Emerging Trends in Corporate Sustainability Reporting

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Recent heightened awareness of environmental, social and governance or sustainability[1] issues among corporate executives, investors, consumers and the general public has spawned widespread corporate sustainability initiatives and public communication of ESG information in the marketplace. ESG information typically includes annual sustainability reports as well as other corporate communications such as press releases, conference presentations, legislative testimony, social media postings and much more (hereinafter collectively referred to as “ESG statements”). As different stakeholder groups begin to make decisions or take action on the basis of ESG statements, companies increasingly face critical questions and legal risks regarding the scope and content of their sustainability reporting, as well as a need to ensure companywide consistency and accuracy of their ESG statements.

In this article, we provide a short background on ESG reporting and describe recent trends, including emerging reporting standards. We also discuss recent litigation involving allegations that companies issued false and misleading material ESG statements, which allegedly wrongfully induced consumers and investors to purchase companies’ products and stocks. Several courts have denied corporate defendants’ motions to dismiss claims based in part upon ESG statements, underscoring the risks associated with the disclosure of corporate sustainability information and the need for companies to carefully consider and manage their ESG statements.

Sustainability Reporting: Background and Trends

Market Drivers for Sustainability Reporting

A wide range of customers, investors and other stakeholders are increasingly demanding more disclosure of information and data from companies on how they are addressing sustainability issues, including ESG factors and other nonfinancial risks and opportunities. For certain entities in the investment community, a key driver for more ESG information is to enable assessments of how ESG factors may impact business fundamentals and a company’s long-term prospects. This is due in large part to shifts in the way business is conducted, how businesses create value and the context in which they operate. Global trends such as demographic changes, urbanization and resource scarcity are increasingly impacting the ability of a company to sustain long-term value, and certain investors are taking notice. For example, a recent PricewaterhouseCoopers survey of global institutional investors found that one-third of investors consider sustainability in their investment strategy.[2] For certain consumers and stakeholder groups (e.g., nongovernmental organizations, regulators and activists), the
primary driver for ESG information is more mission-driven. These stakeholders increasingly pressure companies to take responsibility for and proactively manage environmental and social impacts of their business operations, supply chains and products they manufacture. Greater ESG information enables these stakeholders to assess how a company is managing sustainability issues and to evaluate a company’s leadership, products and services.

**Emerging Standards for Sustainability Reporting**

A range of voluntary and mandatory reporting standards have emerged over the past 15 plus years to help guide companies’ ESG reporting to meet different stakeholder needs.

The Global Reporting Initiative (GRI), formed in 1997, has developed a voluntary reporting standard that promotes broad ESG disclosure. For example, disclosure of over 100 ESG indicators is required to meet the highest level of GRI’s standard. GRI’s breadth of disclosure therefore accommodates the diverse ESG interests of a wide range of stakeholders. GRI has become the leading standard globally for companies issuing standalone sustainability reports, likely as a result of the maturity of the framework (over 15 years old) and the flexibility it provides companies to communicate to a broad base of stakeholders with one reporting platform. GRI has released its fourth generation of standards, G4, which is required for all reports issued after Jan. 1, 2015.[3]

The Sustainability Accounting Standards Board (SASB), formed in 2011, has developed an alternative voluntary reporting approach for U.S. publicly listed companies modeled after the Financial Accounting Standards Board, which establishes financial reporting standards and disclosure requirements. The SASB approach encourages companies to identify ESG issues that are financially material to their business and include discussion of their performance and management of these issues in their financial reporting to the U.S. Securities and Exchange Commission. With its focus on linking ESG issues and business performance, the SASB model may be more aligned with the needs of those investors seeking to factor sustainability performance into their investment decisions. The SASB is in the process of developing guidance for disclosing material sustainability issues and sustainability metrics at an industry level, with all industry sector guidance documents expected to be completed in 2015.[4]

A third voluntary reporting movement gaining momentum is integrated reporting. The International Integrated Reporting Council (IIRC) defines integrated reporting as “a process founded on integrated thinking that results in a periodic integrated report by an organization about value creation over time and related communications regarding aspects of value creation.”[5] The IIRC released its International Integrated Reporting Framework in December 2013 and over 100 organizations from multinational companies to public sector bodies participated in a recently concluded pilot program to further develop the framework.

In addition to these voluntary reporting schemes, there are a growing number of mandatory sustainability reporting requirements for publicly traded companies. The EU, for example, adopted a directive in September 2014 that will require disclosure of ESG information by certain large companies.[6] This new legislation, once incorporated into national law (member states will have two years to comply), will require large listed companies in the EU to report on their environmental and social impacts, including human rights, anti-corruption and bribery issues, and diversity of board of directors. Stock exchanges, particularly in emerging markets, have also implemented initiatives requiring increased disclosure of ESG-related performance. For example, the Shenzhen and Shanghai Stock Exchanges and the Johannesburg Stock Exchange have issued guidelines and listing requirements to enhance disclosure of ESG information.

**Corporate Sustainability Reporting Trends**

In response to growing stakeholder interest and mandatory requirements, companies have been
increasingly disclosing ESG information in their annual financial reporting, standalone sustainability reports and dedicated websites. The primary ESG reporting vehicle for companies has been voluntary sustainability reports and dedicated websites that typically describe the company’s strategic approach to managing sustainability issues and related projects or initiatives in their business operations or supply chains. The number of companies producing voluntary reports has increased significantly over the last four years.

The Governance and Accountability Institute Inc. found that in 2011, just under 20 percent of S&P 500 companies issued sustainability reports; however, by 2013, over 70 percent of S&P 500 companies were reporting,[7] with about 35 percent aligned with GRI guidelines.[8] Companies are also increasingly including at least some ESG disclosure in their financial reporting. In 2013, the Investor Responsibility Research Institute Inc. found that nearly all S&P 500 companies provided at least one sustainability-related disclosure in a financial filing or linked financial performance to a sustainability initiative.[9] Nevertheless, certain investors have indicated they are not satisfied with the level of disclosure and integration into financial reporting. For example, in PwC’s 2014 investor survey, 61 percent of U.S. investors said they are dissatisfied with the current level of corporate disclosure regarding matters relevant to climate change, resource scarcity, social corporate responsibility and good citizenship.[10]

Implications

Today, the volume of ESG information is unprecedented, with companies providing a vast body of materials directly to the public. For some consumers, the ESG claims of a company about the operations of its business or the performance of its product may contribute to the consumers’ purchasing decisions. NGOs may decide to launch an activist campaign based on the ESG information a company is reporting (or not reporting). And for investors, ESG information may influence a decision to buy, sell or hold a public equity, for example, or file a shareholder resolution to influence a company’s ESG practices. In the next section, we discuss the legal risks that have emerged as consumers and investors question the veracity and materiality of ESG information that they allege influenced their purchasing or investment decisions.

Litigation Involving ESG Statements

Recently, a potential new legal trend has emerged in which plaintiffs are filing product liability and class action securities lawsuits against companies invoking claims related to ESG statements. A few of the claims were deemed sufficient to support a cause of action that defendants’ ESG statements wrongfully induced plaintiffs to purchase products or securities. This litigation demonstrates the risks associated with issuing ESG statements, as some consumers and investors will not hesitate to litigate the accuracy and materiality of such statements.

Consumer Suits

Two recent consumer class actions illustrate the risks associated with ESG statements.[11] Stanwood v. Mary Kay Inc.[12] involved allegations that Mary Kay wrongfully induced the plaintiff to purchase cosmetics as a result of statements (and omissions) indicating that Mary Kay did not test its products on animals when, in fact, such testing occurred in China (as required under Chinese law). Plaintiff alleged that Mary Kay provided information regarding its lack of animal testing to the People for the Ethical Treatment of Animals and the Coalition for Consumer Information of Cosmetics, who, in turn placed Mary Kay on lists indicating that it did not use animal testing. The plaintiff alleged testing information was also disseminated directly to her through a statement on Mary Kay’s website and by a Mary Kay sales representative.

The federal district court dismissed claims based on all of these statements on legal standing grounds,[13] except for the sales representative’s alleged statement. Significantly, the court expressed a
certain receptiveness to claims involving ESG statements:

Consumers typically base their purchasing decisions on the price and quality of a product. As consumers have grown more aware of the social, environmental, and political impact of their purchasing decisions, they have tended to look to more factors, including company-wide operations, to inform their consumption choices. Consumers receive this information from a variety of sources, but one of the most direct and important remains the company itself. Companies, realizing this, have tailored their marketing to such consumers. It should not be unexpected then, that when companies make misrepresentations about their company-wide operations, they face potential liability in court to consumers who relied on those representations in purchasing their products.

The court permitted the plaintiff’s claim related to the Mary Kay salesperson’s statements and omissions to proceed under the California Consumers Remedy Legal Act (CCRLA). The court concluded that omissions of material information are actionable under the CCRLA, and that, here, the Mary Kay representative had an affirmative duty to disclose its animal testing information because it was a material fact that significantly affected the plaintiff’s purchasing decision.[14]

A second recent case involving ESG statements, Ruiz v. Darigold Inc., was filed in federal court on May 1, 2014.[15] Plaintiffs/customers alleged that a 2010 ESG report published by Darigold, a subsidiary of the Northwest Dairy Association, a dairy cooperative, wrongfully induced consumers into purchasing dairy products by making false and misleading claims about defendant’s treatment of its animals and workers. Plaintiffs specifically alleged that defendants violated animal-safety laws, and that they were wrongfully induced to purchase products by relying upon statements in the 2010 ESG report, e.g., that Darigold was “adopting proactive measures that protect and enhance animal well-being”; that “[o]ur farmers’ dedication to providing high quality milk begins with world-class animal care”; and that farmers provide cows with “healthy living conditions.” Plaintiffs’ complaint also alleged racism by the company against employees, as well as failure to provide clean drinking water, breaks for rest and meals and pay for all hours work. Plaintiffs claimed that defendants wrongfully failed to disclose these alleged violations in light of the fact that defendants chose to disclose other employee-related issues resolved in its favor, e.g., certain human rights and discrimination incidents.

On Aug. 14, 2014, Ruiz was transferred to the U.S. District Court for the Western District of Washington, and the court granted defendants’ motion to dismiss on Oct. 31, 2014. In general, the court concluded that the 2010 ESG report, taken as a whole, could not “reasonably be read as a representation that all workers and animals involved in the production of Darigold’s products are treated well, with respect, and in compliance with all laws.”[16] The court, however, afforded plaintiffs with the opportunity to file a motion for leave to amend its complaint, but the plaintiffs did not pursue the case further.

**Investor Suits**

Investors have also focused on ESG statements in two recent securities class actions, In re Massey Energy Co. Secs. Litig. and In re BP PLC, Sec. Litig.

In re Massey[17] involved claims against Massey Energy Co. (now Alpha Appalachia Holdings Inc.) stemming from the April 10, 2010, explosion at the Upper Big Branch Mine in West Virginia that killed 29 miners. Plaintiffs alleged, among other things, that Massey issued materially false and misleading statements and omissions in its ESG statements[18] regarding its regulatory compliance and the safety of its operations.[19] Plaintiffs alleged that these and other similar statements were false and misleading in light of, among other things, defendant’s fatality rate (alleged to be the worst in the nation) and the company’s allegedly below-average compliance record under the Mine Safety and Health Act. The action survived defendants’ motion to dismiss based in part on Massey’s allegedly false and misleading ESG
Investors have also focused on ESG statements in ongoing securities litigation against BP PLC arising from the Deepwater Horizon incident in 2010. While a large number of BP’s ESG statements (and other communications) have been held to be nonactionable, a handful survived defendant’s motions to dismiss. In one of the multiple ongoing BP securities cases, a federal court noted that certain ESG statements of then-CEO Tony Hayward regarding BP’s operating management system, a set of process safety rules implemented in the aftermath of the 2005 Texas City BP refinery explosion, were “alleged to be misleading because they repeatedly emphasized the all-encompassing, consistent nature of OMS, without disclosing that it was not designed to and would not apply to project sites owned by contractors.” The court viewed this as a “significant carve-out” because “six out of seven offshore drilling units in the Gulf of Mexico in early 2010 were owned by contractors, including, notably, the Transocean-owned Deepwater Horizon,” and several ESG statements (including those in footnote 24) survived defendants’ motion to dismiss.

**Conclusion**

Many consumers, investors and other stakeholders are demanding that companies disclose their sustainability efforts and companies are meeting that demand with increasing levels of ESG reporting and related ESG statements. As ESG initiatives have proliferated, allegations of materially false and misleading ESG statements have begun to emerge in consumer and investor litigation. This litigation underscores the need for companies to establish and carry out comprehensive, companywide measures to ensure the accuracy and consistency of its ESG statements, and to proactively address any potential liability or litigation risks.

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[1] In this article, we use the terms ESG and sustainability interchangeably.


An “integrated report” is “a concise communication about how an organization’s strategy, governance, performance, and prospects, in the context of its external environment, lead to the creation of value in the short, medium and long term.”

Directive 2014/95/EU.


An important early case involving alleged false and misleading ESG statements was Nike v. Kasky, P.3d 243, 248 (Cal. 2002), cert. granted, 537 U.S. 1099 (2003), cert. dismissed, 539 U.S. 654 (2003) (per curiam). There, the California Supreme Court held that alleged false and misleading statements made by Nike with respect to its labor practices in Asia were commercial in nature — and therefore subject to less protection than noncommercial speech under the First Amendment. Nike appealed to the U.S. Supreme Court, and certiorari was granted but later dismissed as improvidently granted without the court reaching the issue of whether Nike’s relevant speech was commercial or noncommercial. The parties settled the litigation, with Nike donating $1.5 million to the Fair Labor Association. Adam Liptak, Nike Move Ends Case Over Firms’ Free Speech, The New York Times, Sep. 13, 2003, available at http://www.nytimes.com/2003/09/13/us/nike-move-ends-case-over-firms-free-speech.html.

The court dismissed these claims because plaintiff failed to sufficiently allege that she viewed any of the relevant sources, and thus could not connect her injuries to the alleged misrepresentations.

In March 2014, the court granted plaintiff’s motion to voluntarily dismiss the suit with prejudice. Order Granting Plaintiff’s Motion for Dismissal with Prejudice and Modifying Confidentiality Order, Stanwood v. Mary Kay, SAVC-12-00312-CJC(ANx) (C.D. Cal. Mar. 4, 2014).

Complaint, Ruiz v. Darigold, 3:14-cv-02054, (N.D. Cal. May 1, 2014). The claims were made under California, Oregon, and Washington law.


Plaintiffs also claimed that false and misleading statements were made in Massey’s SEC filings.

Such statements included, for example: “no coal company can succeed over the long term without a total commitment to safety” (from the 2009 Corporate Social Responsibility Report); statements
emphasizing that ‘safety first’ was ‘not just a slogan’” (from various 2008 press releases); and “we have a better performance record than the industry ... and safety programs in place that exceed the law ... [w]hat you often don’t see in the press is number one, how safe the industry is; number two, how safe Massey is in comparison” (statement by Massey’s then-CEO at Lehman Brothers CEO Energy Conference).

[20] The court found unavailing defendants arguments that such statements were “immaterial puffery.”


[22] BP and its current and former officers and directors are subject to a large number of ongoing securities suits (both individual and class action). Further information regarding these actions is available at BP, US Legal Proceedings, http://www.bp.com/en/global/corporate/gulf-of-mexico-restoration/investigations-and-legal-proceedings/US-legal-proceedings.html. The trial of the consolidated securities fraud class action is scheduled to begin in January 2016. Id.


[24] Id. These statements included, e.g., that the OMS “turns the principle of safe and reliable operations into reality by governing how every BP project, site, operation, and facility is managed”’; Hayward’s statement in BP’s 2008 sustainability review that OMS “is to be implemented at each BP site”; and Hayward’s statements in the 2009 sustainability review which reinforced that OMS had been implemented in the Gulf of Mexico in 2008.

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