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ENVIRONMENTAL DISCLOSURE AND THE SECURITIES LAWS

Robert H. Feller*

I. INTRODUCTION

In today's highly complex world, government can neither dictate all results nor oversee all events. As an alternative to the command-and-control approach to government regulation, more subtle types of regulation are increasingly being used to promote environmental protection goals. One such type of regulation focuses on disclosure. This type of regulation is based on the theory that if correct information is made available to the public at large, market forces can efficiently accomplish many of the goals that government itself seeks.

In the area of environmental regulation, this approach has recently been adopted as part of an enactment popularly known as SARA Title III.¹ The statute and its implementing regulations call for industries to disclose information about the type and quantity of chemicals they produce, use, and routinely and accidentally discharge into the environment.²

Ironically, while the environmental community is extolling the virtues of a newly enacted disclosure statute, two much older statutes that require disclosure relating to a corporation's environmentally related activities receive less attention. These statutes are the Secu-

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¹ The Emergency Planning and Community Right-to-Know Act, is a self-contained law, comprising Title III of the Superfund Amendments and Reauthorization Act of 1986. Pub. L. No. 99-499, tit. III, §§ 300-30, 100 Stat. 1613, 1728 (1986) (codified at 42 U.S.C. §§ 11,001-11,050 (1988)).

² MICHAEL S. BARAM, ET AL., *MANAGING CHEMICAL RISKS: CORPORATE RESPONSE TO SARA TITLE III 1-3* (1990); *see also* 42 U.S.C. §§ 11,001-11,050.

urities Act of 1933³ and the Securities Exchange Act of 1934 (the Acts).⁴ While the audience for disclosure under the securities laws—actual or potential investors—is much narrower than for SARA Title III, it is an audience that is capable of influencing corporate policy.

At the same time, the number of security investors has increased dramatically over the past several decades. The need to protect against inflation has driven many small investors to use the securities markets to protect the position of such basic investments as retirement and education accounts. The contemporary investor is not as sophisticated as in the past and must rely, directly or indirectly, upon corporate disclosures. Where disclosure is inaccurate or misleading, small investors unwittingly take on risks that they may not be able to afford, with potentially dire consequences.

This Article examines the environmental disclosure requirements of the Acts and focuses on how the requirements are implemented by the Securities and Exchange Commission (SEC).⁵ The Article examines recent disclosure filings of five major companies with environmentally related activities and compares the contents of the filings.⁶ The Article concludes that while existing requirements need to be tightened, significant benefits would accrue to investors if the SEC undertook an aggressive program to enforce existing requirements.⁷ In concert with an aggressive enforcement program, the SEC should move to close loopholes in its rules.⁸ The SEC should also rethink the question of whether the investor's interest is served by limiting environmental disclosure to information that is "material," as currently defined by rule.⁹ In the long term, the SEC needs to consider expanding disclosure requirements to protect not only the traditional investor, whose needs are limited to return on investment, but also the socially conscious investor.¹⁰ The Article suggests additional means of

³ Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a-77aa (1988 & Supp. V 1993)).

⁴ Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a-78ll (1988 & Supp. V 1993)).

⁵ Disclosure of material environmental liabilities is also required under the Williams Act, Pub. L. No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1988)), which addresses disclosure requirements of tender offers. It is not, however, addressed in this Article. For additional treatment of environmental disclosure under the securities laws, see generally, Risa Vetri Ferman, Note, *Environmental Disclosures and SEC Reporting Requirements*, 17 DEL. J. CORP. L. 483 (1992).

⁶ See *infra* Section III.

⁷ See *infra* Section IV.A.

⁸ See *infra* Section IV.B.

⁹ See *infra* Section IV.C.

¹⁰ See *infra* Section V.

improving disclosure that are not dependent on SEC action.¹¹ Improved environmental disclosure can also be accomplished through the regulatory programs of individual states or through private rights of action created under the securities laws.¹²

II. REGULATORY FRAMEWORK

As a result of the stock market excesses that led to the crash of 1929, Congress enacted two landmark statutes: the Securities Act of 1933 and the Securities Exchange Act of 1934.¹³ The purpose of the Acts was to substitute a philosophy of information availability and accessibility for one of caveat emptor.¹⁴ These laws, and others that were added later, are designed principally to protect consumers in the financial markets against excessive speculation, misrepresentation, and exploitation involving unsound, worthless, or fraudulent securities.¹⁵

The Acts only provide guidelines concerning disclosure. The implementation of more detailed disclosure requirements is delegated to an administrative agency, which establishes disclosure requirements through rulemaking.¹⁶ The SEC is the federal agency responsible for establishing disclosure requirements under the Acts. Whenever the SEC has discretion in setting disclosure requirements, the agency balances the value of the information to investors against the burden of disclosure on the company.¹⁷ The point at which the SEC strikes that balance defines the outer boundary of required disclosure.

As environmental issues became more significant for corporate America in the 1970s, the SEC recognized that a special set of rules was needed to address environmental disclosure. Rules specifically relating to environmental liabilities were first adopted in 1971, and have since been amended and revised several times. The principal vehicle for disclosure is the 10-K form. Each corporation that issues publicly

¹¹ See *infra* Section VI.

¹² For a discussion of disclosure issues in a broader context than the securities laws, see the symposium *Corporate Governance and the Environment: Beyond the Transaction Audit*, 12 CARDOZO L. REV. 1291 (1991).

¹³ See *supra* notes 3 and 4.

¹⁴ SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, 186 (1963).

¹⁵ See generally LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATIONS 35-36 (1983).

¹⁶ See 15 U.S.C. §§ 77s(a), 78w(a).

¹⁷ Proposed Environmental Disclosures, Securities Act Release No. 5627 [1975-1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,310, at 85,712 (Oct. 14, 1975) [hereinafter Securities Act Release No. 5627].

traded equity or debt securities must annually file a 10-K form with the SEC.¹⁸

Currently, the environmental disclosure requirements of the securities laws are two-tiered. The first tier, affirmative disclosure duties, is contained in Regulation S-K.¹⁹ After a company makes a required disclosure under Regulation S-K, or makes any voluntary disclosure, the company must fulfill a secondary requirement. This second tier, the so-called "10b-5 Rule," requires the company to make further disclosure of any additional material facts necessary to avoid rendering the original disclosure misleading.²⁰ In addition to these requirements, companies are required to disclose contingent liabilities through their financial statements. These statements must be prepared according to generally accepted accounting principles (GAAP) and various interpretive materials.

The SEC's environmental disclosure requirements rely principally on the concept of materiality. The term "material" is defined under the Acts, and further guidance is provided through a combination of SEC rulemaking, SEC staff guidance, and statements of the non-governmental Financial Accounting Standards Board (FASB). However, determining what is "material" is far from a straightforward exercise.

The SEC defines "material" as follows: "The term 'material,' when used to qualify a requirement for the furnishing of information as to any subject, limits the information required to those matters to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the security registered."²¹ The SEC's guidance for implementing the materiality standard is the major source of controversy over the limits of disclosure. Modifying the SEC approach in this area is thus a key to instituting a realistic reform agenda.

A. *Regulation S-K*

Explicit environmentally related disclosure requirements are contained in three parts of Regulation S-K: Item 101, Description of Business; Item 103, Legal Proceedings; and Item 303, Management's Discussion and Analysis of Financial Conditions and Results of Operations (MD&A).²² Disclosures under Regulation S-K usually take

¹⁸ Corporations must also disclose environmental information on the 10-Q form (quarterly reports) and the 8-K form (episodic reports).

¹⁹ 17 C.F.R. § 229 (1994).

²⁰ *Id.* § 240.10b-5 (1994).

²¹ *Id.* § 240.12b-2 (1994).

²² See Standard Instructions For Filing Forms Under Securities Act Of 1933, Securities

the form of narrative discussions. However, the corporate balance sheet and associated footnotes reflect many decisions concerning disclosure of environmental liabilities. The tough disclosure decisions begin with the questions of when, how, and the extent to which a corporation should recognize contingent liabilities. Although there is a large body of accounting literature that addresses these questions, some issues are particularly relevant to environmental disclosure.

1. Item 101—How Expensive is it to Obey the Law?

Item 101 requires a company to disclose the cost of compliance with federal, state, and local pollution control or environmental laws if such costs will have a material economic impact on the company or the company's subsidiaries.²³ Material impacts can occur when there are significant outlays for capital expenditures, or material effects on earnings or competitive positions.²⁴ For example, the SEC expects that Item 101 will compel disclosure of the costs of compliance with the Clean Air Act Amendments of 1990 of a large number of affected companies, particularly those with toxic air emissions.²⁵ The SEC has indicated that the agency will be looking for disclosure of estimates of increased capital and operating costs, estimates of a company's ability to pass these costs on to customers, and the likelihood of abandonment of operations that cannot be brought into compliance.²⁶

2. Item 103—How Much Legal Exposure?

Apart from the general rules governing disclosure of legal proceedings, the SEC has provided special instructions for legal proceedings that relate to the environment. A company must disclose any administrative or judicial proceeding (1) that is material to the business or financial condition of the company; (2) that involves a claim that exceeds ten percent of the company's assets; or (3) that involves a governmental party and a claim for damages that exceeds \$100,000.²⁷ Note that the \$100,000 threshold replaced a prior requirement to

Exchange Act Of 1934 and Energy Policy And Conservation Act Of 1975 - Regulation S-K, 17 C.F.R. § 229.

²³ *Id.* at § 229.101(c)(1)(xii).

²⁴ *Id.*

²⁵ Richard Y. Roberts, Commissioner of the United States Securities and Exchange Commission, Environmental Liability Disclosure Developments, Remarks at the Dun & Bradstreet Corporation, D.C. Briefing on Environmental Due Diligence 3-4, Apr. 5, 1994 (transcript on file with author) [hereinafter Disclosure Developments].

²⁶ *Id.* at 4.

²⁷ Instruction 5, 17 C.F.R. § 229.103. However, the SEC has opined that remedial costs incurred in CERCLA actions are not to be considered sanctions and therefore would not count

disclose all proceedings involving the government.²⁸ This disclosure section raises several controversial issues.

One set of controversial issues arises out of the valuation of claims and the determination of whether the claims are material. A company's decision to disclose legal proceedings may have far-reaching implications because once a proceeding is disclosed, Rule 10b-5 requires disclosure of all material information necessary to avoid misleading investors.²⁹ On the other hand, a company's decision not to disclose is highly risky because if the decision is made in error the company is exposed to suit by the SEC or by investors.

Consider a realistic hypothetical that illustrates the quandary. Acting under a state statute, a state agency brings suit against a company to compel remediation of an inactive hazardous waste disposal site. On the basis of an opinion of counsel, the company believes that the statute is unconstitutional and hence unenforceable. However, the company knows that if it is required to remediate the site the costs will be enormous. The company's records indicate that the wastes are persistent in the environment and are likely to have migrated from the original disposal area. If the company chooses not to disclose the suit, the reasonableness of the company's reliance on counsel's opinion will come under heavy scrutiny if ultimately proven to be erroneous. However, if the company discloses the suit, Rule 10b-5 would likely also require the company to disclose its knowledge that remedial costs would be enormous. Such a disclosure might not only adversely affect the price of the company's stock, but would also provide potentially prejudicial information to government prosecutors.

The SEC requires the use of the FASB standards for the disclosure of contingent liabilities.³⁰ The FASB standards call for use of a probability/magnitude test for the determination of whether to recognize a potential liability. Under the test, a company must balance the probability of a liability's occurrence with the magnitude of the liabil-

towards the \$100,000 threshold. See Disclosure Requirements, Securities Act Release No. 6835, 54 Fed. Reg. 22,427, 22,430 n.30 (1989) [hereinafter Securities Act Release No. 6835].

²⁸ Securities Act Release No. 5386 (Apr. 20, 1973) 3 Fed. Sec. L. Rep. (CCH) ¶ 23m507A [hereinafter Securities Act Release No. 5386]. The rule stated that any proceeding brought by a governmental authority is deemed material. *Id.*

²⁹ 17 C.F.R. § 240.10b-5.

³⁰ See FINANCIAL ACCOUNTING STANDARDS BOARD STATEMENT OF FINANCIAL ACCOUNTING STANDARDS NO. 5: ACCOUNTING FOR CONTINGENCIES (Mar. 1975) [hereinafter ACCOUNTING FOR CONTINGENCIES], reprinted in ACCOUNTING STANDARDS: ORIGINAL PRONOUNCEMENTS JULY 1973-JUNE 1, 1989, at 34-50 (1989) [hereinafter ORIGINAL PRONOUNCEMENTS]; see also Garret L. Dominy, *Accounting for Environmental Contingencies and Losses*, in UNDERSTANDING ENVIRONMENTAL ACCOUNTING AND DISCLOSURE TODAY 57-63 (1992).

ity's consequences.³¹ Thus, a company must recognize a potential liability with devastating consequences even if the likelihood of the liability's occurrence is remote. It is important to note that recognizing contingent liabilities for accounting purposes is not synonymous with finding contingent liabilities material for disclosure purposes. However, as a practical matter, once a company recognizes contingent liabilities that are large but remote, it is usually the case that they will be found to be material. Thus, separate disclosure will be required.

A second set of controversial issues under Item 103 involves whether a company must disclose unasserted claims when the company knows or reasonably should know that the government is contemplating instituting a proceeding.³² While Item 103 does not explicitly require disclosure of uninitiated actions, a company's failure to disclose potential actions that fit this profile may be misleading. Rule 10b-5 may therefore require disclosure.³³ This interpretation of Item 103 is highly controversial because it can be read to require disclosure as soon as a company has committed a significant environmental law violation, under the theory that the company can anticipate eventual government action against it. Companies object to this interpretation because it appears to compel them to choose between subjecting themselves to either an environmental enforcement action or an action to enforce the securities laws.

The SEC has indicated that in the context of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the mere designation of a company as a potentially responsible party (PRP) at a remedial site does not trigger the duty to disclose.³⁴ However, designation as a PRP, together with knowledge of the company's particular circumstances, could require disclosure.³⁵ At least one SEC Commissioner has stated that if sites have been identified where a company is a PRP, the company should disclose whether the estimated costs of remediation have been recognized, including an explanation of the uncertainties involved.³⁶ The Commissioner also

³¹ Dominy, *supra* note 30, at 58-61; *see* ACCOUNTING FOR CONTINGENCIES, *supra* note 30.

³² For a thorough review of this problem, see Gerard A. Caron, Comment, *SEC Disclosure Requirements for Contingent Environmental Liability*, 14 B.C. ENVTL. AFF. L. REV. 729 (1987).

³³ *See supra* notes 20-21 and accompanying text.

³⁴ Securities Act Release No. 6835, *supra* note 27, at 22,430 n.30.

³⁵ *See id.*

³⁶ Disclosure Developments, *supra* note 25, at 8-9.

stated that if it is reasonably likely that the company is a PRP at unidentified sites, that uncertainty, if material, should be disclosed.³⁷

The final controversial issue arising under Item 103 relates to how a company calculates the \$100,000 threshold for damages in government actions. The present SEC interpretation states that a company should not count any amounts that would have to be paid for remedial work toward the threshold, only amounts that would result from fines and penalties for non-compliance.³⁸ Thus, where a company has signed a consent order to participate in the remediation of a site, Item 103 does not require disclosure of that fact even though the estimated costs of remediation vastly exceed \$100,000.³⁹

3. Item 303—The Real Assessment from Management

Over time, the SEC has come to recognize the need for a narrative explanation of financial statements in order that investors can judge both the quality of earnings and the likelihood that past performance will be indicative of future performance. To address this need, the SEC adopted the MD&A requirement in 1980. In the SEC's view, the MD&A is intended to give investors "an opportunity to look at the company through the eyes of management."⁴⁰

There are two components of the MD&A that are relevant to the environmental disclosure debate. One component is the required discussion of current trends or uncertainties that would have a material effect on the company or that would cause the information disclosed elsewhere to not be indicative of future performance. The other component is the voluntary disclosure of forward-looking information.

The type of information that must appear in the MD&A is intended to be very company specific. The SEC has therefore rejected attempts to standardize the requirements.⁴¹ In the SEC's view, standardization would foster boilerplate discussions. However, the lack of a standardized approach leaves filers with considerable discretion. In 1987, the SEC undertook a study to assess whether the MD&A was living up to its expectations. Additional guidance was provided in 1989 as a

³⁷ *Id.* at 9.

³⁸ This interpretation appears in the so-called "Cole letter" issued by the SEC on January 17, 1989. See Securities Act Release No. 6835, *supra* note 27, at 22,430 n.30.

³⁹ The liability for remediation might have to be disclosed under other provisions of the securities laws, but only if the company concluded that the expense was material to investors.

⁴⁰ Request for Comments on MD&A, Securities Act Release No. 6711, 52 Fed. Reg. 13,715, 13,717 [hereinafter Securities Act Release No. 6711].

⁴¹ See Securities Act Release No. 6835, *supra* note 27, at 22,427.

result of that study (1989 Guidance).⁴² The 1989 Guidance has wide-ranging implications, in particular because it places the burden on management to objectively prove the negative if management decides to forego disclosure.

The 1989 Guidance sets forth a two-part analysis for the determination of whether a company should disclose current environmental trends under Item 303. Management must first determine whether a contingent event is reasonably likely occur.⁴³ Unless management can conclude that the event is *not* reasonably likely to occur, management must assume that the event will occur.⁴⁴ Second, management must disclose the contingent event unless it can determine that the event's occurrence is *not reasonably likely to have a material effect* on the company.⁴⁵ This two-step approach has satisfied neither side in the debate and, as discussed below, may not even generate the useful investor information that the SEC seeks.⁴⁶

As an example, consider the case of a Midwest utility that operates several electrical generating plants fueled by high-sulfur coal. As part of its 1989 filing, the utility would be required to consider the possibility that Congress could enact legislation that would regulate or cap annual emissions of sulfur dioxide, a precursor to acid deposition. The utility would need to disclose this possibility in its 10-K filing unless it was prepared to show (1) that it reasonably believed that Congressional action was not likely to occur; or (2) that any additional controls that were likely to be imposed would not materially affect its business.

Unfortunately, what the 1989 Guidance giveth with one hand, it taketh away with the other. Although the 1989 Guidance does change the burden of proof, the "reasonably likely" standard is much less stringent than the traditional standard used to disclose contingent liabilities—the probability/magnitude test.⁴⁷ Under the probability/magnitude test, a company is required to recognize a very large contingent liability, even though the probability of its occurrence is quite small. Once a company recognizes such a liability the company must disclose the liability, if the liability is material.⁴⁸ However, under the reasonably likely test, management need not disclose such a liability,

⁴² See *id.*

⁴³ See *id.* at 22,428.

⁴⁴ *Id.* at 22,430.

⁴⁵ *Id.*

⁴⁶ See discussion *infra* Section III.B.

⁴⁷ See *supra*, note 31 and accompanying text.

⁴⁸ See *supra* notes 28–30 and accompanying text.

regardless of the magnitude of the potential liability, if management can objectively show that the event is not reasonably likely to occur.⁴⁹

It should be noted, however, that these tests only address the duty to disclose. The tests do not dictate how the estimates of contingent liability are to be made. For a company, the decision whether to disclose is far more important than how the company derives the particular amount disclosed. Failure to disclose is actionable under the securities laws. But where a company discloses matters that later prove to be inaccurate due to the uncertainties involved in making forward-looking estimates, the company is not liable so long as its estimates were made in good faith and with a reasonable basis.⁵⁰ Whether the new approach will result in more disclosure is still unclear.⁵¹

While some commentators have criticized the approach taken in the 1989 Guidance as unrealistic,⁵² the approach does begin to address the very real problems that arise when the definition of materiality is applied in the context of corporate environmental disclosure. Under the traditional balancing test for disclosure, there is too much management discretion concerning environmental matters that could have a very significant impact on the corporation. Management's broad discretion is largely a result of the unsettled nature of the law with respect to many environmental issues. It is simply too easy, and essentially objectively unreviewable, for a company to defend a decision to withhold disclosure based on the company's interpretation of the law. The disclosure statements by the five companies examined below demonstrate the broad discretion which the rules grant to management.⁵³

Commentators have generally focused on four areas where environmental contingencies need to be disclosed under Item 303: (1) the cost to comply with new environmental regulations, for example, the costs imposed by the 1990 Clean Air Act Amendments; (2) toxic tort liability; (3) obligations to remediate that are known only to the com-

⁴⁹ The author apologizes for the continuous use of double negatives, but it is necessary to accurately describe the legal standards involved.

⁵⁰ See Securities Act Release No. 6835, *supra* note 27, at 2230.

⁵¹ A 1991 study examined the 10-K reports filed by the nation's twenty largest bank holding companies, and an additional six banks, that operate in ten states containing many Superfund sites. The study found no disclosure of current liabilities related to Superfund cleanups. Amy Dockser Marcus & Amy Stevens, *Banks' Burden in Cleanups is Questioned*, WALL ST. J., Apr. 11, 1991, at B5.

⁵² See, e.g., Elizabeth Ann Glass Geltman, *Disclosure of Contingent Environmental Liabilities by Public Companies Under the Federal Securities Laws*, 16 HARV. ENVTL. L. REV. 129 (1992).

⁵³ See *infra* notes 80-131 and accompanying text.

pany; and (4) liability for contribution to the costs of an ongoing remedial action by the government or a responsible party.⁵⁴ The last two areas are especially significant because the rule under Item 103 that relates to government proceedings involving \$100,000 does not count remedial costs toward the threshold amount.

Finally, it should be noted that regardless of the burden of proof, the disclosure requirement remains linked to the concept of materiality. Therefore, the potential liability in relation to the size of the company and other factors, such as insurance coverage, remains germane to the disclosure decision.

B. *Accounting for Contingent Liabilities*

Although this Article primarily addresses the legal issues concerning environmental disclosure, these issues cannot be divorced from related accounting issues. This discussion is intended to provide an overview of the key accounting issues and to place the environmental disclosure issue in the context of the larger controversy. The principal accounting issue related to environmental disclosure concerns the treatment of contingent liabilities.⁵⁵ In the environmental area, contingent liabilities most commonly occur in four contexts: (1) fines and penalties arising out of violations of environmental laws; (2) remediation costs; (3) liability in toxic tort litigation; and (4) facility closure costs.

The SEC requires that companies conform to GAAP and other rules adopted by the Commission.⁵⁶ Although GAAP has been in existence for some time, issues that involve its application to environmental liabilities have only recently received a great deal of attention. Four sub-issues arise in the context of applying GAAP to environmental liability. First, when a contingent liability should be recognized in the company's accounts; second, how that liability should be measured; third, how the liability should be classified, that is, as a current

⁵⁴ See Ross H. Fishman et al., *Environmental Reporting Required by the SEC*, 22 *Envtl. Rep. (BNA)* 1065, 1065-68 (Aug. 16, 1991); Archer, McMahon & Crough, *SEC Reporting of Environmental Liabilities*, 20 *Envtl. L. Rep. (Envtl. L. Inst.)* 10,105 (Mar. 1990).

⁵⁵ The difference between a contingent and a "hard" liability is merely a matter of degree of certainty. It is obvious that when a company ignores contingent liabilities until they become certain, it provides a distorted picture of its financial position by overstating its financial strength. On the other hand, recognition of liabilities that only have a remote chance of becoming realized runs the same risk in the opposite direction. While it might seem that a company would have no incentive to recognize liabilities that are only remotely likely, it should be noted that once a liability is recognized, the company can use it as a charge against income, thereby reducing its tax liability.

⁵⁶ See Dominy, *supra* note 30, at 57.

or capital expense; and fourth, whether the liability needs to be disclosed in the company's SEC filings.

The basic rule is that an estimated loss from a contingency must be accrued by a charge to income if it is probable that a liability has been incurred and the amount of the loss can be reasonably estimated.⁵⁷ Note that the recognition of the liability for accounting purposes is not tied to whether the liability is material to the business.

The SEC has found that, generally, companies have not had difficulty in determining whether a loss is probable.⁵⁸ Yet the SEC has still found disclosure inadequate. The Commission suspects that the source of the problem is related to the determination of whether a loss can be reasonably estimated and what that estimate should be.⁵⁹ A companion issue also needs clarification. This issue concerns the extent to which a company must address contingent losses recognized in the company's financial statements through notes appended to the financial statements.

Guidance has been available for some time on a number of issues that the basic rule for accrual of contingent liabilities raises.⁶⁰ However, as contingent liabilities occur in more and varied situations, it is inevitable that further questions will arise. The increasing importance of accounting for contingent liabilities, coupled with a lack of definitive guidance in several areas, has placed the issue on the agenda of FASB's Emerging Issues Task Force (EITF).

Some of the most recent thinking appears in SEC Accounting Bulletin Number 92 (SAB 92).⁶¹ SAB 92 is a useful step in the process of sorting out the accounting issues relating to contingent liabilities. As stated in the Federal Register summary, the purpose of SAB 92 is "to promote timely recognition of contingent losses and to address the diversity in practice concerning accounting and disclosures in this

⁵⁷ ACCOUNTING FOR CONTINGENCIES, *supra* note 30, at 35.

⁵⁸ *Id.*

⁵⁹ See Richard Y. Roberts, Commissioner of the United States Securities and Exchange Commission, *Environmental Liability Disclosure, Staff Accounting Bulletin No. 92, and Shareholder Proposals*, Remarks at the Law Education Institute and the Bureau of National Affairs, National CLE Conference 8, Mar. 6, 1994 (transcript on file with author) [hereinafter *Environmental Liability Disclosure*].

⁶⁰ See, e.g., FINANCIAL ACCOUNTING STANDARDS BOARD, FASB INTERPRETATION NO. 14: REASONABLE ESTIMATION OF THE AMOUNT OF A LOSS (Sept. 1976), *reprinted in ORIGINAL PRONOUNCEMENTS*, *supra* note 30, at 5041-43; FINANCIAL ACCOUNTING STANDARDS BOARD, FASB INTERPRETATION NO. 39: OFFSETTING AMOUNTS RELATING TO CERTAIN CONTRACTS, FINANCIAL ACCOUNTING SERIES, Mar. 1992; FINANCIAL ACCOUNTING STANDARDS BOARD, FASB INTERPRETATION NO. 20: REPORTING CHANGES UNDER AICPA STATEMENTS OF POSITION, *reprinted in ORIGINAL PRONOUNCEMENTS*, *supra* note 30, at 5082-83.

⁶¹ Staff Accounting Bulletin No. 92, 58 Fed. Reg. 32,843 (1993)(to be codified at 17 C.F.R. Part 211).

area.”⁶² SAB 92 accomplishes this goal by affirming the concurrence of the SEC staff with the EITF regarding the requirement that companies recognize contingent liabilities and offset contingent recovery claims separately.⁶³ The staff believes these requirements are especially needed in order to prevent the misrepresentation of the effect, likelihood, and timing of insurance recoveries.⁶⁴

SAB 92 deals with the treatment of joint and several liability, evaluation of uncertainties in the estimation process, and accounting for the time value of money. Also significant is SAB 92's duty to report on sites with environmental problems on a disaggregated basis in order to promote a full understanding of the contingencies relevant to a particular site. It is hoped that SAB 92 will bring greater uniformity to the process of accounting for environmental contingent liabilities in corporate financial statements.

SAB 92 also addresses the issue of when companies must make additional disclosures in the notes appended to their financial statements. The SEC staff states that environmental liabilities typically are of such significance that detailed disclosures regarding the judgments and assumptions underlying the recognition and measurement of the liabilities are necessary to prevent the financial statements from being misleading.⁶⁵ Such disclosure is also needed, according to the SEC, to fully inform readers of the range of reasonably possible outcomes that would have a material effect on the registrant's financial condition, results of operations, and liquidity.⁶⁶

SAB 92 gives examples of situations that would require companies to make further disclosure in the notes to their financial statements. It is important to recognize that, disclosure in the notes to the financial statements is only necessary where the particular contingent liability that is being recognized is found to be material.⁶⁷

Finally, the SEC has shown increasing concern that the financial statements, and, in particular, the notes to those statements, must present a picture consistent with disclosure made outside of those statements. SAB 92 itself directs that, where necessary, notes to the financial statements be cross-referenced to the MD&A.⁶⁸

It is still too soon to fully assess the effect of the SEC's recent attempts to define environmental disclosure requirements more pre-

⁶² *Id.* at 32,843.

⁶³ *Id.* at 32,844-45.

⁶⁴ *Environmental Liability Disclosure*, *supra* note 59, at 7-8.

⁶⁵ 58 Fed. Reg. 32,845.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

cisely. This is especially true with respect to SAB 92. The SEC reports that there is substantially more disclosure on environmental matters in 10-K filings in 1993 than in the past.⁶⁹ However, this observation is not confirmed by the sampling of companies reviewed below.⁷⁰

The SEC has announced that it expects continued scrutiny of the environmental component of company filings.⁷¹ Those companies that operate in fields such as property and casualty insurance, pulp and paper manufacturing, primary metal manufacturing, oil and gas production, electricity generation, pharmaceutical manufacturing, and organic chemical manufacturing should anticipate intensified scrutiny. The SEC is also expected to focus on the consistency of corporate filings with the principles of SAB 92—in particular, its offsetting and discounting provisions.⁷²

The stakes are high. Failure to comply with the securities laws carries the potential for significant fines and penalties.⁷³ Furthermore, now that many of the disclosure requirements have been clarified, the SEC appears to feel more confident about its ability to take serious enforcement action against those who fail to comply.⁷⁴

Some analysts believe that SAB 92 will precipitate considerably more disclosure. These analysts suggest that investors could be inundated by environmental liability data in 1993 corporate annual reports.⁷⁵ The disclosures may in turn have an effect on stock prices. Those in the chemical and manufacturing industries are particularly vulnerable. But while many companies believe the more definitive requirements will result in substantive changes in their own disclosure, others anticipate very little change.⁷⁶

⁶⁹ Interview with Kurt Hohl, Division of Corporate Finance, United States Securities and Exchange Commission (Mar. 1994).

⁷⁰ See *infra* Section III.

⁷¹ *Environmental Liability Disclosure*, *supra* note 59.

⁷² Richard Y. Roberts, Commissioner of the U.S. Securities and Exchange Commission, *SAB 92 and the SEC's Environmental Liability Disclosure Regulatory Approach*, Remarks at the 1994 Quinn, Ward & Kershaw Environmental Law Symposium, University of Maryland School of Law 5 (Apr. 8, 1994) (transcript on file with author) [hereinafter *SEC's Regulatory Approach*].

⁷³ See 15 U.S.C. § 78ff (1988).

⁷⁴ See Plishner, *Environmental Financial Disclosure*, CHEMICAL WEEK, Dec. 8, 1993 at 49; Murphy, *SEC Targets Environmental Disclosure Practices*, NATIONAL UNDERWRITER, Sept. 6, 1993 at 23.

⁷⁵ See Plishner, *Environmental Financial Disclosure*, CHEMICAL WEEK, Dec. 8, 1993 at 49; Murphy, *SEC Targets Environmental Disclosure Practices*, NATIONAL UNDERWRITER, Sept. 6, 1993 at 23.

⁷⁶ See Plishner, *Environmental Financial Disclosure*, CHEMICAL WEEK, Dec. 8, 1993 at 49; Murphy, *SEC Targets Environmental Disclosure Practices*, NATIONAL UNDERWRITER, Sept. 6, 1993 at 23.

The lack of definite accounting rules in the environmental area has contributed to widespread reporting disparities among companies.⁷⁷ *The Wall Street Journal* reported that inadequate disclosure in this area is rampant, and that a recent Price Waterhouse survey found that sixty-two percent of 523 companies surveyed reported that they are aware of environmental exposures that are not recorded in their financial statements.⁷⁸ The author's own review of the recent 10-K filings of five major companies with environmentally related operations confirms the breadth of the reporting disparities.

III. REVIEW OF SAMPLE SEC FILINGS

This section examines the recent 10-K filings of five major corporations with environmentally related activities: Exxon, Atlantic Richfield (ARCO), Union Carbide, Minnesota Mining & Manufacturing (3M), and Warner Lambert.⁷⁹ The examined filings are for the period between 1990 and 1993.⁸⁰ This review provides a sense of the content of these filings and illustrates the uneven manner in which the filing requirements are implemented in practice. The filings also demonstrate the degree to which disclosure requirements are subject to varying interpretations. The effectiveness of the SEC's disclosure requirements is thus substantially reduced if the SEC fails to clarify the requirements and fails to oversee compliance. Worse yet, in some situations where public policy would seem to overwhelmingly favor disclosure, it is not clear whether disclosure is required under present rules.

The treatment of the *Valdez* oil spill in the Exxon filings is perhaps the most glaring example of how subjectivity in disclosure can render disclosure statements irrelevant. While it is true that investors did not need the securities laws in order to obtain general information about the spill and its potentially widespread consequences, the company took the position that very minimal disclosure was required in

⁷⁷ *SEC Rule Forces More Disclosure*, WALL ST. J. Dec. 13, 1993 at B1-B2.

⁷⁸ See *infra* Section III.

⁷⁹ The full text of the 10-K forms are available from the SEC. The forms are also available through computerized database retrieval systems. The CD-ROM database "Disclosure" also contains significant excerpts from the 10-K form. There is no prescribed form companies must follow in their 10-K filings. Rather, the contents are defined by the information requirements set forth by the SEC. Most companies use a similar format, but the title of sections which cover the same material may vary. When citing information, this Article employs the topical headings used in the specific 10-K filings. "MD&A" refers to the Management's Discussion and Analysis of Financial Condition and Results of Operation, which is required in all 10-Ks submitted. See *supra* section II.A.3.

⁸⁰ Only the 1990, 1991, and 1992 filings of Union Carbide were examined.

its filings. A similar position can be seen in the filings of some of the other companies.

A. Comparison of Sample Filings

1. Exxon

The most noteworthy feature of the Exxon disclosure statements that were examined is the statements' lack of detail and specificity. The disclosure statements identify environmental compliance costs only in the most general terms. For instance, in its 1993 statement, Exxon identified only a lump-sum amount for annual compliance expenses.⁸¹ Although compliance costs are reported as approaching \$2 billion, there is no indication as to the costs related to any particular type of facility or environmental problem, except for a statement that most costs relate to air and water conservation.⁸² Given that compliance expenses are so high and are recurring, it would seem that Rule 10b-5 requires a more detailed breakdown of these costs in order to give investors a complete picture.

Not surprisingly, the focus of the disclosure of pending litigation is the group of lawsuits arising out of the grounding of the Exxon tanker *Valdez* in Prince William Sound, Alaska.⁸³ The 1990 filing reveals that over two hundred related actions were commenced against Exxon, including a criminal indictment in the United States District Court for the District of Alaska.⁸⁴ Exxon reported \$4.655 billion net income in 1989 before taking into account costs associated with the *Valdez* spill.⁸⁵ Costs attributable to cleanup, restoration, litigation, and related expenses net of insurance recoveries are estimated to be \$1.68 billion.⁸⁶

Amazingly, Exxon reports that the impact of this litigation is not considered material to its operations.⁸⁷ If this litigation is not material, it is hardly surprising that the company does not feel compelled by

⁸¹ EXXON CORP., 1993 FORM 10-K, MD&A (1994) [hereinafter EXXON 1993 10-K REPORT].

⁸² *Id.*

⁸³ See EXXON 1993 10-K REPORT, *supra* note 79, *Notes to Consolidated Financial Statements*, note 14; EXXON CORP., 1992 FORM 10-K, *Notes to Consolidated Financial Statements*, note 15 (1993) [hereinafter EXXON 1992 10-K REPORT]; EXXON CORP., 1991 FORM 10-K, *Notes to Consolidated Financial Statements*, note 15 (1992) [hereinafter EXXON 1991 10-K REPORT]; EXXON CORP., 1990 FORM 10-K, *Notes to Consolidated Financial Statements*, note 15 (1991) [hereinafter EXXON 1990 10-K REPORT].

⁸⁴ EXXON 1991 10-K REPORT, *supra* note 83, *Notes to Consolidated Financial Statements*.

⁸⁵ EXXON 1990 10-K REPORT, *supra* note 83, MD&A.

⁸⁶ *Id.*

⁸⁷ *Id.*

the securities laws to disclose any other environmental litigation. Even as late as 1993, no mention is made of the fact that \$16.5 billion in punitive damages was sought by the plaintiffs in the private actions arising out of the *Valdez* incident. In fact, in 1994, a jury awarded \$5 billion in punitive damages, the largest such award ever.⁸⁸

Minimal disclosure is the rule in other areas as well. In its 1993 10-K, Exxon reports that it set aside \$2.5 billion in anticipation of site restoration costs under CERCLA.⁸⁹ However, there is no analysis of current trends or any insight into management's views of Exxon's approach to environmental problems. The investor is simply told in conclusory fashion that management does not believe that any costs in excess of the amounts already provided for would have a materially adverse effect upon the corporation's operations, financial condition, or liquidity.⁹⁰

2. Atlantic Richfield (ARCO)

Of all the companies reviewed, ARCO's 10-K reports consistently contained the greatest amount of useful environmental disclosure. ARCO's 1993 report came far closer to fulfilling the intent of the securities disclosure laws than the reports of any of the other companies examined. That ARCO took the initiative to create a separate section in the report comprehensively and succinctly addressing all environmental matters is symbolically important.⁹¹

The ARCO filings contain considerable detail about the nature of pending legal actions. For example, ARCO reports the extent of its involvement with the Exxon *Valdez* litigation, a class-action personal injury suit related to its manufacturing and sale of lead-based paints, a personal injury action arising out of a hazardous waste site in Texas, and a citizen suit related to its activities at the Hanford Nuclear Reservation in Washington.⁹² The status of each case is reviewed and, where settlements have been reached, settlement terms are disclosed. In ARCO's 1993 filing, the details of two separate suits filed by the states of Montana and Colorado involving natural resource-damage

⁸⁸ *In re Exxon Valdez*, No. A-89-0095-CV (D. Alaska, Sept. 16, 1994), cited in 25 Env't Rep. (BNA) 1029 (Sept. 24, 1994).

⁸⁹ See EXXON 1993 10-K REPORT, *supra* note 81, MD&A.

⁹⁰ *Id.*

⁹¹ See ATLANTIC RICHFIELD CO., 1993 FORM 10-K, *Environmental Matters* (1994) [hereinafter ARCO 1993 10-K REPORT]. This section contains subsections entitled "Site Remediation," "Clean Air," "Environment-Related Expenditures," "Material Environmental Litigation," and a conclusion.

⁹² See ARCO 1993 10-K REPORT, *supra* note 91, *Notes to Consolidated Financial Statements*,

claims against the company are also disclosed.⁹³ In each case, the company details the nature of the claim and the status of the proceedings. ARCO's disclosure does not provide estimates of the company's ultimate liability.

Dovetailing with its disclosure of accruals to address future cleanup charges, ARCO also states in its 10-Ks that the company anticipates removal or remediation obligations under federal, state, and local environmental laws.⁹⁴ ARCO reports that although the extent of its liability is currently unknown, the liability is in the process of being assessed.⁹⁵ ARCO states that liability will not depend only on physical site conditions but also on the extent of its involvement relative to other parties and the extent to which the company is insured.⁹⁶ The disclosure statements also note the potential for further private claims for personal injury arising out of toxic materials that the company manufactures.⁹⁷

In the "Environmental Proceedings" section of its filings, ARCO reports government enforcement actions where penalties over \$100,000 are sought.⁹⁸ This disclosure, required under Item 103, is non-discretionary.⁹⁹

In ARCO's MD&As, the company reviews several trends that may affect its financial position. These discussions provide some insights into management's environmental policy. Once again the likelihood of future removal or remedial actions is discussed.¹⁰⁰ Without quantifying the associated costs, the company indicates the rate at which it is

Environmental Matters; ATLANTIC RICHFIELD CO., 1992 FORM 10-K, *Notes to Consolidated Financial Statements* (1993) [hereinafter ARCO 1992 10-K REPORT]; ATLANTIC RICHFIELD CO., 1991 FORM 10-K, *Notes to Consolidated Financial Statements* (1992) [hereinafter ARCO 1991 10-K REPORT].

⁹³ ARCO 1993 10-K REPORT, *supra* note 91, *Environmental Matters: Material Environmental Litigation*.

⁹⁴ *Id.* at *Environmental Matters: Site Remediation*; ARCO 1992 10-K REPORT, *supra* note 92, MD&A; ARCO 1991 10-K REPORT, *supra* note 92, MD&A.

⁹⁵ *See* ARCO 1993 10-K REPORT, *supra* note 91, *Environmental Matters: Site Remediation*; ARCO 1992 10-K REPORT, *supra* note 92, MD&A; ARCO 1991 10-K REPORT, *supra* note 92, MD&A.

⁹⁶ *See* ARCO 1993 10-K REPORT, *supra* note 91, *Environmental Matters: Site Remediation*; ARCO 1992 10-K REPORT, *supra* note 92, MD&A; ARCO 1991 10-K REPORT, *supra* note 92, MD&A.

⁹⁷ *See* ARCO 1993 10-K REPORT, *supra* note 91, *Notes to Consolidated Financial Statements*, note 12.

⁹⁸ *Id.* at MD&A: *Environmental Proceedings*.

⁹⁹ *See supra* notes 27-28 and accompanying text.

¹⁰⁰ *See* ARCO 1993 10-K REPORT, *supra* note 91, MD&A; ARCO 1992 10-K REPORT, *supra* note 92, MD&A; ARCO 1991 10-K REPORT, *supra* note 92, MD&A.

accumulating reserves for this contingency.¹⁰¹ The company also identifies the need to spend about \$2 billion for capital projects to meet the requirements of the 1990 Clean Air Act Amendments and the regulations issued by the California Air Resource Board.¹⁰²

Although earlier versions of ARCO's 10-K report contained a limited amount of disclosure concerning environmental compliance costs, the 1993 report shows significant improvement in this area. Significantly, ARCO discloses both the positive and negative consequences that the company anticipates the 1990 Clean Air Act Amendments will have on its operations.¹⁰³ In each reporting year, ARCO provides an overall estimate of ongoing compliance costs.¹⁰⁴ On the positive side, the MD&A indicates the company's intent to use the clean air issue to gain a competitive advantage: ARCO reports that it is the world's leading producer of MTBE, an important additive for reformulated gasolines.¹⁰⁵ ARCO indicates that the company has already introduced its own reformulated emission control gasolines at its service stations in Southern California.

3. Minnesota Mining and Manufacturing (3M)

Although 3M enjoys the reputation of an innovator in the environmental field, its SEC filings contain little information about the company's environmental expenditures or liabilities. 3M does not identify the cost of compliance with environmental regulations. In the years in which 3M's reports were reviewed, 3M specifically identified only one pending legal action, an administrative action brought by the United States Environmental Protection Agency (EPA) for violations of the Toxic Substances Control Act.¹⁰⁶ 3M acknowledges the violations but characterizes the violations as inadvertent, informing the investor that the size of the penalty assessment is the only issue being litigated. This is a clear example of an action that would likely not have been disclosed but for the special requirements of Item 103 relating to government actions for damages over \$100,000.

The company also identifies that it is a named party in a number of state and federal actions which assert liability for past disposal of

¹⁰¹ See ARCO 1993 10-K REPORT, *supra* note 91, MD&A; ARCO 1992 10-K REPORT, *supra* note 92, MD&A; ARCO 1991 10-K REPORT, *supra* note 92, MD&A.

¹⁰² ARCO 1991 10-K REPORT, *supra* note 92, *President's Letter*.

¹⁰³ See ARCO 1993 10-K REPORT, *supra* note 91, *Environmental Matters*.

¹⁰⁴ *Id.*

¹⁰⁵ ATLANTIC RICHFIELD CO., 1990 FORM 10-K, *President's Letter* (1991).

¹⁰⁶ MINNESOTA MINING & MFG. CO., 1990 FORM 10-K, *Legal Proceedings* (1991) [hereinafter 3M 1990 10-K REPORT].

hazardous wastes at inactive waste disposal sites.¹⁰⁷ The company does not identify the particular sites involved. In addition, 3M asserts that it cannot estimate the extent of its liability because of the number of PRPs involved, the multiplicity of possible remedial solutions, the evolving state of clean-up technology, and the duration of remedial activity required.¹⁰⁸ The company only reports that it believes it has accrued sufficient reserves to address the potential liability and that these accruals, in the aggregate, are not expected to have a material effect on the company's financial position.¹⁰⁹

In its 1991 filing, 3M discloses that the company intends to make capital investments of approximately \$175 million over the next five years to reduce emissions significantly below the limits now set by regulation.¹¹⁰ The company also identifies a five-year program to improve productivity by reducing waste generation by thirty-five percent and energy consumption by twenty percent.¹¹¹ No information is included about the cost of the program or the program's expected savings.

4. Union Carbide

Union Carbide identifies its annual environmental compliance costs with some degree of specificity. The company identifies the total amount of expenditures and provides a breakdown between capital and operating expenses.¹¹² While Union Carbide's statements do not indicate the precise nature of the expenditures, the statements note that, since the late 1980s, over eighty percent of the total expenses are consistently attributable to its chemicals and plastics operation.¹¹³ That

¹⁰⁷ MINNESOTA MINING & MFG. CO., 1993 FORM 10-K, *Legal Proceedings* (1994) [hereinafter 3M 1993 10-K REPORT]; MINNESOTA MINING & MFG. CO., 1992 FORM 10-K, *Legal Proceedings* (1993) [hereinafter 3M 1992 10-K REPORT]; MINNESOTA MINING & MFG. CO., 1991 FORM 10-K, *Financial Footnotes: Litigation and Claims* (1992) [hereinafter 3M 1991 10-K REPORT]; 3M 1991 10-K REPORT, *supra* note 104, *Financial Footnotes: Litigation and Claims*.

¹⁰⁸ 3M 1990 10-K REPORT, *supra* note 106, *Legal Proceedings*.

¹⁰⁹ 3M 1993 10-K REPORT, *supra* note 107, *Legal Proceedings*; 3M 1992 10-K REPORT, *supra* note 107, *Legal Proceedings*; 3M 1991 10-K REPORT, *supra* note 107, *Financial Footnotes: Litigation and Claims*; 3M 1990 10-K REPORT, *supra* note 106, *Financial Footnotes: Litigation and Claims*.

¹¹⁰ 3M 1991 10-K REPORT, *supra* note 107, *MD&A*.

¹¹¹ *Id.*

¹¹² UNION CARBIDE CORP., 1992 FORM 10-K, *MD&A: Costs Relating to Protection of the Environment* (1993) [hereinafter UNION CARBIDE 1992 10-K REPORT]; UNION CARBIDE CORP., 1991 FORM 10-K, *MD&A: Costs Relating to Protection of the Environment* (1992) [hereinafter UNION CARBIDE 1991 10-K REPORT]; UNION CARBIDE CORP., 1990 FORM 10-K, *MD&A: Costs Relating to Protection of the Environment* (1991) [hereinafter UNION CARBIDE 1990 10-K REPORT].

¹¹³ UNION CARBIDE 1991 10-K REPORT, *supra* note 112, *MD&A: Costs Relating to Protection*

information, together with other information concerning the nature of that operation, provides the investor with a reasonably complete picture of environmental compliance costs.

The central focus of Union Carbide's disclosure concerning pending litigation is the legal action arising out of the release of methyl isocyanate gas at the company's plant in Bhopal, India in 1984.¹¹⁴ The extent of Union Carbide's liability is clearly defined because, during the period reviewed, a settlement with the Indian government on civil liability was finalized. To its credit, Union Carbide also discloses in considerable detail related United States-based litigation even though the company believes these suits will be dismissed in light of the settlement in India.¹¹⁵

Union Carbide also discloses that it is involved as a PRP with respect to an unstated number of sites.¹¹⁶ As do the other companies, Union Carbide notes the impossibility of identifying its ultimate share of liability with any reliability. Union Carbide does, however, indicate that at a majority of the sites the company anticipates little or no liability. This assertion is based on the assumption that costs will be allocated among PRPs in proportion to their relative contribution.¹¹⁷

Union Carbide's MD&As identify a number of trends that are relevant to investors. Most significant is the likelihood of increases in environmental protection costs arising from the company's commitment to rigorous internal standards and from the imposition of stringent laws and regulations.¹¹⁸ Union Carbide has indicated its participation in the so-called "Responsible Care" industry initiative.¹¹⁹ Each year's filing provides an estimate of average annual compliance costs

of the Environment; UNION CARBIDE 1990 10-K REPORT, *supra* note 110, *MD&A: Costs Relating to Protection of the Environment*.

¹¹⁴ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, *Notes to Financial Statements*, note 19; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, *Notes to Financial Statements*, note 20; UNION CARBIDE 1990 10-K REPORT, *supra* note 112, *Notes to Financial Statements*, note 22.

¹¹⁵ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, *Notes to Financial Statements*, note 19; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, *Notes to Financial Statements*, note 20; UNION CARBIDE 1990 10-K REPORT, *supra* note 112, *Notes to Financial Statements*, note 22.

¹¹⁶ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, *MD&A: Costs Relating to Protection of the Environment*; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, *MD&A: Costs Relating to Protection of the Environment*; UNION CARBIDE 1990 10-K REPORT, *supra* note 112, *Legal Proceedings*.

¹¹⁷ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, *MD&A: Costs Relating to Protection of the Environment*; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, *MD&A: Costs Relating to Protection of the Environment*.

¹¹⁸ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, *MD&A*; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, *MD&A*; UNION CARBIDE 1990 10-K REPORT, *supra* note 112, *MD&A*.

¹¹⁹ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, *MD&A*. The Responsible Care

for the upcoming five-year period, broken down into overall and capital costs for the period.¹²⁰

The MD&As go on to disclose some of the specific environmental programs that would support the trend toward increased costs. The MD&As cite the company's internal commitment to reduce toxic emissions, to improve waste disposal practices, and to institute improved environmental audit programs. Union Carbide also cites compliance requirements associated with specific statutes, in particular the 1990 Clean Air Act Amendments and CERCLA.¹²¹

5. Warner Lambert

Of the companies whose reports were examined, Warner Lambert discloses the least environmental information. The statements contain no information concerning current or future environmental compliance costs or any information about trends that might affect the company. Warner Lambert only notes that it does not expect its compliance costs to be material.¹²² The only information that is specific to the company's own operations is that it initiated a worldwide audit program to ensure compliance with environmental regulations during 1993.¹²³

The disclosure statements do not provide any specific information about legal actions in which the company is involved. There is only brief mention that the company is a party to a number of proceedings brought by EPA and various states under CERCLA or comparable legislation.¹²⁴ The company indicates that it cannot predict the costs of remediation or the outcome of any litigation.¹²⁵ However, manage-

initiative is an effort by the Chemical Manufacturer's Association to set standards for management practices that go beyond simple compliance with regulatory requirements. *See id.*

¹²⁰ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, MD&A; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, MD&A; UNION CARBIDE 1990 10-K REPORT, *supra* note 112, MD&A.

¹²¹ UNION CARBIDE 1992 10-K REPORT, *supra* note 112, MD&A; UNION CARBIDE 1991 10-K REPORT, *supra* note 112, MD&A; UNION CARBIDE 1990 10-K REPORT, *supra* note 112, MD&A.

¹²² WARNER LAMBERT CO., 1993 FORM 10-K, MD&A (1994) [hereinafter WARNER LAMBERT 1993 10-K REPORT]; WARNER LAMBERT CO., 1992 FORM 10-K, MD&A (1993) [hereinafter WARNER LAMBERT 1992 10-K REPORT]; WARNER LAMBERT CO., 1991 FORM 10-K, MD&A (1992) [hereinafter WARNER LAMBERT 1991 10-K REPORT]; WARNER LAMBERT CO., 1990 FORM 10-K, MD&A (1991) [hereinafter WARNER LAMBERT 1990 10-K REPORT].

¹²³ WARNER LAMBERT 1993 10-K REPORT, *supra* note 122, MD&A.

¹²⁴ WARNER LAMBERT 1993 10-K REPORT, *supra* note 122, MD&A, *Notes to Consolidated Financial Statements*; WARNER LAMBERT 1992 10-K REPORT, *supra* note 122, MD&A, *Notes to Consolidated Financial Statements*; WARNER LAMBERT 1991 10-K REPORT, *supra* note 122, MD&A, *Notes to Consolidated Financial Statements*; WARNER LAMBERT 1990 10-K REPORT, *supra* note 122, MD&A, *Notes to Consolidated Financial Statements*.

¹²⁵ WARNER LAMBERT 1993 10-K REPORT, *supra* note 122, MD&A, *Notes to Consolidated*

ment offers the opinion that it is unlikely that these costs will have a materially adverse effect on the company's financial position, liquidity, cash flow, or results of operations for any year.¹²⁶ Only in its 1993 filing does Warner Lambert indicate that the company is accruing expenses relative to the costs of remediation.¹²⁷

In Warner Lambert's 1992 10-K report, the company reports on its Novon Products Group. The group is responsible for the production of Novon specialty polymers, a family of materials that are fully degradable in biologically active environments.¹²⁸ This represents a potential breakthrough in the solid waste field. The report states that Warner Lambert expects Novon specialty polymers to generate increased revenues in 1993.¹²⁹ However, Warner Lambert's latest disclosure statement indicates that it intends to sell the Novon Products Group.¹³⁰

B. *Summary and Conclusions*

It is clear that the extent and detail of corporate environmental disclosure vary widely in the 10-K filings of the five corporations examined. In some cases, it appears that the decision to disclose depends upon whether the news is good or bad. However, it is unrealistic to expect a company to disclose matters that the law does not require the company to disclose, unless the company perceives that such disclosure will work to its benefit.

Some of the differential may be attributed to the specific circumstances of the individual companies. However, given the size and diversity of these companies, there can be little doubt that all face significant challenges in the environmental field. One must conclude that, under present circumstances, companies retain an enormous

Financial Statements; WARNER LAMBERT 1992 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*; WARNER LAMBERT 1991 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*; WARNER LAMBERT 1990 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*.

¹²⁶ WARNER LAMBERT 1993 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*; WARNER LAMBERT 1992 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*; WARNER LAMBERT 1991 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*; WARNER LAMBERT 1990 10-K REPORT, *supra* note 122, *MD&A, Notes to Consolidated Financial Statements*.

¹²⁷ WARNER LAMBERT 1993 10-K REPORT, *supra* note 122, *Notes to Consolidated Financial Statements*.

¹²⁸ WARNER LAMBERT 1992 10-K REPORT, *supra* note 122, *MD&A*.

¹²⁹ *Id.*

¹³⁰ WARNER LAMBERT 1993 10-K REPORT, *supra* note 122, *Business*.

amount of discretion concerning the amount of environmental information they must disclose.

Without any common denominator, the value of disclosure under the Acts is significantly diminished for those who must rely upon it. Even where companies report on the same issues, the reported statistics are not standardized, making comparisons difficult, if not impossible. The SEC, by not standardizing information requirements and verifying the information received, is denying the investment community the element of reliability, a central purpose of the Acts. As in many areas of the law, the certainty of having a clear rule to rely on is far more important than ensuring that the rule is perfect.

The questions that emerge based on a review of the current state of affairs are twofold. First, what is an appropriate level of disclosure of environmental information? Second, how can that level of disclosure be required of all SEC registrants in an even-handed manner? The challenge of finding the answers to these questions is addressed in the remainder of this Article.

IV. THE REFORM AGENDA AND THE SEC

While any number of reforms can be proposed to promote enhanced disclosure, one should not lose sight of the basic purpose and philosophy of the securities laws.¹³¹ The SEC perceives its role as protecting the investor rather than acting as an instrument of corporate change.¹³² While environmental advocates might prefer the latter view, the SEC's reading of the purpose of the securities laws is probably correct. At a minimum, the SEC is more likely to give serious consideration to changes that do not require the agency to alter its fundamental philosophy of securities disclosure. The sections that follow discuss and suggest procedural, administrative, and regulatory reforms that would make corporate environmental disclosure more meaningful to the investor.

The SEC should begin by developing a credible threat to non-compliance by enforcing existing requirements more vigorously. The SEC should also close loopholes in the reporting requirements and move toward limiting company discretion by more clearly defining the minimum information that companies must submit. In defining these minimums, the SEC should also assure that the format for reporting

¹³¹ See *supra*, notes 14-15 and accompanying text.

¹³² *Environmental Liability Disclosure*, *supra* note 59.

allows cross-company comparisons, particularly with respect to quantitative information.

A. *Greater Enforcement of Existing Requirements*

While existing disclosure requirements can certainly be improved, such requirements are not insubstantial. Unfortunately, the SEC's failure to vigorously enforce such requirements significantly diminishes their usefulness to investors. The publication of the 1989 MD&A Guidance and SAB 92, coupled with increased cooperation between the EPA and the SEC, has served to increase the amount of environmental information disclosed.¹³³ It also appears that the clarification of a number of accounting issues in SAB 92 is likely to result in more detailed disclosure.¹³⁴ However, an increase in the amount of disclosure will not necessarily improve the quality or usefulness of the information disclosed.¹³⁵

In order to ensure that companies are meeting both the letter and spirit of existing requirements, the SEC must adopt a more aggressive enforcement posture. The SEC must take substantial steps to verify more accurately the information in the disclosure forms, and must be prepared to pursue enforcement actions where its investigations reveal non-compliance.¹³⁶

An increased SEC enforcement presence would surely have an impact on corporate disclosure, regardless of the results obtained in any particular enforcement action. The attitude of companies towards compliance with regulatory requirements is always influenced, consciously or not, by companies' perception of whether the regulator is aggressively enforcing those requirements. Enforcement actions also serve to define the position of the agency on the meaning of requirements that might otherwise be ambiguous and to provide a forum for judicial interpretations. For these reasons, the failure of the SEC, for more than a decade, to bring any significant enforcement actions concerning the environmental disclosure requirements has reinforced

¹³³ See Donna Engelgau, *Truth and Consequences*, RESOURCES, May 1991 at 3-5.

¹³⁴ See *SEC Rule Forces More Disclosure*, *supra* note 77, at B1.

¹³⁵ This is the opinion expressed by both Michael Northridge, Attorney with EPA Enforcement Division, and Andrew Tataryn, Special Assistant to the Director of Corporate Finance at the SEC, in personal conversations with the author.

¹³⁶ SEC Commissioner Richard Y. Roberts has indicated that the Enforcement Division would be aggressively pursuing companies "for inconsistencies and lack of disclosure" about environmental liabilities. *SEC Rule Forces More Disclosure*, *supra* note 77, at B1.

the complacency among companies not inclined to disclose.¹³⁷ An aggressive enforcement posture will help substantially in reversing that attitude.

It is important that any enforcement strategy that the SEC adopts be comprehensive. The SEC is now verifying information against EPA records, but that arrangement has not yet been institutionalized. Other information, such as assessments of the exposure to liability arising from private litigation, receives no SEC verification whatsoever.¹³⁸ On a selective basis, the SEC should independently evaluate private claims to see if such claims are substantial enough to warrant disclosure. To evaluate such claims, the SEC will need to employ independent counsel that possess expertise in the field of environmental litigation. Given the potential losses involved, the SEC's obligation to investors requires the agency to monitor the disclosure of private litigation liability exposure.

B. *Closing Existing Loopholes*

There are several loopholes in existing SEC rules that need to be addressed. These include the thresholds for the disclosure of legal proceedings and for the determination of materiality. Closure of these loopholes, coupled with a higher enforcement profile, will likely result in more meaningful disclosure.

The first loophole relates to the requirement for disclosure of legal proceedings involving the government where potential damages are at least \$100,000.¹³⁹ The SEC presently does not require disclosure if the company reasonably believes that the damages will be less than the threshold amount.¹⁴⁰ Legal actions brought by the government should carry with them the presumption that the action itself and the accompanying request for relief are made in good faith. Therefore, whenever the government sues for damages of \$100,000 or more, companies should not be given the leeway to predict the outcome. Disclosure should be automatic.

¹³⁷ The SEC has announced two significant actions related to compliance with MD&A requirements. Although the actions do not involve environmental disclosure, they do give some cause to hope that the SEC will take a more aggressive enforcement posture. See *SEC Charges Caterpillar Failed to Warn Holders of Earnings Risk Posed by Unit*, WALL ST. J., Apr. 2, 1992, at A3 (addressing SEC actions against Caterpillar, Inc.).

¹³⁸ Interview with Andrew Tataryn, Special Assistant to the Director of Corporate Finance Division, U.S. Securities and Exchange Commission.

¹³⁹ See *supra* Section II.A.2.

¹⁴⁰ See *supra* notes 27-28 and accompanying text.

The SEC has also opined that remedial costs arising from actions under CERCLA and similar statutes do not constitute "damages."¹⁴¹ This characterization is correct from a legal point of view, as remedial costs are compensatory, nonpenal in nature. However, there does not appear to be any policy reason to make a significant distinction between potential liability for civil penalties and potential liability for remedial costs. Investors are principally concerned with the impact that these costs will have on the company, not how the costs are characterized. From the investor's point of view, the only difference between penalties and remedial costs is that the economic impact of remedial costs may be less significant because remedial costs are tax deductible as a business expense. However, the SEC could address this issue simply by requiring disclosure where the potential after-tax impact is \$100,000 or more. Therefore, whatever the rationale for disclosure of penalties, the argument would be equally compelling when applied to remedial costs.

The second loophole that the SEC should address is the interpretation in the 1989 MD&A Guidance that reworks the traditional test of materiality.¹⁴² While most commentators have focused on the shift in the burden of proof that effectively requires companies to disprove the materiality of current trends, little attention has been focused on the substantial increase in the threshold for determining materiality.¹⁴³ Under current rules, the MD&A need not include a discussion of trends or potential events with devastating financial consequences if the company can objectively show that the events are "not reasonably likely to occur."¹⁴⁴ At the very least, the SEC should address in an interpretive release the meaning of the "not reasonably likely to occur" test. To avoid disclosure, companies should be required to show that the event has a *de minimis* likelihood of occurring, not merely that the likelihood of the event's occurrence is less than fifty percent.

As the SEC becomes aware of accounting issues, the agency should make efforts to examine them and issue guidance expeditiously. This will have the effect of placing companies on notice of the SEC's expectations and should also help ensure consistency and a level playing field.

¹⁴¹ See *supra* note 27.

¹⁴² See *supra* text accompanying notes 43-48.

¹⁴³ See Fishman et al. *supra* note 54 at 1065-68.

¹⁴⁴ Securities Act Release No. 6835, *supra* note 27.

C. *Reassessing the Materiality Standard*

The concept that requires the most scrutiny is materiality.¹⁴⁵ The environmental disclosure requirements are tied to the materiality concept by the implementing regulations, not by the securities laws themselves.¹⁴⁶ However, the concept of materiality is a statutory requirement in other securities disclosure contexts, and the extension of the concept's use to the environmental area is not surprising.¹⁴⁷ The concept evolved as a way of balancing what the SEC sees as the two competing concerns with which it must contend: (1) protecting the investor and (2) not overburdening the disclosure system with information that is of questionable value.¹⁴⁸

In the context of corporate environmental matters, the way in which materiality is now defined fails to strike that balance properly. First, it is often too difficult for companies to determine the value of environmental liabilities on an objective basis. The histories of many environmental statutes and regulations are insufficient to allow for reasonably predictable litigation outcomes. Similarly, the cost of actions that are necessary to control or remediate pollution is difficult to estimate because of limitations in the understanding of ecosystems and because of frequent changes in technology. In short, the present definition of materiality ensures its unenforceability and encourages uneven reporting.

The SEC need not rely on the concept of materiality to strike the balance it seeks. Through rulemaking, the SEC could establish minimal thresholds which, if exceeded, require disclosure. The SEC should, after consultation with the EPA, propose a set of objective measures of environmental costs and performance. Such measures should be selected based on (1) usefulness to investors; (2) objectivity of the information; and (3) the degree to which the measure avoids the burden of producing new, i.e., otherwise unrequired, documents. For example, the SEC could require disclosure of annual compliance costs that exceed a threshold amount or that are greater than a particular percentage of a company's gross income. If the component items of environmental compliance costs were defined by regulation, it is likely that disclosure of such costs would meet the three tests

¹⁴⁵ See *supra* note 21 and accompanying text.

¹⁴⁶ Compare 15 U.S.C. § 78j and § 78m (1988 & Supp. V 1993), the statutory sources of authority for reporting environmental liabilities with the rules promulgated thereunder in 17 C.F.R. pt. 229.

¹⁴⁷ For example, see 15 U.S.C. § 78n (1988 & Supp. V 1993), which contains requirements made in connection with a tender offer.

¹⁴⁸ Securities Act Release No. 5627, *supra* note 17.

mentioned above. Such an approach would simultaneously address concerns about the broad discretion companies now have in making determinations about materiality.¹⁴⁹

In order to enable investors to make cross-company comparisons, the regulations should prescribe a consistent reporting format. Currently, when companies report compliance costs, some companies provide a total amount; others provide either capital or operational expenditures; and still others provide information that is limited to domestic operations. With a minimal burden, the SEC can, and should, standardize the reporting format for these types of information.

If the SEC insists on adherence to the materiality standard, the agency could justify instituting the above suggestions by other means. In particular, the SEC could hold that its rulemaking determines the materiality of this information generically, as a matter of law. Interestingly, the SEC itself has employed this rationale in prior rulemakings.¹⁵⁰

D. Contents of the MD&A

Another element of the reform agenda concerns the content of the MD&A. Admittedly, the very nature of the MD&A requires flexibility.¹⁵¹ However, the SEC could establish a set of topics that companies would be required to address. The SEC could also prescribe the format in which statistics on these topics must be reported. This disclosure would provide investors with a baseline of environmental information about a company's operations, as well as a common basis for comparison with other registrants.

While the SEC envisioned the MD&A as a vehicle that would allow investors to see the company through the eyes of management, the content of the MD&A has become too dependent upon the attitude of management toward disclosure.¹⁵² In the SEC's attempt to avoid boilerplate discussions in the MD&A, the agency has effectively given management a blank check. One study of the 10-K filings of the Standard & Poors 500 companies supported the conclusion that there is a widespread lack of uniformity in disclosure; the same conclusion reached by this author based on a more limited sampling.¹⁵³

¹⁴⁹ For another view on the benefits of standardization of environmental reporting, see Sand & van Buren, *Environmental Disclosure and Performance*, 12 CARDOZO L. REV. 1347 (1991).

¹⁵⁰ See *supra* note 29 and accompanying text.

¹⁵¹ See *supra* Section II.A.3.

¹⁵² See *supra* Section III.B.

¹⁵³ See Biersach, *Inside the 10K*, INVESTOR'S ENVTL. REP., Winter 1991 at 1, 12-15; see also *supra* Section III. The Standard & Poors study found a wide variability in the type, amount and detail of information provided by these companies.

Two distinct reform agendas can be pursued to improve the content of the MD&A: (1) a limited agenda that deals with the disclosure of information with direct economic consequences or (2) a more extensive agenda that would include information targeted to the needs of the "socially responsible" investor. The latter agenda is unrealistic at this point, given both the SEC's attitude toward environmentally motivated issues and a level of environmental investments that is currently insufficient to persuade the SEC to revise its approach.¹⁵⁴

The more modest agenda would include disclosure of items such as (1) the amount and type of pollution liability insurance policies—this would include insurance that would cover liability for personal injury and remediation; (2) real property the company owns or has an interest in for which there is a reasonable likelihood that the value of the property has been environmentally impaired—unless the asset has already been devalued on the company's accounts to reflect that impairment; (3) the projected impact of new environmental enactments identified by the EPA as entailing significant compliance costs;¹⁵⁵ and (4) whether the company meets or exceeds existing regulatory standards.¹⁵⁶

E. *Summary*

There are many ways in which the SEC requirements for environmental disclosure can be made more useful to investors. Improvement can be made without any change in the rules simply by placing increased emphasis on enforcement of existing requirements. Other changes can be made through rule amendments that prevent abuses and distortions of the disclosure process, while leaving the SEC's basic approach intact. The final type of recommended change would require the SEC to adopt a new set of rules and to accept a fundamentally different approach to disclosure.

¹⁵⁴ See *infra* Section V.

¹⁵⁵ This would, of course, require coordination between the SEC and EPA and some objective standard by which significant compliance costs would be determined. The estimates of compliance costs should be readily available, however, as EPA routinely provides Congress with such estimates for proposed legislation and is required by the Administrative Procedure Act to estimate compliance costs for any new regulatory requirements.

¹⁵⁶ Although it is vitally important from an investor's point of view to know whether a company is in compliance with regulatory standards, compelling a company to disclose non-compliance raises serious policy questions which are beyond the scope of this Article. It is worth noting, though, that such a requirement would not run afoul of the constitutional privilege against self-incrimination because that privilege does not extend to corporate entities. See, e.g., *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968).

Given the breadth of the SEC's discretion to determine what is necessary to implement the Securities Acts, it is unlikely that the SEC can be forced to adopt any of these changes through litigation. Hence, those who wish to advance the reform agenda need to demonstrate to the SEC that their recommendations are consistent with the agency's mission. The following section examines how this might be accomplished.

V. A PLAN FOR SEC IMPLEMENTATION OF THE REFORM AGENDA

Like any other government agency, the SEC examines its enabling statutes to determine its purpose and mission. In order to formulate a strategy that will be effective in persuading the SEC to adopt reform measures, it is critical to scrutinize the available evidence that shows how the SEC perceives its mandate. It will be far easier to convince the SEC that reforms are consistent with this mandate than to convince the SEC that it needs to rethink the nature of that mandate.

A. *The SEC Rosetta Stone*

The principal focus for implementing the reform agenda must be SEC action. In this regard, it is crucial to understand the source of the SEC's resistance to requiring increased environmental disclosure. More than a decade ago, the Natural Resources Defense Council (NRDC) sued the SEC regarding the scope of environmental disclosure that should be required of publicly held companies.¹⁵⁷ The securities releases that followed the NRDC litigation provide important insights concerning the issues that will need to be addressed if the NRDC proposals—or similar proposals suggested in this Article—are to have any likelihood of success.¹⁵⁸ The releases are thus the Rosetta Stone for understanding the SEC's thinking on issues relating to environmental disclosure.

The NRDC litigation concerned the effect of the National Environmental Policy Act (NEPA)¹⁵⁹ on the SEC's decisionmaking process in promulgating disclosure rules to implement the securities laws. NEPA, a statute of general applicability, requires, among other

¹⁵⁷ See *Natural Resources Defense Council, Inc. v. Securities & Exch. Comm'n*, 606 F.2d 1031, 1036-37 (D.C. Cir. 1979). For a more detailed treatment of the NRDC-SEC controversy, see Caron, *supra* note 33 at 733-41.

¹⁵⁸ See *supra* Section IV.

¹⁵⁹ National Environmental Policy Act, 42 U.S.C. §§ 4321-4370d (1988 & Supp. IV 1992).

things, that federal agencies incorporate into their decisionmaking the effect that their actions will have on the environment.¹⁶⁰ Before the enactment of NEPA in 1969, there was no general charge requiring federal agencies to consider the environmental impact of their actions. Most agencies operated under statutes that established "mission-oriented" programs that required the agencies to pursue objectives regardless of the environmental impact of success.¹⁶¹

In 1971, the NRDC petitioned the SEC to amend its rules to require additional filings designed to disclose the effect of corporate activities on the environment.¹⁶² The SEC considered the NRDC proposals, along with alternatives, in a rulemaking action, and ultimately adopted environmental disclosure rules much more modest than those proposed by the NRDC.¹⁶³ The NRDC challenged these rules, but the rules were upheld upon judicial review.¹⁶⁴ While the United States Court of Appeals for the D.C. Circuit acknowledged that NEPA made consideration of environmental factors part of the SEC's charge, the court granted the SEC a great deal of discretion in determining how to fulfill that charge consistently with its other statutory requirements.¹⁶⁵ The court held that judicial intervention was appropriate only if the SEC's actions were arbitrary and capricious.¹⁶⁶ Given this standard of review, it is highly unlikely that the SEC can be compelled to adopt more expansive environmental disclosure rules. However, the securities releases that the SEC issued in relation to its rulemaking provide reason to believe that, as circumstances change, the SEC itself might be convinced of the wisdom and practicality of additional disclosure.

In the three releases that resulted from the NRDC rulemaking petition, the SEC carefully analyzed the principles that govern its obligations under the securities laws and NEPA.¹⁶⁷ The SEC states in the releases that, as a general rule, the agency's mandate is to require

¹⁶⁰ See *id.* § 4332.

¹⁶¹ DANIEL R. MANDELKER, *NEPA LAW AND LITIGATION* § 1.02 (2d ed. 1994).

¹⁶² See *Natural Resources Defense Council, Inc. v. Securities & Exch. Comm'n*, 389 F. Supp. 689, 694 (D.D.C. 1974) (setting forth contents of petition).

¹⁶³ See *id.* at 694-95.

¹⁶⁴ See *id.* at 692-695.

¹⁶⁵ *Natural Resources Defense Council, Inc. v. Securities & Exch. Comm'n*, 606 F.2d 1031, 1044-45 (D.C. Cir. 1979).

¹⁶⁶ See *id.*

¹⁶⁷ See Notice of Public Hearing Regarding Environmental and Other Matters of Social Concern, Securities Act Release No. 5569 [1975 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,110 (Feb. 11, 1975) [hereinafter Securities Act Release No. 5569]; Securities Act Release No. 5627, *supra* note 17; Rulemaking on Environmental Disclosure, Securities Act Release No. 5704 [1976 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,495 (May 6, 1976) [hereinafter Securities Act Release No. 5704].

disclosure of information that would be of interest generally to investors, rather than information that would be of value only in certain instances.¹⁶⁸ Therefore, the SEC concluded that information on issues of corporate social responsibility is probably outside its legal mandate under its organic statutes, the Securities Act of 1933, and the Securities Exchange Act of 1934.¹⁶⁹ Significantly, the SEC recognized that NEPA altered that mandate and required special efforts on the part of the agency to protect the environment.¹⁷⁰ Nonetheless, the SEC believes that the securities laws were adopted almost exclusively to protect the economic interests of investors and to provide investors with sufficient information to exercise their shareholder voting rights. While the Commission recognizes that its regulations may have an indirect effect on corporate conduct, the agency has declined to impose disclosure requirements in order to advance a social agenda.

The SEC regards the decision to require disclosure of particular information as a balancing of competing interests. As detailed in the NRDC releases, the SEC examines the interest of investors in disclosure and balances these considerations against the cost of disclosure and the likelihood that the information will prove useful to investors.¹⁷¹ Although the SEC struggled in the NRDC litigation with the question of how NEPA might alter that balance, the agency ultimately concluded that it was not a significant enough factor to justify disclosure if the disclosure was outside its basic charge under the securities laws.¹⁷²

The SEC was concerned not only that some types of information would prove to be too burdensome to disclose but that, due to the lack of standards for compiling and judging the information, disclosure could not be standardized.¹⁷³ For example, the SEC questioned how a corporation would be able to comprehensively describe the effects of its operations on the environment.¹⁷⁴ This difficulty would lead to added burdens and the production of information that might not even be useful to investors. The SEC also argued that much of the information was available from alternative sources and would merely be duplicative.¹⁷⁵

¹⁶⁸ Securities Act Release No. 5569, *supra* note 167.

¹⁶⁹ Securities Act Release No. 5627, *supra* note 17, at 85,713.

¹⁷⁰ *Id.* at 85,714.

¹⁷¹ *Id.* at 85,712–13.

¹⁷² *Id.* at 85,714–15.

¹⁷³ *Id.* at 85,110.

¹⁷⁴ *Id.* at 85,717.

¹⁷⁵ *Id.* at 85,719.

The SEC found that the only justification being offered by the NRDC that was arguably in harmony with the purposes of the securities laws was the need for investors to be informed in order to exercise their voting rights in an intelligent way.¹⁷⁶ While this reason alone could have supported the addition of disclosure requirements, the SEC rejected the argument because the agency found that the level of investor interest in “social” issues was very low.¹⁷⁷ The SEC cited statistics showing that only one percent of shareholders invested in “socially responsible” investment vehicles.¹⁷⁸ The SEC also relied on information that showed that shareholder resolutions having social implications were reported to have received only between two and three percent support.¹⁷⁹

It is important to note that even though the SEC rejected the NRDC proposals, the SEC acknowledged its continuing obligation to expand or contract disclosure requirements in light of changing circumstances.¹⁸⁰ The challenge for reformers is to structure a proposal that, when examined in light of current circumstances, would meet most, if not all, of the SEC’s objections.

B. *Importance to Investors*

The most fundamental issue that must be developed to persuade the SEC to adopt any part of the reform agenda is the value of environmental disclosure to investors. The SEC is sensitive to the need for information that investors require to make purchasing decisions and vote at shareholder meetings. The case for additional disclosure to serve investor interest can be based on either concern.

In order to make the case that a type of information is needed for the purchasing decision, it must be shown that the information does in fact affect company value, or at least that investors perceive that it does. To show an actual impact, an analysis of the information and how the information affects the corporation’s economic position or how the information reflects on management’s competence is required. The strongest case would be based on an after-the-fact review of the effect of a particular type of information. With this evidence, it will be easier to document actual impact.

¹⁷⁶ *Id.* at 85,711.

¹⁷⁷ *Id.* at 85,719–21,

¹⁷⁸ *Id.* at 85,719–21.

¹⁷⁹ *Id.* at 85,720.

¹⁸⁰ *Id.* at 85,719.

For instance, a review of the impact of lawsuits that were not disclosed could be used to demonstrate that investors need to know more about pending lawsuits. Another study could examine the extent of the impact of insurance on environmental liabilities. Existing studies, though not performed with SEC disclosure requirements in mind, contain extensive documentation of the importance of much of the information for which disclosure is sought. For instance, studies have documented the growing portion of GNP devoted to pollution control measures¹⁸¹ and the effect of compliance costs on company credit ratings.¹⁸²

With respect to information for which a demonstrable, direct economic impact cannot be shown, the SEC will need to be convinced that investor interest in using "non-economic" criteria is high. This requires a showing that a substantial number of investors not only perceive that the information is important to the purchasing decision, but also that the investors make purchasing decisions based on this type of information.

In recent years, with the rise of specialized mutual funds, there has been sufficient investor interest to sustain numerous funds whose stated purpose is to make socially responsible investments. Many of these funds specialize in environmentally responsible investments or include such investments as a significant portion of their portfolio. Unfortunately, because of the inherent limitations and uneven results of the currently required disclosure, few researchers who seek to evaluate social criteria for institutional investors rely on 10-K filings.¹⁸³

In the securities releases that arose out of the NRDC litigation, the SEC examined statistics related to the number of investment deci-

¹⁸¹ Pollution control expenditures consumed 2.1% of GNP in 1990 and are expected to rise to 2.6% of GNP in the year 2000 according to an EPA report to Congress, *Environmental Investments: The Cost of a Clean Environment* (1990).

¹⁸² Teresa Opheim, *Environmental Costs Reduce Credit Ratings*, INVESTOR'S ENVTL. REP., Summer 1991, at 4-5.

¹⁸³ None of the six mutual funds that specialize in environmentally responsible investments that were reviewed by the author cited any reliance on the 10-K form by its research staff. Sources that were cited included government records from the EPA, Department of Defense, Department of Labor, Occupational Health and Safety Administration, and Office of Technology Assessment; national and local media; special interest groups; interviews with corporate personnel and labor unions; business and trade publications; and electronic legal databases. The funds examined were Pax World Fund, Calvert-Ariel Appreciation and Social Investment Funds, Parnassus Fund, Dreyfus Third Century Fund, and New Alternatives Fund. Two research firms, Franklin Research and Development Corporation, and the Investor Responsibility Research Center (IRRC), did cite the use of the 10-K forms, though IRRC indicated it was of very limited value.

sions that utilized environmental criteria.¹⁸⁴ The statistics that the SEC relied upon are now hopelessly outdated. In recent years, investment decisions that employ environmental criteria have increased both in absolute numbers and as a percentage of total investments.¹⁸⁵ A comprehensive study documenting these changes would support a compelling case for reform.

Even though the SEC acknowledged that investors need to be well informed in order to make knowledgeable decisions when exercising their voting rights, the agency declined to require disclosure on "social" issues, because the agency found that there was little interest in environmentally oriented shareholder resolutions.¹⁸⁶ However, a large number of such shareholder resolutions recently have been introduced, especially after the grounding of the *Valdez*. In 1990, resolutions that required compliance with the *Valdez* Principles¹⁸⁷ were introduced at shareholder meetings of American Express, Atlantic Richfield, Exxon, Kerr-McGee, and Union Pacific.¹⁸⁸ Although these resolutions were defeated, support ranged from 8.5% to 16.7%.¹⁸⁹ This is much higher than the two to three percent level of support cited by the SEC in its decision to deny the NRDC petition.¹⁹⁰ Clearly, this increase can be a powerful argument in support of the need for disclosure of information on corporate environmental policy irrespective of its economic significance.

Although some may take the position that requiring the additional disclosure of this heretofore "private" information is unnecessary given the ability of large institutional investors to procure the same information through other channels, there is a solid case to the contrary. First, the securities laws are intended to make information critical to the investment decision available to all investors. Second, many of the alternative sources that large institutional investors are

¹⁸⁴ See *supra* note 165 and accompanying text.

¹⁸⁵ Securities Act Release No. 5627 reports that investments using social criteria accounted for only 2/3 of 1% of the portfolios of investors that were concerned enough to respond. Securities Act Release No. 5627, *supra* note 17, at 85,719. The SEC also reported in the same release that mutual funds using environmental criteria only had \$35 billion in assets. *Id.* at 85,719, 85,720.

¹⁸⁶ See *id.*

¹⁸⁷ The *Valdez* Principles were developed by a group of environmental organizations, the Coalition for Environmentally Responsible Economies (CERES). ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 229 (1992). They constitute a statement of long-term commitment to environmental values. See *id.* at 228-30.

¹⁸⁸ Christopher J. McKenzie, Note, *Environmental Investment: A Proposal for State Legislation*, 16 COLUM. J. ENVTL. L. 349, 359-60 (1991).

¹⁸⁹ *Id.* at 360.

¹⁹⁰ Securities Act Release No. 5627, *supra* note 17, at 85,720.

compelled to use lack the credibility that arises from the combination of government verification and the penalties associated with the submission of false or misleading information under the securities laws. The value of including such additional information in securities filings can be justified on this basis even if similar information is available elsewhere.

C. Burden on the Disclosure Process

The SEC has made it clear that the importance of information to the investor is not the sole criterion on which the agency decides whether to compel disclosure.¹⁹¹ While almost any information is potentially useful to investors, the SEC is sensitive to the extent to which a disclosure requirement will increase the burden on companies. In addition, the SEC is wary that excessive disclosure will result in a clutter of information and that investor understanding will suffer. Thus, the SEC has, for example, already rejected suggestions that companies append lengthy documents, such as environmental impact statements, to disclosure filings.¹⁹² Advocates of more extensive disclosure must convince the SEC that additional requirements will not overburden the disclosure process and will also provide useful information.

To satisfy these concerns, proponents of the reform agenda should first focus on the information that can be submitted within the existing reporting structure, perhaps as part of the MD&A.¹⁹³ It is unlikely that the SEC will object to the inclusion of such information. As a strategy to convince the SEC to require reporting that would compel submissions beyond the existing reporting structure, proponents will need to demonstrate how such reforms can be accomplished with a minimum of burden to the companies in terms of recordkeeping and reporting.

Proponents may need to design reporting forms for this data that meet the SEC's concerns. In doing so, proponents should carefully examine the information that is already being generated to satisfy other regulatory requirements. Proponents of additional disclosure must be sensitive to the SEC's concern that new disclosure not be duplicative of other information that is already in the public domain. Where similar information must be submitted pursuant to other legal

¹⁹¹ *Id.* at 85,721.

¹⁹² *Id.* at 85,724.

¹⁹³ Note that the MD&A requirement only came into existence in 1980, after the NRDC controversy was resolved.

authority, the SEC will have to be convinced that the information proposed for disclosure is sufficiently different to warrant separate publication.

To the extent possible, the information reported to the SEC should require a minimum of separate recordkeeping or data gathering. The management of socially responsible investment firms should also be enlisted to help demonstrate to the SEC that disclosure can be made without undue burden and cost.

VI. ALTERNATIVE COURSES OF ACTION

While this Article has focused on the SEC process, some of the same goals can be pursued through other means. This section discusses two particular avenues through which similar goals can be achieved. One route is based on the regulatory authority of individual states. The second is the pursuit of private actions based on the rights or authority of shareholders.

A. *State Action*

While the SEC requirements are the main focus of this Article, the more general issue is the use of the securities laws to obtain the disclosure of environmental information. In this regard, pursuit of a reform agenda must discuss the authority that states have to pursue similar objectives.

Even though most regulation of securities is done by the federal government, states are not preempted from regulation in this field. In fact, the Federal Securities and Exchange Act of 1933 contains an explicit provision that allows for concurrent securities regulation by the states.¹⁹⁴ Most states have adopted their own codes to regulate securities issued within their jurisdictions. These laws are commonly referred to as "Blue Sky Laws."¹⁹⁵

Federal securities regulation relies heavily on the use of disclosure as its principal tool. In contrast, Blue Sky Laws generally call for regulation of the individuals and entities involved in security transactions, such as by requiring the licensing of brokers.¹⁹⁶ However, there is no legal impediment preventing states from adopting some

¹⁹⁴ 15 U.S.C. § 77r-1(a)(1).

¹⁹⁵ See, e.g., N.Y. GEN. BUS. LAW §§ 352-359(h) (McKinney 1984) (commonly referred to as the "Martin Act").

¹⁹⁶ See Jack H. Halpern, *Introduction to State Securities Regulations*, in PLI CORPORATE LAW AND PRACTICE COURSE HANDBOOK SERIES 698—BLUE SKY LAWS: STATE REGULATION OF SECURITIES 9, 15 (1985).

or all of the disclosure requirements recommended in this Article. This type of reform would be particularly effective if it were instituted in states in which the financial centers where most securities are registered are located.

B. *Private Action*

In two cases, the reform agenda can be pursued without reference to any government action. The first case relates to the enforcement of existing SEC requirements. The securities laws provide a cause of action to investors against companies that fail to comply with disclosure requirements.¹⁹⁷ Hence, private litigation, or the threat of private litigation, is a tool that can be used to push companies toward more disclosure. The obvious drawback to private litigation is the large monetary advantage that a corporation would likely have in defending such an action. Nonetheless, in the case of blatant violations, this possibility should not be abandoned. To improve chances for success, interested parties could concentrate their resources on one or two high-profile actions.

The second type of private action is the opportunity for shareholders to convince or compel corporate management to expand disclosure beyond what is legally required. A number of attempts have been made to introduce resolutions at shareholder meetings that would require the adoption of more extensive corporate environmental disclosure policies, though to date none have been successful.¹⁹⁸ However, in a recent case, the United States Court of Appeals for the Second Circuit found that a company had misrepresented its environmental record in responding to a shareholder proposal urging adoption of the *Valdez Principles*.¹⁹⁹ In that case, the court ordered the company to disclose the contents of its opinion with the following year's proxy materials.²⁰⁰

¹⁹⁷ 15 U.S.C. §§ 77k, 77l, 77n; Securities Act Release No. 5704, *supra* note 158, at 86,291; *see, e.g.,* Grossman v. Waste Management, Inc., 589 F. Supp. 395 (N.D. Ill. 1984).

¹⁹⁸ *See, e.g.,* INTERFAITH CENTER ON CORPORATE RESPONSIBILITY, Church Proxy Resolutions (January 1991), which provides a text of resolutions that have been offered at shareholder meetings together with an identification of all the companies with which they have been filed.

There has been some success with placing shareholder resolutions on the annual meeting agenda that are intended to change corporate environmental policy. *See* Roosevelt v. DuPont, 958 F.2d 416, 417-18 (D.C. Cir. 1992) (proposal to accelerate phaseout of ozone-depleting chlorofluorocarbons).

¹⁹⁹ *See* United Paperworkers Int'l Union v. International Paper Co., 985 F.2d 1190, 1194, 1199 (2d Cir. 1993); *see also supra* note 187.

²⁰⁰ *See* United Paperworkers, 985 F.2d at 1202.

Although the success of shareholder resolutions does not depend on government action, the SEC does have the authority to determine whether shareholder resolutions must be included with proxy materials.²⁰¹ The SEC has recently issued at least one favorable ruling upholding the right to include shareholder proposals with proxy materials.²⁰²

VII. SUMMARY AND CONCLUSIONS

The federal securities laws provide the SEC with a great deal of discretion to determine what information registrants will be required to disclose. There is little doubt that the SEC has the necessary authority to require the type of environmental disclosure discussed in this Article. It is clear, however, that presently the SEC is not convinced that the disclosure of such information is consistent with its statutory mandate.

It is not surprising, therefore, that institutional investors who specialize in environmentally responsible investments do not appear to utilize the environmental disclosure required by the SEC as a source of information for investment decisions.²⁰³ The reasons for this are not entirely clear, but it appears to be a combination of (1) insufficient information or lack of detail and (2) no assurance that the information is accurate because of the absence of SEC oversight. Given the well documented effect that environmental compliance costs and environmental liabilities can have on a company, the absence of useful disclosure for investors and potential investors appears to constitute a failure to fulfill the intent of the securities laws.

The SEC's discomfort with expanded environmental disclosure stems, in part, from the nature of the information sources upon which the agency would need to rely. Rather than taking the information from corporate balance sheets, companies would have to garner such information from nontraditional sources with which the SEC is unfamiliar and which are, in the SEC's view, too subjective. The SEC also seems concerned that the information will be too voluminous and unwieldy for 10-K disclosure. While the concerns of the SEC are far

²⁰¹ Exchange Act Rule 14a-8(d).

²⁰² This case involved the American Telephone and Telegraph Company and concerned a proposal that the company implement a policy of evaluating the environmental rights impact of its business in Mexico. *See American Tel. & Tel. Co.*, SEC No-Action Letter, 1994 WL 19155 (SEC). In another action with a contrary result, the decision of the SEC is in litigation. *See New York City Employees' Retirement System v. Securities & Exch. Comm'n*, 843 F. Supp. 858, 861 (S.D.N.Y. 1994).

²⁰³ *See supra* Section III.

from trivial, such concerns do not appear to be insurmountable. Careful study is needed to standardize the information that will be disclosed so as to satisfy the SEC's concerns.

The existing environmental disclosure requirements, though tied exclusively to economic impacts on the corporation, are not insubstantial. However, filings made pursuant to those requirements are very inconsistent. This variation can be attributed to requirements insufficiently well defined and a lack of an SEC enforcement presence.

The SEC should vigorously enforce the existing requirements for environmental disclosure and adopt more objective standards for determining what environmental information companies must disclose. Environmental disclosure should be extended to information that is of particular significance to the "socially responsible" investor. While the SEC is not disposed to require any disclosure in the environmental area that is not specifically tied to materiality in the economic sense, some opportunities are worth exploring. Proponents of disclosure will have to persuade the SEC that disclosure is required by demonstrating that the information sought falls within the areas that are protected by the federal securities laws. While a similar effort undertaken by the NRDC in the 1970s was unsuccessful, there is reason to believe that circumstances have changed such that a properly supported rulemaking petition would now have a reasonable chance of success.

Proponents of disclosure should first push the SEC to more vigorously enforce the requirements that are already on the books. Proponents should also demonstrate the impacts that existing loopholes may have on the disclosure process, preferably with real examples. In addition, proponents should explore the opportunity to pursue a rulemaking petition with the agency. Such a petition should be as specific as possible in terms of the requirements it suggests. The petition should also demonstrate that these new requirements will not overburden the disclosure process and that the new requirements will provide useful information to actual and potential investors.

Finally, other avenues might also be pursued. Among these are the encouragement of both private and government enforcement of existing requirements, and an appeal to state regulators to adopt some of the requirements that the SEC rejects.

If these reforms are implemented and enforced, the disclosure process will become a meaningful tool for investors. The reforms will also have the serendipitous effect of promoting the broader public good that results from sound environmental management practices in corporate America.