tracy Soehle, *SEC Disclosure Requirements for Environmental Liabilities*, 8 TUL. ENVTL. L.J. 527 (1995).

[39.](#) Lober et al., *supra* note 1, at 67.

[40.](#) Elizabeth Ann Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. ENVTL. L. REV. 129, 131 (1992); Soehle, *supra* note 38, at 544.

[41.](#) Regulation S-K, 17 C.F.R. § 229.10.

[42.](#) *See id.* § 229.101.

[43.](#) *See id.* § 229.103.

[44.](#) *See id.* § 229.103, Instruction 5.

[45.](#) *See id.* § 229.303.

[46.](#) *See* Bagby et al., *supra* note 38, at 303-04.

[47.](#) Regulation S-X, 17 C.F.R. § 210.1-01.

[48.](#) Accounting for Contingencies, Statement of Financial Accounting Standards No. 5 (Fin. Accounting Standards Bd. 1975). SEC Staff Accounting Bulletin No. 92 addresses the issue of loss contingencies and, in particular, contingent environmental liabilities and provides clarification to interpretations given by the accounting profession to SFAS No. 5. Staff Accounting Bulletin No. 92, Accounting and Disclosures Relating to Loss Contingencies, 58 Fed. Reg. 32843 (1993).

[49.](#) *See* Bagby et al., *supra* note 38, at 307.

[50.](#) *See id.* at 307-08.

[51.](#) 15 U.S.C. § 78j.

[52.](#) 17 C.F.R. § 240.10b-5.

[53.](#) *See* Bagby et al., *supra* note 38, at 315.

[54.](#) *See id.* at 316.

[55.](#) *See id.* at 315-16.

[56.](#) Soehle, *supra* note 38, at 547.

[57.](#) *See, e.g.*, Diane C. Bellantoni, *Coming Clean: Environmental Disclosures in SEC Filings*, 4 ENVTL. COMPLIANCE & LITIG. STRATEGY 3, 3 (1997) (describing petition by environmental groups to SEC requesting investigation of Viacom Inc. for alleged material omissions regarding environmental liabilities in the corporation's annual report).

[58.](#) For example, research professionals, described by Professor Cynthia Williams in a recent *Harvard Law Review* article as "social analysts," maintain extensive databases on the environmental record of numerous, especially large, companies. This database includes information disclosed under the federal securities acts, as well as information collected from a number of other public sources (such as FOIA requests to various government agencies). These researchers sell the information to managers of socially screened investment funds and other financial managers interested in socially screened investments. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1289-90 (1999).

[59.](#) *See* Lober et al., *supra* note 1, at 76.

[60.](#) KPMG REPORT, *supra* note 3, at 4.

[61.](#) *Id.*

[62.](#) For good discussions of the applicability of the Federal Trade Protection Act to environmental marketing claims, *see* Jeremy Rosen, *Requirements for Environmental Marketing Claims Under the Federal Trade Commission's Guidelines*, 4 Env'tl. Law. 241 (1997), and Jeff B. Slaton, *Searching for "Green" Electrons in a Deregulated Electricity Market: How Green Is Green?*, 22 ENVIRONS ENVTL. L. & POL'Y J. 21 (1998).

[63.](#) 15 U.S.C. §§ 41-77.

[64.](#) Guides for the Use of Environmental Marketing Claims, 16 C.F.R. § 260.

[65.](#) In this regard, former FTC Commissioner Roscoe B. Starek III, has observed that "the Guides are administrative interpretations of the Commission's policies, laws, and cases. They are intended to help advertisers voluntarily comply with the law by indicating how the Commission intends to apply Section 5 of the FTC Act to environmental claims." Roscoe B. Starek III, *F.T.C. "Green Guides": A Consumer Success Story*, WEST'S LEGAL NEWS, Dec. 23, 1996, at 13607.

[66.](#) 16 C.F.R. § 260.2.

[67.](#) See Lober et al., *supra* note 1, at 67.

[68.](#) 16 C.F.R. § 260.5.

[69.](#) *Id.*

[70.](#) See Ivan L. Preston, *The Federal Trade Commission's Identification of Implications as Constituting Deceptive Advertising*, 57 U. CIN. L. REV. 1243, 1248 (1989).

[71.](#) Starek, *supra* note 65, at 13607.

[72.](#) See Preston, *supra* note 70, at 1246 ("the proper way to analyze [an advertisement's] overall impact is to see the ads as consumers see them . . . rather than the way they might be technically analyzed").

[73.](#) 16 C.F.R. § 260.6(a).

[74.](#) *Id.* § 260.6(c).

[75.](#) *Id.* § 260.6(d).

[76.](#) See *id.* § 260.7. The rules regarding particularized claims generally state that "it is deceptive to misrepresent, directly or by implication, that a product or package" possesses the particular attribute in question, unless the claim can be scientifically substantiated as required by the guidelines. The particularized claims in question include the following categories: (1) degradable/biodegradable/photodegradable; (2) compostable; (3) recyclable; (4) recycled content; (5) source reduction; (6) refillable; and (7) ozone safe or ozone friendly. See *id.* § 260.7(b)-(h).

[77.](#) See *id.* § 260.7(a).

[78.](#) See *id.*

[79.](#) The FTC Guides provide numerous examples of environmental marketing claims that the FTC deems deceptive if reasonable consumers might draw overly broad conclusions from them. Examples include utilizing a brand name such as "Eco-safe" or environmental symbols in labeling or asserting general claims that a product is "environmentally friendly" or "environmentally superior." 16 C.F.R. § 270(a), Examples 1, 2, and 5. These are considered deceptive practices unless the direct or implied message conveyed is specifically qualified so that no deception is possible or there is substantiation of the direct or implied message as required by the Guides.

[80.](#) KONINKLIJKE PHILIPS ELECTRONICS N.V., ENVIRONMENTAL REPORT—1998 (1999) [hereinafter PHILIPS REPORT].

[81.](#) See *id.* at 13.

[82.](#) 16 C.F.R. § 260.7(d).

[83.](#) *Id.*

[84.](#) See *id.* § 260.7(d), Example 5.

[85.](#) PHILIPS REPORT, *supra* note 80, at 16.

[86.](#) *Id.* at 12.

[87.](#) *Id.* at 13.

[88.](#) See 15 U.S.C. §§ 50, 57b.