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Illustration by Ryan Day

Click on the website of virtually any major corporation and search for the terms "sustainability" and "social responsibility" and you are likely to be directed to a portal that discusses in great detail the company's efforts to address the effect of the corporation's activities on society and the environment, especially on global warming. Some commentators suggest we are about to reach the sustainability "tipping point" — the point at which the idea of sustainability becomes a strategic business imperative — driven not by regulation, but rather by pressure from virtually the entire spectrum of corporate stakeholders.[1] This article provides an introduction to the concept of corporate sustainability and its legal ramifications.

WHAT'S IT ALL ABOUT?

The terms "corporate sustainability" and "corporate social responsibility" both have a variety of definitions. Under one formulation, the term "corporate sustainability" refers to minimizing a company's environmental footprint and thus adverse impacts on future generations, while the term "corporate social responsibility" refers to addressing environmental and social, as well as financial, concerns — the so-called triple bottom line. Under another formulation, corporate sustainability is the term that focuses on the broader set of issues.[2] Although there are nuances between them, here "corporate sustainability" and "corporate social responsibility" are used interchangeably, with a focus on the environmental component. To better understand the concept, a little historical context is helpful.

In response to the enactment of environmental legislation based on command and control, companies focused on developing programs to attain and maintain compliance. Such a focus was entirely consistent with the prime corporate objective of increasing shareholder value, by reducing the potential for regulatory penalties and injunctive relief, though some companies may have decided at times that it was more cost effective to violate laws and pay fines than to comply.

With the enactment of Superfund in 1980, under which liability — for costs of remediation and for natural resource damages — is premised not on a violation, but rather on a nexus to contamination, companies began to understand the need to manage environmental risks as well as to comply with environmental statutes. As a result, many companies began to go beyond compliance and develop more comprehensive risk management programs.

In 1996, the International Organization for Standardization (ISO) established ISO 14000, a family of standards addressing various aspects of environmental management. The purpose of ISO 14000 is "to provide a framework for a holistic strategic approach to the organization's environmental policy, plans, and actions," which includes development of an Environmental Management System (EMS) and a commitment to compliance, continual improvement, and prevention of pollution.[3]

In the past several years, pressure to establish corporate social responsibility programs has been building from all major stakeholders, including shareholders, customers, investors, lenders, insurers, corporate management and employees, governments, non-governmental organizations or NGOs, and the public at large. This pressure has taken the form of, among other things, international standards, such as those established by ISO, and legal requirements, such as regulation by the European Union of waste electrical and electronic equipment[4]; public attention to climate change and other sustainability issues; NGO and shareholder activism; and requirements of various stakeholders such as investors, lenders, insurers, business partners, and global supply chains. Wal-Mart, for example, has launched its "Packaging Scorecard" Plan to measure its 60,000 worldwide suppliers on their ability to develop packaging that conserves natural resources.[5] And Citigroup, JPMorgan Chase & Co., and Morgan Stanley recently joined together to establish "The Carbon Principles," guidelines that encourage lower carbon dioxide emissions, renewable energy, and low emissions technology. They will use these guidelines in negotiating with clients seeking funding for power plant-related projects.[6]

Corporate sustainability programs generally include strategic planning; corporate policy and goals and procedures to implement them; infrastructure; a code of conduct; standards, manuals, and guides; stakeholder communication, including dialogue and reporting; performance and appraisal metrics; and line responsibilities. ISO has launched the development of a new standard — ISO 26000 — to provide voluntary guidance on social responsibility including an international consensus on what it means and the issues that need to be addressed and how best to address them.[7] But under most formulations, a distinguishing feature of a corporate social responsibility program is the notion that long-term environmental and social aspects, as well as economic aspects, be integrated into a corporation's business strategy, rather than considered in isolation or as add-ons.

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WHAT ARE THE LEGAL ISSUES?

Because sustainability programs focus on societal and environmental impacts in addition to economic ones and because they are not regulatorily compelled, they raise fundamental questions about the role of corporations. They also raise questions regarding how companies talk about sustainability to their stakeholders — whether and how to report corporate information concerning sustainability efforts and the risks associated with failure to report accurately.

Philanthropy v. Shareholder Value

Although we may well be approaching a tipping point for companies to implement corporate sustainability programs, the concept is not without its critics. Some argue that companies use corporate sustainability programs as a public relations "smokescreen" to cover up corporate environmental shortcomings; others argue, as did the late Nobel laureate economist Milton Friedman, that the only social responsibility of business is to increase its profits and that "the business of business is business." These critics maintain that other stakeholders, such as governments, individuals, and NGOs, are better equipped to address social and environmental concerns and that corporations should not engage in philanthropy. The legal component of this argument is based on the fiduciary duties of directors and officers of loyalty and care to the corporation in the interest of shareholders. But courts generally permit directors to consider the impact of their decisions on constituencies other than shareholders, "provided there are rationally related benefits accruing to the stockholders." *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A2d 173, 182 (Del. 1985).

Corporate sustainability supporters maintain that the conflict between the economic bottom line, on the one hand, and societal values and environmental protection, on the other, is for the most part illusory, because socially and environmentally progressive policies positively affect the bottom line in numerous ways. They assert there is a growing body of evidence that corporations can do well by doing good. Examples include preemption of future burdensome regulatory requirements; obtaining benefits under existing regulatory programs, such as fewer inspections and greater flexibility; improvement of public image; increased sales, investment, productivity, and employee satisfaction; development of new business opportunities; and cost savings in reducing energy and waste management demands and environmental risks, as well as expenses and costs of insurance, worker compensation, and borrowing.

A Jan. 19, 2008, *New York Times* article, however, quoted a recent study that found that there was only a very small correlation between corporate socially responsible behavior and good financial results, one explanation being that companies that performed well over a long period of time have enough money to contribute positively to society.[8] On the other hand, corporate misdeeds, once they become known, may have a significant negative impact on financial performance. The authors of the study found that only 2 percent of the studies reviewed showed that managers who dedicate corporate resources to take actions that consider the interests of society impose a direct cost to shareholders. So, restated, the point is "companies can do good and do well, even if they don't do well by doing good."

To Report or Not to Report

In addition to having to decide whether to develop a corporate sustainability program, corporations face other, related issues regarding the need to disclose corporate sustainability information, especially with respect to climate change, and liabilities associated with erroneous sustainability disclosures. And, there has been litigation to attempt to compel reporting of certain components of sustainability programs, such as climate change. Many companies, however, are not waiting for government regulation and are voluntarily issuing sustainability and climate change reports.

The U.S. Securities and Exchange Commission (SEC) regulations provide some guidelines that may bear on reporting on sustainability issues such as climate change. The SEC's rules require that various filed reports contain discussions of trends, events, or uncertainties that will be reasonably likely to have a material effect on the company. *See* 17 U.S.C. §§229.101, 229.303.

Regulation S-K Item 101, regarding disclosure of capital expenditures, requires disclosure of any material effect that environmental compliance costs may have on earnings and competitive position. At present, corporate sustainability programs are largely voluntary.

Regulation S-K Item 103 requires the disclosure of material pending legal proceedings, other than "ordinary routine litigation incidental to the business." 17 C.F.R. §229.103. Litigation is increasingly being used to determine corporate sustainability responsibilities, especially with regard to climate change. For example, the village of Kivalina, Alaska, recently sued several major oil and power companies, alleging increased erosion of the village's lands due to loss of sea ice. *Native Village of Kivalina and City of Kivalina v. ExxonMobil Corporation et al.*, CV 08-1138, U.S. District Court, Northern District of California.

Regulation S-K Item 303, which sets out guidance for management's discussion and analysis (MD&A), creates a potential basis for corporate sustainability and climate change disclosure. The MD&A typically identifies and discusses "known trends or any known demand, commitments, events, or uncertainties that will reasonably result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way," and known trends or uncertainties reasonably expected to have a material impact on sales, revenues, or income. 17 CFR §229.303(a)(1), (a)(3)(ii); Securities Act

Release No. 33-6835. In 2007, New York Attorney General Andrew Cuomo launched an investigation of five major energy companies, questioning whether their disclosures adequately informed investors of the risks and liabilities posed by carbon dioxide emissions from new power plants.

Various stakeholders have pressured the SEC to put more teeth into reporting requirements relating to corporate social responsibility in the area of greenhouse gases. In September 2007, a group of pension plans and institutional investors, in conjunction with Ceres (a network of investors, environmental organizations, and public interest groups focused on sustainability issues), filed a petition calling for the SEC to issue an interpretive release clarifying that material climate change information must be included in corporate disclosures under existing law. The SEC has declined to act on that petition.

To reach customers — a critical class of corporate stakeholders — many companies have launched active green marketing campaigns, touting the sustainability of their products or their manufacture. To help corporate marketers avoid making environmental claims that are unfair or deceptive under Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, the Federal Trade Commission (FTC) has issued "Green Guides," 16 CFR Part 260, which, though not independently enforceable, do provide the agency's interpretation of the law. The FTC explains that the Green Guides "outline general principles that apply to all environmental marketing and then provide guidance regarding specific environmental claims." The FTC is soliciting comments on the continuing need for the guides and has been holding a series of workshops on emerging green marketing issues, including ones focusing on carbon offsets and so-called renewable energy certificates or RECs.

Many of the benefits that companies pushing sustainability seek to achieve from stakeholders depend on the reporting and transparency of the initiatives and their results. More companies are including discussions on sustainability programs or components of such programs (such as climate change initiatives) in either their SEC reports or stand-alone Corporate Sustainability Reports. A recent survey of sustainability reports by KPMG showed that, while "almost all" companies included discussions of climate change in sustainability reports, most of these reports dealt with "potential opportunities rather than financial risk" from the issue. *See Reporting the Business Implications of Climate Change in Sustainability Reports*, KPMG, 2007. However, there are pitfalls for companies reporting on the results and benefits of a sustainability or climate change program.

Nike v. Kasky[9] is a cautionary tale on how a company communicates regarding its corporate social responsibility programs. In this case, Nike made claims in advertising and other communications regarding steps taken to improve conditions for overseas workers. Nike's statements were challenged under California's false advertising laws. Nike was unsuccessful in its efforts before the California Supreme Court to obtain a ruling that its statements were First Amendment-protected political speech. The case settled prior to a trial. This decision sends a warning signal to corporations that choose to speak out on social and public issues impacting the business of the company not to overreach.[10]

The issue of truth in disclosures may arise not only under state law, but under federal securities law as well. Section 10(b) of the Securities Exchange Act of 1934, which makes it unlawful for anyone to make an untrue statement or to omit to state a material fact in connection with the purchase or sale of any security, may be viewed by the plaintiffs' bar as a potential basis to complain of a company's untruthful disclosures regarding its social responsibility activities.

A key aspect of reporting relates to how various parameters of corporate social responsibility are to be measured. At present there are no regulatory metrics, but there are a number of voluntary frameworks that provide guidance. The Global Reporting Initiative (GRI) is a multistakeholder network of thousands of experts in dozens of countries who pioneered the world's most widely used sustainability reporting framework. The GRI Sustainability Reporting Guidelines provide organizations with

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detailed guidance on how to report their sustainability performance, including with regard to strategy and analysis; organization profile; report parameters; and governance, commitments, and engagement.[11] The Carbon Disclosure Project (CDP), an international nonprofit organization servicing institutional investors with a combined $57 trillion of managed assets, has requested from 3,000 of the world's largest corporations information on business risks and opportunities presented by climate change, as well as greenhouse gas emissions data.[12] CDP asserts its methodology has become the gold standard for carbon disclosure.

Some reporting, however, may not remain voluntary for long. The Consolidated Appropriations Act, 2008 contains requirements for the U.S. Environmental Protection Agency (EPA) to establish mandatory greenhouse gas reporting requirements. The EPA is directed to draft rules by September 2008 and finalize rules by June 2009.

Conclusion

The bottom line is that corporate sustainability programs are becoming strategic business imperatives, driven by stakeholder pressures rather than by governmental directives. Because there is no true regulatory oversight, there are as yet no uniform, mandated definitions, performance metrics, and reporting standards. States and the federal government, however, are beginning to climb on the sustainability bandwagon and perhaps one day will develop pertinent regulatory programs to complement or supplant the efforts of other stakeholders.[13] For now, a corporation that decides to develop a corporate sustainability program should consider, among other things, how to address the issues of what, when, where, and how to report sustainability efforts and results.

Notes

1. *Corporate Acts: Five Signs that Sustainability's Tipping Point Is Close*, green@work (March/April 2003), *at* http://www.greenatworkmag.com/magazine/corp_acts/05julaug.html; *Supply Chain Sustainable Development: Reaching a Tipping Point*, Network Insight (2007), *at* http://www.rmtinc.com/public/netinsights_spring07_supply_chain_sustainability.html; ABA Model Commitment to Sustainability for a Law Organization (Revised Draft No. 6, March 30, 2007).
2. *Is Corporate Social Responsibility the Same as Corporate Sustainability?* (Dec. 2000), at http://www.mhcinternational.com/sustainability.htm.
3. ISO 14000 (2000), *available at* http://www.iso.gov.
4. Directive 2002/95/EC of 27 Jan. 2003 of the European Parliament and of the Council on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment, O.J. (L 37) 19–23; Directive 2002/96/EC of the European Parliament and of the Council of 27 Jan. 2003 on Waste Electrical and Electronic Equipment (WEEE) — Joint declaration of the European Parliament, the Council, and the Commission relating to Article 9, O.J. (L 37) 24–39.
5. Press Release, Wal-Mart, Inc., "Wal-Mart Unveils 'Packaging Scorecard' to Suppliers" (Nov. 1, 2006), *available at* http://www.walmartstores.com/FactsNews/NewsRoom/6039.aspx.
6. Press Release, Citigroup, Inc., "Leading Wall Street Banks Establish the Carbon Principles" (Feb. 4, 2008) (on file with author); *Three U.S. Banks Develop Guidelines to Protect Against Climate Change Risk*, BNA's Environmental Due Diligence Guide, Feb. 21, 2008, at 9; *see too The Equator Principles* (July 2006) (on file with author), which the World Bank Group's International Finance Corporation and a number of banks developed as an industry framework for addressing environmental and social risks in project financing.
7. ISO 26000 (Working Draft, March 2006), *available at* http://www.iso.gov.
8. Paul B. Brown, *Bottom Line on Doing Good*, Jan. 19, 2008, *available at* http://www.nytimes.com/2008/01/19/business/19offline.html
9. *Nike v. Kasky*, 27 Cal. 4th 939 (2002) (concluding corporation's messages were commercial speech for purposes of applying state laws barring false and misleading commercial messages), *cert. dismissed*, 539 U.S. 654 (2003).
10. The petition in the *Kivalina* litigation suggests that a corporation may be damned if it admits its activities may contribute to global warming and damned if it denies it. Plaintiffs assert, on the one hand, that a defendant's statement — that there is an emerging consensus that climate change is, at least in part, linked to the production and consumption of carbon-based fuels — constituted an admission. On the other hand, plaintiffs assert that another defendant's statements "downplay[ing] the severity of global climate change" were intended to mislead and were elements in a conspiracy.
11. Global Reporting Initiative *at* http://www.globalreporting.org/Home.
12. Carbon Disclosure Project *at* http://www.cdproject.net/.
13. An EPA advisory group, the National Advisory Council for Environmental Policy and Technology, has suggested that the EPA reframe its mission to provide leadership and a collaborative, national focus on environmental stewardship. Amy Phillips, "Advisers Urge EPA to 'Reframe' Mission With Focus on Stewardship, Collaboration," BNA Daily Environment Report, March 31, 2008, at A-8.

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