Shh--Maybe in My Backyard--An Equity and Efficiency-Based Critique of SEC Environmental Disclosure Rules and Extraterritorial Environmental Matters

Robert J. Lewis
Note

"Shh! Maybe in My Backyard!" An Equity and Efficiency-Based Critique of SEC Environmental Disclosure Rules and Extraterritorial Environmental Matters

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WORLDMINE, Inc., a U.S.-based nickel mining company, operates identical tailings ponds at mining sites in six countries: the United States and Countries A through E. The United States Environmental Protection Agency (EPA) notified WORLDMINE that its sites in the United States and Country A\(^1\) stand in violation of the Clean Air Act\(^2\) and the Clean Water Act.\(^3\) WORLDMINE estimates that its total pollution control expenditures to remedy these violations will fall within a $700 million to $1 billion range for its U.S. site.\(^4\) Countries B and C have similarly notified WORLDMINE that its sites in those countries

1. See infra note 93 (addressing the extraterritorial application of U.S. environmental laws).
2. 42 U.S.C. §§ 7401-7642 (1988 & Supp. III 1991). The Clean Air Act mandates that the EPA establish primary and secondary "national ambient air quality standards" (NAAQSs) for various pollutants. § 7409. The States must develop "state implementation plans" (SIPs) which impose specific emissions limitations on various sources of air pollution. §§ 7407, 7410. WORLDMINE's host state therefore has set limits below WORLDMINE's current emissions. After issuing a Notification of Violation (NOV) to both the host state and the violating party, § 7413(a), the EPA has authority to seek civil fines up to $25,000 per day of violation, § 7413(b), and criminal penalties, including imprisonment and fines up to $1,000,000. § 7413(c)(5)(A).
3. Federal Water Pollution Act, 33 U.S.C. §§ 1251-1376 (1988 & Supp. IV 1992). The Clean Water Act requires, inter alia, that the EPA promulgate effluent limitations guidelines and new source performance standards for various classes of waste discharges into rivers, streams, and other bodies of water. §§ 1312-1313. After issuing an order for compliance, § 1319(a), the EPA has authority to seek civil fines up to $25,000 for each violation, § 1319(d), and criminal penalties, including imprisonment and fines up to $25,000 per day for negligent violations and $50,000 for subsequent violations. § 1319(c)(1). These fines increase up to $100,000 and $1,000,000 for knowing violations and knowing endangerment, respectively. § 1319(c)(2)-(3).
violate their respective environmental regulations. Both countries' regulations are substantively equivalent to the Clean Air Act and Clean Water Act.5 Whereas Country B vigorously enforces its regulations, however, Country C rarely pursues enforcement.6 Country D has also notified WORLDMINE of violations, but that nation's environmental provisions, when enforced, impose only nominal fines.7 Country E has no environmental laws or regulations.8 WORLDMINE seeks your counsel in meeting the Securities and Exchange Commission's (SEC) disclosure requirements.

The introductory hypothetical raises the issue of disclosure obligations concerning extraterritorial environmental matters. The Securities Act of 19339 and the Securities Exchange Act of 193410 grant the SEC broad discretion to promulgate rules11 that obligate companies12 to meet exacting disclosure requirements associated with the registration and sale of securities,13 as well as annual and periodic reports.14 The Commission

5. See infra note 100 (noting foreign regulations comparable to U.S. regulations).
7. See infra note 127 (noting countries with environmental regulations imposing nominal burdens on violators).
8. See infra note 133 (noting countries with little or no environmental regulatory regime).
11. See § 77s(a) (authorizing the SEC to promulgate such rules "as may be necessary to carry out the provisions of this subchapter"); § 78w(a) (authorizing rulemaking "as may be necessary or appropriate to implement the provisions of this chapter for which [the SEC is] responsible or for the execution of the functions vested in [it] by this chapter").
12. Throughout this Note, the Author uses the terms "company" and "registrant" interchangeably. The application of the SEC's regulations extends both to the ongoing reports of publicly held companies, see infra note 14, and registration statements, see infra note 13. See Gerard A. Caron, Comment, SEC Disclosure Requirements for Contingent Environmental Liability, 14 B.C. ENVTL. AFF. L. REV. 729, 729 n.1 (1987).
13. See § 77g (registration statements); § 77j (prospectuses).
14. See § 78m (periodic and other reports); § 78n (proxies); § 78q (records and reports). Issuers of regulated securities must file annual and quarterly reports. 17 C.F.R. §§ 240.13a-1, 13a-13 (1993). Indeed, the scope of Regulation S-K, which sets forth current uniform disclosure rules, includes:
   (1) Registration statements under the [1933] Securities Act...; and (2) Registration statements... annual or other reports... annual reports to security holders and proxy and information statements under the [1934 Securities] Exchange Act... and any other documents required to be filed under the Exchange Act....
Id. at § 229.10(a)(1)-(2).
has extended this obligation to include environmental disclosures.\textsuperscript{15}

Companies have wrestled with the SEC's attempts to clarify these environmental disclosure obligations for two decades, and a few registrants have acknowledged proliferating extraterritorial matters.\textsuperscript{16} Recently, however, the Commission has voiced concern about the accuracy and completeness of environmental disclosures, and threatened administrative action.\textsuperscript{17} Due to the substantial liability attached to actions predicated on inadequate disclosures,\textsuperscript{18} it behooves companies and their counsel to evaluate extraterritorial environmental matters in light of the SEC's disclosure regulations.

This Note argues that current SEC disclosure rules require companies to report only certain overseas environmental mat-


The Author's inclusion of these corporations' reports does not indicate a belief that these corporations' disclosure statements are inadequate. To the contrary, the Author commends these corporations for their recognition of extraterritorial environmental matters.

\textsuperscript{17} See Richard Y. Roberts, Emphasis on Environmental Disclosure, 53 Ala. Law. 262, 264-65 (1992) (noting increased pressure on SEC to monitor the adequacy of registrant's disclosures); Lee Berton, SEC Rule Forces More Disclosure, WALL St. J., Dec. 13, 1993, at B1, B3 (noting that "[i]nadequate disclosure is rampant" and quoting SEC Commissioner Roberts's threat that the SEC's enforcement division would "draw . . . and quarter" some registrants "for inconsistencies and lack of disclosure" about environmental matters); see also David Lake & John Graham, What Shareholders Will Know, Fin. & Treasury, June 28, 1993, at 5, 5 ("In recent years, the SEC has taken a much more aggressive approach to calculating the environmental liabilities of public companies.").

\textsuperscript{18} See infra notes 26-28 & part I.D (describing SEC enforcement actions and private actions).
tors, and that these regulations are inconsistent and inequitable, and thereby threaten investment interests. Part I traces the historical development as well as legal and policy considerations underlying the SEC's current environmental disclosure rules. Part II applies these rules to the introductory hypothetical, and Part III critiques the results. Part IV proposes rule modifications and administrative actions to improve overseas environmental matter disclosures. This Note concludes that, absent these modifications by the SEC, companies may arguably ignore or understate extraterritorial environmental matters and threaten investors' interests.

I. TWO DECADES OF SEC ENVIRONMENTAL DISCLOSURES: A REVIEW

On June 8, 1993 the SEC issued a Staff Accounting Bulletin (SAB) that clarifies a company's environmental matter reporting obligations in its financial statements.¹⁹ This SAB is the most recent in a series of SEC actions directed at environmental disclosures that began following the passage of the National Environmental Policy Act (NEPA)²⁰ in 1969. Before reviewing this history, this Note examines SEC filing requirements and the role of the materiality requirement.

A. SEC DISCLOSURES, BENEFIT-COST ANALYSIS AND THE MATERIALITY REQUIREMENT

The SEC generally requires that companies disclose only facts that are "necessary or appropriate in the public interest or

¹⁹. Staff Accounting Bulletin, supra note 15, at 64,282-85; see also infra notes 75-78 and accompanying text (discussing the 1993 release).

for the protection of investors." The Commission places primary emphasis on "the dissemination of information which is or may be economically significant." In deciding what information a registrant must disclose, the Commission considers the benefits and costs that accrue, weighing the interests of the investor against the disclosure burden placed on registrants.

In light of this benefit-cost analysis, the Commission has set a threshold for most disclosures whereby a company must disclose any "material" fact. The Commission defines a fact as "material" if a substantial likelihood exists that a reasonable investor would have viewed its disclosure "as having significantly altered the 'total mix' of information made available."


On this point, the SEC also recognizes NEPA's mandate to incorporate environmental policy into its administrative actions insofar as that information has economic relevancy. Cf. Crouse-Hinds Co. v. InterNorth, Inc., 518 F. Supp. 416, 475 (N.D.N.Y. 1980) (finding that the SEC is "empowered to design and enforce rules and regulations which fulfill its responsibilities under the environmental laws and protect the public interest"); Environmental Disclosure Requirements, Securities Exchange Act Release Nos. 33-6130 and 34-16224, Fed. Sec. L. Rep. (CCH) ¶ 23,507B, at 17,203-4 (Sept. 27, 1979) [hereinafter Environmental Disclosure Requirements] (noting the SEC's mandate under the NEPA "to consider environmental values" and the SEC's mandate under the securities laws to protect investors).

23. For example, the SEC has recognized that elaborate environmental disclosures are expensive to produce and arguably confuse investors. See, e.g., Proposed Amendments to Item 5 of Regulation S-K Regarding Disclosure of Certain Environmental Proceedings, Securities Act Release No. 6315, [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,867, at 84,266-87 (May 4, 1981) (discussing benefits and costs to investors and registrants) [hereinafter Disclosure of Environmental Proceedings]; Proposed Environmental Disclosures, supra note 22, at 85,712-13. The Commission has repeatedly refused to alter its benefit-cost analysis to place an undue burden on registrants to disclose environmentally matters. See supra note 20; infra notes 42-45 and accompanying text (discussing NEPA mandate).

24. Basic Inc. v. Levinson, 485 U.S. 224, 231-32 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); see also 17 C.F.R. § 230.405 (1993) (defining the materiality requirement to include all information "to which there is a substantial likelihood that a reasonable investor would attach importance in determining whether to purchase the securities registered"); § 230.408 (1993) (requiring the disclosure of any additional material information); § 240.14a-9(a) (1993) (listing potential material factors, including predictions as to specific market values).
Materiality will "depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity."\(^25\)

The Securities Act of 1933 and the Securities Exchange Act of 1934 describe prohibitions against material misstatements or omissions.\(^26\) The SEC may commence an enforcement action against a company that violates these disclosure requirements, and investors have judicial remedies available which supplement the SEC's enforcement activities.\(^27\) With respect to pri-

\(^{25}\) SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); see also Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 517 (7th Cir. 1989) ("The anticipated magnitude (the size if the worst happens, multiplied by the probability that it will happen) may be small even when the total effect could be whopping.").

With respect to facts with determinable magnitudes, notably those that have occurred or are occurring, this materiality standard requires the relatively straightforward assessment of the reasonable investor's response to that fact. See David S. Ruder et al., Disclosure of Environmental Problems, ENVT.L. Couns., July 15, 1992, at 18, 20. In contrast, future events, including contingent liabilities, may resist quantification.

\(^{26}\) See, e.g., 15 U.S.C. §§ 77-78 (1988 & Supp. IV 1992): § 77k(a) (prohibiting material misstatements or omissions of material facts in registration statement for distribution of securities); § 77l(2) (prohibiting material misstatements or omissions in prospectus or oral communication used in sale of securities, whether or not securities are registered); §§ 77q (prohibiting fraudulent transactions in sale of securities) and 77w (prohibiting unlawful representation in registration statements); § 78j; 17 C.F.R. § 240.10b-5 (1993) (prohibiting fraudulent or manipulative statements and other activities in connection with the purchase or sale of securities); §§ 78c(b), 78w(a)(1); 17 C.F.R. § 240.14a-9 (1993) (prohibiting solicitation of proxies which contain material misstatements or omissions); § 78r (prohibiting false or misleading statements in documents filed with SEC).

\(^{27}\) SEC administrative action includes entering cease-and-desist orders based upon misrepresentations or failure to make required disclosures, 15 U.S.C. §§ 77h-1(a), 78u-3(a) (Supp. IV 1992); and recommending criminal prosecution to the U.S. Attorney General, 15 U.S.C. § 77t(b) (1988). The SEC may also initiate action in the courts, seeking enjoinders to prevent the corporation from making misstatements. § 77t(b). Should the corporation fail to comply with an injunction or otherwise violate these Acts, the SEC may then pursue civil and criminal penalties. See 15 U.S.C. §§ 77x, 78u-yy, 78ff (1988 & Supp. IV 1992); see also Environmental Disclosure Requirements, supra note 22, at 17,208-3 (summarizing that SEC will take enforcement action in instances of non-compliance with environmental disclosure requirements). See generally Richard H. Rowe, SEC Review Practices: A Primer, in ADVANCED WORKSHOP ON PROBLEMS IN SECURITIES DISCLOSURES 1991, at 579, 580-82 (PLI Corp. L. & Practice Course Handbook Series No. 737, 1991) (describing the SEC's decision to review processes).

With respect to private causes of action, see generally Tower C. Snow, Jr. & Michelle A. Bryan, A Litigation Framework For Analyzing Disclosure Issues, in ADVANCED WORKSHOP ON PROBLEMS IN SECURITIES DISCLOSURES 1991, supra, at
vate action, corporations face potentially crippling liability because litigants are often large classes of investors.  

B. The Emergence of Current Environmental Disclosure Requirements

In 1971 the SEC issued an interpretive release alerting businesses that SEC regulations mandate the reporting of current environmental compliance costs and legal proceedings. Dissatisfied with registrants' disclosures following this release, in 1973 the SEC issued a superseding interpretive release reiterating the dichotomy of the 1971 release: reporting of material compliance costs and legal proceedings. The 1973 release, however, extended registrants' disclosure obligations to include both present and future compliance costs, as well as all envi

7 (describing myriad of bases for securities class-action litigation). With respect to environmental matters particularly, see Proposed Environmental Disclosures, supra note 22, at 85,707.

28. Private litigants typically base recovery on the differential in share price resulting from the misrepresentation or omission as compared to its expected price. Ruder et al., supra note 25, at 19. Consequently, the large number of plaintiffs in a class-action suit magnifies even a small differential. This is not to say that SEC action has no financial impact. See 15 U.S.C. §§ 77t(b), 78u-y3 (1988 & Supp. IV 1992).


30. The SEC required that companies report compliance costs under statutory requirements when compliance "may necessitate significant capital outlays, may materially affect the earning power of the business, or cause material changes in registrant's business done or intended to be done." Id. at 80,487-88.

31. All material legal proceedings arising under "federal, state or local" environmental laws were subject to mandatory disclosure. Id. at 80,488 (emphasis added). These laws include the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1988), the Federal Water Pollution Control Act, §§ 1251-1387, discussed supra note 3, and the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988 & Supp. III 1991).

The SEC further requested that registrants furnish supplemental information on any proceedings omitted from disclosure on the ground that it was not material. Disclosures Pertaining to Matters Involving the Environment and Civil Rights, supra note 29, at 80,488.


33. Id. at 83,029-31.

34. The SEC again qualified these compliance costs as those accruing under "Federal, State and local [environmental] provisions." Id. at 83,029 (emphasis added). The SEC set the threshold for disclosure of future compliance
environmental administrative or judicial proceedings initiated by a governmental authority, regardless of materiality. On May 9, 1973, Air Products and Chemicals, Inc. inquired of the SEC whether the Commission intended to limit the scope of reporting on environmental matters to those arising only under federal, state, or local laws. The SEC first instructed that a company should disclose any material compliance costs arising under any foreign environmental provision. Next, the SEC stated that only economically material foreign environmental proceedings face mandatory disclosure; the 1973 release's broad disclosure mandate requiring a registrant to report all environmental proceedings, regardless of materiality, extended only to proceedings "instituted by governmental entities within the United States." In 1975 the SEC acquiesced to an order of the District Court for the District of Columbia, stemming from litigation initiated by the National Resources Defense Council (NRDC), and is-

35. Id. at 80,030. This disclosure requirement extended broadly to all material legal proceedings "known to be contemplated by governmental authorities." Id. (quoting Item 12 of Form S-1). The Commission believed that this broad disclosure requirement would efficiently inform investors and promote environmental goals. Id. The SEC further reasoned that "administrative or judicial proceedings arising under any Federal, State or local provision regulating the discharge of materials into the environment, or otherwise specifically relating to the protection of the environment" were not "ordinary routine litigation incidental to the business," and therefore fell outside the "ordinary routine litigation" disclosure exception. Id. (emphasis added).

The SEC also required that companies describe individually the factual basis and relief sought for environmental proceedings, governmental or otherwise, that are "material to the business or financial condition of the registrant." Id. This release reduced the standard of economic materiality to include only claims for damages in excess of ten percent of current assets. Id. The SEC permitted companies to group similar proceedings not meeting the materiality criteria under a single, generic description. Id. at 83,030-31.


38. Id.


sued a release containing exhaustive policy analysis and additional proposals regarding environmental disclosures. The Commission recognized that NEPA mandated such broad policy considerations. In addition to the traditional objectives of federal securities laws—the protection of investors, "the furtherance of fair, orderly and informed securities markets," and the fair opportunity for corporate suffrage—NEPA authorized the SEC to consider the promotion of environmental protection. Nonetheless, because federal action under securities laws has only an indirect effect upon the environment, the SEC concluded that it would continue to place primary emphasis on the disclosure of economically significant information.

...
The SEC further honed its environmental disclosure scheme through the late 1970s, issuing another interpretive release in 1979 in conjunction with an enforcement proceeding against United States Steel Corporation (U.S. Steel). With respect to environmental compliance costs, this release clarified that a corporation must disclose all known or estimated material capital expenditures for current and succeeding fiscal years. When

common thread is the hope for a satisfactory return, and it is to this that a disclosure scheme intended to be useful to all must be primarily addressed.

Id. at 85,721. The Commission then reiterated its opposition to requiring “voluminous, subjective and costly” disclosures. Id. at 85,717-18. It continued to reject a mandate to disclose all pending environmental litigation, and it refused to require companies to disclose their environmental policies. Id. at 85,718-19.

In 1976, the SEC made three minor amendments and clarifications to its disclosure requirements, but rejected broader proposals that the Commission take “principal responsibility for substantive regulation of environmental practices.” Rulemaking on Environmental Disclosure, supra note 39, at 86,291-92. First, the Commission required that compliance cost disclosures include “material estimated capital expenditures for environmental control facilities” for the registrant’s current and succeeding fiscal years, and any additional periods that the registrant may deem material. Id. at 86,294 & n.14; see also Proposed Environmental Disclosures, supra note 22, at 85,727 (describing the 1975 proposal as it applies to “Federal, state or local environmental standards”) (emphasis added).

The SEC then reiterated its requirement that registrants disclose all environmental litigation initiated by a governmental authority pursuant to “federal, state or local provisions.” Id. at 86,295 (emphasis added). The Commission noted that the receipt of a cease and desist order from the EPA would be sufficient to indicate contemplated governmental legal action and to trigger the disclosure obligation. Rulemaking on Environmental Disclosure, supra note 39, at 86,297 n.22.

Finally, the SEC added a new disclosure requirement that registrants’ filings must contain “all material information necessary to make the statements neither false nor misleading, [including] information concerning environmental compliance, impact, expenditures, plans, or violations, not otherwise specifically required, of which the average prudent investor ought reasonably to be informed.” Id. at 86,297.

46. Environmental Disclosure Requirements, supra note 22, at 17,203-3.

47. In re United States Steel Corp., supra note 4, at 82,376. In this administrative action, the SEC found that U.S. Steel had failed to make adequate disclosure of its estimates of $1.1 to $1.6 billion in environmental expenditures and its environmental proceedings in ongoing reports filed under the Exchange Act. Id. at 82,380-81. The Commission also asserted that U.S. Steel had pursued a corporate policy that resisted environmental requirements and thereby exposed the company to substantial civil and criminal penalties. Id. Without admitting to these violations, U.S. Steel consented to notify its investors of the SEC action and to undertake an independent audit to evaluate the company’s compliance with environmental laws. Id. at 82,384-86.

48. Environmental Disclosure Requirements, supra note 22, at 17,203-4 n.11, 17,203-5. Moreover, a registrant’s reasonable expectation that future
reporting administrative proceedings, a company must disclose all environmental proceedings initiated by either the government or the registrant and give an estimated cost for the relief sought by the government, if material.\textsuperscript{49} The Commission also broadly interpreted "proceedings" to include administrative and judicial consent orders.\textsuperscript{50}

C. Current Environmental Disclosure Requirements

In an effort to streamline its regulatory regime and to amend some provisions with which it was dissatisfied, in 1982 the SEC promulgated Regulation S-K which sets forth current uniform disclosure rules.\textsuperscript{51} Several provisions explicitly\textsuperscript{52} and implicitly\textsuperscript{53} address environmental matters.

1. Item 101 of Regulation S-K

Item 101 codifies the SEC's efforts to regulate the disclosure of "the material effects [of] compliance with \textit{Federal, State and local} [environmental] provisions . . . upon the capital expenditures, earnings and competitive position of [a] registrant and its compliance costs will be materially higher than costs disclosed for the current or succeeding period may create an affirmative duty on the registrant to estimate such costs and to describe the source of such estimates and the extent of any uncertainty. \textit{Id.} at 17,203-5; see also Ferman, \textit{supra} note 40, at 496 & n.91 (noting duty to formulate estimates).

\textsuperscript{49} Environmental Disclosure Requirements, \textit{supra} note 22, at 17,203-6. The SEC stated, "[t]he obligation to disclose is triggered whenever a governmental authority is a party to any proceeding." \textit{Id.} Government initiated proceedings include federal, state, and local governmental actions under federal law. \textit{Id.} at 17,203-6 & n.14.

\textsuperscript{50} \textit{Id.} The Commission stated described that a registrant's request for an adjudicatory hearing to contest the denial of a permit under the National Pollution Discharge Elimination System (NPDES) permit program also triggers this disclosure obligation. \textit{Id.} at 17,203-6.

The Commission also described two circumstances under which a corporation must disclose its environmental policy. \textit{Id.} First, any voluntary disclosure of environmental policy must be accurate and obligates the corporation to make supplemental disclosures to avoid being misleading. \textit{Id.} In addition, a company must disclose its environmental policy if that policy is "likely to result in substantial fines, penalties, or other significant effects upon the corporation," and the registrant may need to "disclose the likelihood and magnitude of such fines [and] penalties." \textit{Id.} at 17,203-6 to 17,203-7.

\textsuperscript{51} 17 C.F.R. § 229.10-.802 (1993); see also \textit{supra} note 14 (describing the scope of Regulation S-K).

\textsuperscript{52} \textit{See infra} parts I.C.1 & I.C.2 (describing Items 101 and 103 of Regulation S-K, respectively).

\textsuperscript{53} \textit{See infra} part I.C.3 (addressing Item 303); \textit{cf.} part I.C.4 (describing that Regulation S-X implicitly addresses environmental matters).
subsidiaries.” This Item also continues the SEC’s mandate that companies disclose their material estimated capital expenditures related to environmental compliance for current and succeeding fiscal periods.

2. Item 103 of Regulation S-K

Item 103, the second provision that incorporates explicit language on environmental disclosures, sets forth the SEC’s disclosure requirements concerning legal proceedings. A registrant must report any material pending or contemplated legal proceedings, except “ordinary routine litigation incidental to business.” Item 103’s Instruction 5 eliminates this exception for all administrative or judicial proceedings “arising under any Federal, State or local [environmental] provisions.”

Instruction 5 sets out three criteria under which a registrant must describe such a proceeding. First, a description is necessary if the proceeding is material to the registrant’s business or financial condition. In addition, the registrant must describe any proceeding involving a claim in excess of ten per-

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54. 17 C.F.R. § 229.101(c)(xii) (1993) (emphasis added). Item 101 also sets forth disclosure obligations concerning foreign and domestic operations and export sales. § 229.101(d). Item 101(d) requires a registrant to describe “any risks attendant to its foreign operations,” unless the registrant chooses to describe this matter under an alternative heading, such as environmental matters. § 229.101(d)(2) (emphasis added); see also § 229.303(a), Instruction 11 (mandating foreign private registrants to discuss governmental, economic, fiscal, monetary, or political policies or factors that have had a material effect on their business operations).

55. § 229.101(c)(1)(xii); cf. supra notes 45, 48 and accompanying text (describing compliance costs as addressed in the 1976 and 1979 releases).


57. § 229.103; see also Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 516-18 (7th Cir. 1989) (affirming the district court’s holding that Commonwealth Edison met Item 103’s disclosure requirements concerning the materiality of pending Nuclear Regulatory Commission licensure for several nuclear power facilities, without deciding whether application for such licensure constituted a “routine” proceeding).

58. § 229.103, Instruction 5 (1993) (emphasis added). The omission of any language limiting disclosure to only those actions initiated by governmental authorities or the registrant suggests that the SEC intended broad disclosure requirements. Cf. Notice of Adoption of Amendments, supra note 32, at 83,030 (applying to government initiated proceedings); Environmental Disclosure Requirements, supra note 22, at 17,203-6 (expanding proceedings to include registrant-initiated proceedings).


60. 17 C.F.R. § 229.103, Instruction 5(A) (1993); cf. Notice of Adoption of Amendments, supra note 32, at 83,030 (employing the same language).
cent of the registrant's current consolidated assets. Finally, the SEC mandates a description of all proceedings involving a governmental authority unless the registrant reasonably believes that monetary sanctions will not exceed $100,000.

3. Item 303 of Regulation S-K

Item 303, setting forth disclosure obligations in Management's Discussion and Analysis of Financial Condition and Results of Operations (MD&A) in SEC filings, makes no explicit reference to environmental matters. This Item requires a registrant to discuss its liquidity, capital resources, and "results of operations," as well as any other information the registrant believes is "necessary to an understanding of its financial condition" and changes in its financial condition. Management is to discuss any retrospective or forward-looking information,

61. 17 C.F.R. § 229.103, Instruction 5(B) (1993); cf. Proposed Environmental Disclosures, supra note 22, at 85,718 (mandating the disclosure of proceedings if amounts exceed ten percent of consolidated assets); Notice of Adoption of Amendments, supra note 32, at 83,030 (defining economic materiality as ten percent of assets).

62. 17 C.F.R. § 229.103, Instruction 5(C) (1993); see also Disclosure of Environmental Proceedings, supra note 23, at 84,289 (explaining that registrant must have a reasonable belief at the time of disclosure and must reevaluate that belief in connection with future filings), supra note 49 and accompanying text (discussing administrative proceedings). This third criterion departs from the obligation under prior releases to disclose all proceedings to which the government was a party, regardless of materiality in that it sets a $100,000 economic threshold for materiality. The SEC determined that the older, broader provision failed to accomplish its intended results because registrants could obscure significant environmental proceedings with lengthy descriptions of relatively inconsequential ones and thereby complicate investor and administrative review of business operations. Disclosure of Environmental Proceedings, supra note 23, at 84,287. Instruction 5(C) also allows the registrant to aggregate similar proceedings under generic descriptions. § 229.103, Instruction 5(C).


65. § 229.303(a).

66. § 229.303(a)(3)(i). The regulation states: "Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected." Id.

67. § 229.303(a)(3)(ii). This regulation requires that the registrant "describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." Id.
and is to pay particular attention to information "that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition."\(^6\)

In 1989, the SEC issued an interpretive release\(^6\) that explicates a two prong test to determine MD&A disclosure obligations and illustrates Item 303's application to environmental matters.\(^7\) First, the company must decide whether a "known trend, demand, commitment, event, or uncertainty [is reasonably] likely come to fruition."\(^7\) If management can prove that there is not a reasonable likelihood, it need not disclose the matter.\(^7\) Then, if management cannot make such a negative determination, it must assume that the trend, demand, commitment, event, or uncertainty will occur.\(^7\) Given this assumption, Item 303 then requires disclosure unless a "material effect on the registrant's financial condition or results of operations is not reasonably likely to occur."\(^7\)

68. § 229.303(a), Instruction 3.
70. In setting forth this test, the SEC first drew a sharp distinction between required and voluntary prospective information. Id. at 22,429. The SEC requires a registrant to predict the impact of "known trends, events and uncertainties," and asks that a registrant volunteer information involving "anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty." Id. With regard to required prospective information involving known trends, demands, commitments, events, or uncertainties, the SEC established the two prong test. See infra notes 71-74. Furthermore, the SEC's safe harbor rules apply to both the required prospective disclosures and voluntary forward-looking projections. MD&A Release, supra note 15, at 22,429. The safe harbor provisions protect registrants from liability from forward looking statements, unless such statements are "made or reaffirmed without a reasonable basis or [are] disclosed other than in good faith." 17 C.F.R. §§ 230.175, 240.3b-6 (1993); see also Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 512-16 (7th Cir. 1989) (discussing safe harbors); Ferman, supra note 40, at 488-89, 501-02 (discussing safe harbors).
71. MD&A Release, supra note 15, at 22,430.
72. Id.
73. Id.
74. Id. The SEC illustrated this two part test with an example involving a company that the EPA had correctly designated as a potentially responsible party (PRP), under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992), with respect to clean-up costs at three hazardous waste sites. MD&A Release, supra note 15, at 22,430. The hypothetical assumed that management could not determine that a material effect on the future financial condition of the company was not reasonably likely to occur. Id. Consequently, Item 303 required the company to report "the effects of the PRP status, quantified to the extent reasonably practicable." Id.
4. Regulation S-X

Regulation S-X governs registrants' accounting presentations. The SEC staff recently interpreted the current accounting literature to guide registrants' disclosure of environmental contingencies in accounting presentations. Recognizing that the risks and uncertainties adhering to material contingent environmental liabilities are separate from those associated with a registrant's claim for recovery from third parties, the SEC now requires that a registrant independently evaluate environmental liability expenditures and claims for recovery. In addition, management may not delay reporting of liabilities, despite uncertainty, but should recognize the minimum amount of the expected range of liability.

D. SEC Administrative and Judicial Actions

In addition to issuing the 1989 and 1993 releases, the Commissioners have made recent public statements urging companies to make broad environmental disclosures in compliance


76. The SEC staff based its instructions on ACCOUNTING FOR CONTINGENCIES, Statement of Financial Accounting Standards No. 5 (Fin. Accounting Standards Bd. 1975) [hereinafter FASB 5]. See Staff Accounting Bulletin, supra note 15 at 64,282. Paragraph 8 of FASB 5 requires that a registrant accrue an "estimated loss from a loss contingency . . . by a charge to income" if it is probable that the registrant has incurred a liability and the registrant can reasonably estimate the loss. FASB 5, supra, ¶ 8. Further, if one or both of these conditions does not hold, the registrant must disclose the contingency when "there is at least a reasonable possibility that [the registrant incurred] a loss . . . " Id. ¶ 10; see also Perry E. Wallace, Disclosure of Environmental Liabilities Under the Securities Laws: The Potential of Securities-Market-Based Incentives for Pollution Control, 50 WASH. & LEE L. REV. 1093, 1119-24 (1993) (discussing financial statement disclosure of environmental liabilities).

77. Staff Accounting Bulletin, supra note 15, at 64,282. Only if a claim for recovery is probable of realization may the registrant reduce any loss arising from the recognition of environmental liability by the expected value of the claim. Id. at 64,282 & n.1 (defining "probable" as "likely to occur"). Conversely, if it is probable that other responsible parties will not pay, and the liability will consequently fall on the registrant, the registrant must include its best estimate of total expected payment. Id. at 64,283.

78. Id. In discussing the relevant factors in measuring liabilities, the SEC argues that "minimum clean-up costs [are] unlikely to be zero." Id.
with SEC regulations. The SEC has also established a close alliance with the EPA to assist with monitoring environmental disclosures.

Recent rhetoric notwithstanding, the SEC has only infrequently challenged a registrant's environmental disclosures.

79. As SEC Commissioner Richard Roberts, head of the SEC's environmental portfolio, recently commented:

Vigorous enforcement of environmental laws is likely to occur in the next decade. . . . Liabilities could be devastating, serious enough to bring down many public companies. Disclosure is being dealt with, yet the liabilities are not quantified or reflected as quickly as they should be in the financial statements. Face it. If you are a [Potentially Responsible Party under CERCLA], you can be sure the liability is material.

80. The EPA will send to the SEC its lists of Potentially Responsible Parties (PRPs) under CERCLA, data on cleanup requirements under the Resource Conservation Recovery Act (RCRA), lists of criminal and civil proceedings, and information on companies barred from governmental contracts under the Clean Air Act and Clean Water Act. The SEC will then use this information to assess registrants' disclosures. See Mark A. Stach, Disclosure of Existing and Contingent Superfund Liability Under the Reporting Requirements of the Federal Securities Laws, 18 U. DAYTON L. REV. 355, 356-57 (1993) (describing SEC and EPA cooperation in light of the SEC's recent emphasis on forward-looking disclosures); Wallace, supra, note 76, at 1099-1100 (describing SEC-EPA dialogue).

81. This is not to say that the SEC has not pursued informal investigations into registrants' environmental disclosures. See Berton, supra note 17, at B3 (naming companies that admit to receiving informal inquiries from the SEC).

Private actions predicated on a corporation's failure to meet SEC environmental disclosure requirements have increased in number in recent years, and have encountered mixed results. Compare Pacific Dunlop Holdings, Inc. v. Allen & Co., Inc., 993 F.2d 578, 579-80 (7th Cir. 1993) (holding that claim for recision of private resale of stock could proceed when plaintiffs alleged the sellers made erroneous representations that battery manufacturer and subsidiaries complied with environmental laws), cert. granted on other grounds, 1994 U.S. LEXIS 1316 (U.S. 1994) and Endo v. Albertine, 812 F. Supp. 1479, 1486-88 (N.D. Ill. 1993) (rejecting summary judgment against plaintiff's claims based on defendant's failure to disclose contingent environmental liabilities stemming from a former subsidiary's operations) and Grossman v. Waste Management, Inc., 589 F. Supp. 395, 408-09 (N.D. Ill. 1984) (denying defendant's summary judgment motion in civil fraud action for failure to disclose that corporation was running the risk of violating environmental laws) with Levine v. NL Indus., Inc., 926 F.2d 199, 203 (2d Cir. 1991) (dismissing action in which U.S. Department of Energy promised to indemnify the defendant against its subsidiary's environmental liabilities, thus making the liabilities non-material) and Crouse-Hinds Co. v. InterNorth, Inc., 518 F. Supp. 416, 474 (N.D.N.Y. 1980) (dismissing claim for failure to assert that defendant misstated or omitted material fact concerning environmental liabilities).
One judicial action, SEC v. Allied Chemical Corp.,\(^\text{82}\) and two administrative actions, In re United States Steel Corp.\(^\text{83}\) and In re Occidental Petroleum Corp.,\(^\text{84}\) all led to consent decrees in which the subject corporation agreed to develop a comprehensive environmental audit program.

Interestingly, the SEC also commented upon Occidental's failure to disclose certain non-environmental risks associated with the corporation's overseas operations,\(^\text{85}\) thereby confirming that the Commission's reporting requirements extend to overseas operations.\(^\text{86}\) Indeed, the SEC revisited foreign operations disclosures in a 1992 enforcement release describing non-environmental MD&A reporting violations by Caterpillar, Inc.\(^\text{87}\)

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82. No. 77-373, 1977 SEC LEXIS 2280, at *1 (D.D.C. Mar. 4, 1977). The SEC charged that Allied knew of the adverse effects that its discharge of toxic chemicals had on animal and marine life, but failed to report the resulting material contingent liabilities from companies, individuals, and state and local governments. Id. at *1-*2; Chemical Company Enjoined for Failure to Disclose Pollution's Potential Impact, Sec. Reg. & L. Rep. (BNA) No. 393, at A-17 to A-18 (Mar. 9, 1977).

In addition to requiring Allied to perform an internal environmental audit and to report its findings to the SEC, the consent agreement also permanently enjoined Allied from further violations of the securities laws anti-fraud and reporting provisions. The agreement also obligated Allied to provide information to the SEC with respect to its current environmental policies, practices, and procedures for informing company management of material environmental risks and uncertainties associated with the company's operations. SEC v. Allied Chem. Corp., 1977 SEC LEXIS 2280, at *2.

83. See supra note 47 (discussing U.S. Steel action).

84. Exchange Act Release No. 16,950, [1980 Transfer Binder] Fed. Sec. L. Rep. (CCH) 82,622, at 83,346 (July 2, 1980). Occidental had failed to report the effect of environmental compliance on its capital expenditures. Id. at 83,349. The corporation also failed to disclose the nature of environmental violations, environmental liabilities, and pending and contemplated proceedings. Id. at 83,348-49. The SEC settlement with Occidental required that the company institute an environmental audit to better inform management of environmental matters affecting its business operations. Id. at 83,356-57.

85. According to the SEC, Occidental failed to disclose economic risks associated with a refinery in the United Kingdom and the extent of Occidental's dispute with the Libyan government following the nationalization of its facilities in Libya. Id. at 83,353-55.

86. See also 17 C.F.R. § 229.101(d) (1993), discussed supra note 54 (describing disclosure requirements).

87. In re Caterpillar, Inc., Securities Exchange Act Release No. 30,532, 7 Fed. Sec. L. Rep. (CCH) ¶ 73,830, at 63,050, 63,055 (Mar. 31, 1992). Caterpillar had failed to disclose information about the 1989 earnings of its Brazilian subsidiary and known uncertainties about the subsidiary's 1990 projected earnings. Id. at 63,051. Due to known turmoil in the Brazilian economy, Caterpillar's management could not reasonably believe that a material effect on Caterpillar's operations was not likely to occur from lower earnings. Id. at 63,055.
This review of the SEC's disclosure regulations reveals significant administrative interest in extending the reporting of economically relevant investment information to include environmental matters. Recognizing that NEPA's mandate elevates the importance of environmental matters disclosures, the SEC nonetheless exhibits a reluctance to take regulatory action predicated solely on an intent to alter corporate attitudes toward the environment. Instead, the Commission addresses environmental matters within the context of their economic impact, as accrued through compliance costs (Item 101) and proceedings (Item 103), and generally (Item 303 and Regulation S-X).

II. SEC ENVIRONMENTAL DISCLOSURE RULES AND THE HYPOTHETICAL

This section applies the forgoing disclosure rules to the introductory hypothetical in order to lay the foundation for illustrating flaws in the SEC's current disclosure regime. Table 1 summarizes the results.

**TABLE 1. WORLDMINE'S SEC DISCLOSURE OBLIGATIONS, SITES IN UNITED STATES AND COUNTRIES A THROUGH E**

<table>
<thead>
<tr>
<th>United States</th>
<th>Country Sites</th>
<th>Country Sites</th>
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<tr>
<td></td>
<td>A</td>
<td>B</td>
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<tr>
<td>Item 101 (Compliance Costs)</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>Item 103 (Proceedings)</td>
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<tr>
<td>MD&amp;A: Compliance Costs</td>
<td>D</td>
<td>D</td>
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<tr>
<td>MD&amp;A: Proceedings</td>
<td>D</td>
<td>D</td>
</tr>
<tr>
<td>Financial Statements: Compliance Costs</td>
<td>D</td>
<td>D</td>
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<tr>
<td>Financial Statements: Proceedings</td>
<td>D</td>
<td>D</td>
</tr>
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Key: D = Disclosure; N = Nondisclosure.

Evaluating WORLDMINE's disclosure obligations with respect to its U.S. site provides a basis for comparison to its obligations concerning the company's extraterritorial sites. First, Item 101 of Regulation S-K requires that WORLDMINE disclose its material estimated capital expenditures for pollution control at the U.S. site. The company must disaggregate and describe its $700 million to $1 billion estimate according to current and

succeeding fiscal year expenditures, in addition to disclosing any future expected costs included in this estimate. In addition, Instruction 5 of Item 103, mandating the disclosure of all material pending or contemplated environmental proceedings, compels WORLDMINE to report the EPA's notice of violation. Finally, because the compliance costs and proceedings represent material current or contingent expenditures, WORLDMINE must report both in its MD&A and financial statements.

A. SEC DISCLOSURES AND WORLDMINE's COUNTRY A SITE

WORLDMINE's second site faces EPA action pursuant to the extraterritorial application of United States environmental laws. Because Item 101 requires WORLDMINE to report material estimated compliance costs, the company must first esti-

89. § 229.101(c)(1)(dii); Environmental Disclosure Requirements, supra note 22, at 17,203-5. These costs arise through compliance with federal environmental provisions and are material; indeed, this author knows of no corporation for which expenditures approaching $1 billion are not material.

90. The EPA's Notice of Violation meets the SEC's broad definition of "proceeding." See Grossman v. Waste Management, Inc., 589 F. Supp. 395, 412 (N.D. Ill. 1984) (holding that "defendant had an affirmative duty to disclose matters relating to pending and contemplated environmental regulatory proceedings"); Crouse-Hinds Co. v. InterNorth, Inc., 518 F. Supp. 416, 474-75 (N.D.N.Y. 1980) (comparing factual basis for suit in which the regulatory agency had made no determination of environmental liability to that in the SEC enforcement action against Occidental Petroleum Corp. in which the EPA had found liability); see also Environmental Disclosure Requirements, supra note 22, at 17,203-6 (describing the SEC's broad interpretation of "proceeding"); Rulemaking on Environmental Disclosure, supra note 39, at 86,297 n.22 (noting that the receipt of a cease and desist order from the EPA is sufficient to indicate contemplated governmental legal action).

This proceeding meets all three thresholds for disclosure described in Instruction 5. For example, a description is necessary under Instruction 5(C) because the EPA could easily assess fines exceeding $100,000. See supra notes 2-3 (describing the magnitude of fines that the EPA may charge for failure to comply with environmental laws); see also supra note 62 and accompanying text (noting that Item 103's Instruction 5(C) compels the reporting of government proceedings in excess of $100,000).

91. 17 C.F.R. § 229.303(a) & Instruction 3 (1993); see supra notes 69-74 and accompanying text (describing the MD&A Release).

92. Staff Accounting Bulletin, supra note 15, at 64,282-83; see supra notes 75-78 and accompanying text (describing financial statement reporting).

93. This Note recognizes that the extraterritorial applicability of U.S. environmental laws is highly suspect, but includes this wrinkle to tease out additional nuances in the disclosure requirements. Cf. Carl F. Schwenker, Note, Protecting the Environment and U.S. Competitiveness in the Era of Free Trade: A Proposal, 71 Tex. L. Rev. 1355, 1389-1403 (1993) (proposing that the United States take unilateral regulatory action to apply U.S. environmental laws outside the territorial limits of the United States through a Foreign Environmental Pollution Prevention Act).
mate the compliance costs. In light of the estimates in the United States, it is likely that compliance costs in Country A will be material, thereby obligating disclosure. WORLD Mine must also disaggregate these costs by current and succeeding years and any additional years, if material. Similarly, Item 103's requirement that WORLD Mine disclose all material environmental proceedings arising under federal, state, or local provisions, extends to the EPA's notice of violation in Country A.

Accepting the materiality of the compliance costs and the contingent materiality of the proceedings, WORLD Mine should disclose both in its MD&A. The compliance costs will come to fruition, thereby satisfying the first prong of the MD&A disclosure test. Although WORLD Mine may be unsure whether the EPA will assess fines, pursuant to the second prong of the MD&A test, WORLD Mine must disclose the proceedings because, if imposed, the fines will be material. WORLD Mine should also disclose its material disaggregated compliance estimates for Country A and the factors considered in deriving those estimates in its financial statements.

94. See 17 C.F.R. § 229.101(c)(1)(xii) (1993). This may require WORLD Mine to consider, inter alia, currency exchange rates, labor cost differentials, and the local availability of clean-up technology.

95. 17 C.F.R. § 229.101 (1993); see also supra notes 88-89 and accompanying text (describing Item 101 disclosure obligations at WORLD Mine's U.S. site).

96. 17 C.F.R. § 229.103, Instruction 5 (1993). The action involves a governmental agency, thereby triggering Instruction 5(C), and given the size of fines under the Clean Air Act and Clean Water Act, see supra notes 2-3, WORLD Mine cannot reasonably believe that sanctions will not be greater than $100,000. 17 C.F.R. § 229.103, Instruction 5(C) (1993).

The SEC's instructions in its 1973 No-Action Letter to Air Products and Chemicals, Inc., supra note 36, at 83,229, stipulating that the broad disclosure requirements covering nonmaterial environmental proceedings apply only to those instituted by governmental entities "within the United States", id., are ambiguous. It remains unclear whether this quoted language limits application to only U.S.-based governmental agency's action (the language modifies "governmental entities"), actions begun only within the United States (the language modifies "proceedings"), or only those proceedings involving sites within the United States (the language describes the location of the site). Id. If the SEC intended either of the first two interpretations, then disclosure of the proceeding concerning the site in Country A is mandatory, regardless of economic materiality. If the Commission intended the third, then the EPA action must be economically material to compel disclosure.


98. See id.

99. Staff Accounting Bulletin, supra note 15, at 64,284 (interpreting Regulation S-X as applied to environmental matters).
B. SEC DISCLOSURES AND WORLD Mine's Country B SITE

Although the site in Country B is subject to environmental laws and regulations substantively equivalent to United States regulations, WORLD Mine's disclosure obligations only partly parallel those for its United States and Country A sites. For example, WORLD Mine's Item 101 obligations are ambiguous. An estimation of compliance costs similar to that in Country A would likely suggest that WORLD Mine's compliance costs in Country B are material. One might expect this result to trigger disclosure under Item 101. The language, however, of Item 101 relating to environmental matters mandates disclosure of material compliance costs associated with "Federal, State and local provisions." Hence, a close reading suggests that WORLD Mine need not report the compliance costs associated with its tailings pond in Country B as these costs accrue through compliance with foreign provisions.

Alternatively, pursuant to the SEC's 1973 instructions concerning foreign environmental matters, WORLD Mine must report compliance costs in Country B because they will have a material impact on WORLD Mine's business operations. The authority of the 1973 instructions is, however, in doubt. The SEC has not incorporated these instructions into any subsequent release on environmental compliance cost reporting.

Because Regulation S-K supersedes earlier disclosure regula-

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100. See, e.g., Canada Environmental Protection Act, R.S.C., ch. C-15.3, §§ 113-114 (1989) (Can.) (imposing fines up to CAN$1,000,000 and criminal sanctions for fraud or failure to comply with Canada's environmental regulations involving air and water quality); Environmental Protection Act, R.S.C. ch. E-19, §§ 193(2), (4) (1990) (Ont.) (imposing fines on corporations up to CAN$200,000 per day for failure to comply with, and up to CAN$1,000,000 if adverse effects result from violations of, air and water quality standards pursuant to Ontario's environmental protection laws); Tae Hee Lee, Environmental Law of South Korea, in INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION S.Kor-1, § 3.2 (J. Andrew Schlickman et al. eds., 1992) (describing civil and criminal sanctions up to 15 million Won applicable to violations of nearly all of South Korea's environmental regulations and noting South Korea's environmental regulators' improvement order powers and resources for enforcement).

101. See supra notes 94-95 and accompanying text (discussing estimation of compliance costs for WORLD Mine's Country A site).


103. § 229.101(c)(1)(xii).

104. See Air Products and Chemicals, Inc., supra note 36, at 83,229.

105. Id.

106. See supra notes 32, 34, 41, 45, 54 and accompanying text (quoting SEC releases' language inclusive only of compliance costs arising under federal, state and local environmental provisions).
tions,107 and because the 1973 No-Action Letter arguably relates only to the 1973 release, WORLDMINE may again conclude that current regulations do not require disclosing compliance costs in Country B under Item 101.

WORLDMINE encounters a similar problem under Item 103. WORLDMINE must disclose any material proceedings in Country B "known to be contemplated by governmental authorities."108 That Country B notified WORLDMINE of its noncompliance is sufficient to show that Country B is contemplating proceedings.109 WORLDMINE, however, might construe Country B's action as "ordinary routine litigation"110 and thereby exclude it from disclosure.111 Furthermore, Item 103's Instruction 5 is inapplicable because that Instruction eradicates the "ordinary routine litigation" exception only for those material proceedings "arising under any Federal, State or local provisions."112 Hence, because Country B's proceeding arises under a foreign provision, WORLDMINE may utilize the "ordinary routine litigation" loophole and elect not to describe the proceeding.

WORLDMINE's MD&A disclosures concerning the Country B site should include reporting of compliance costs and proceedings as they are material and likely to come to fruition.113 Furthermore, WORLDMINE must disclose and describe its material compliance costs, expected material fines, uncertainties, and estimation factors in its financial statements pursuant to Regulation S-X.114

107. See 17 C.F.R. § 229.10 (1993); Wallace, supra note 76, at 1105 (stating that Regulation S-K supersedes prior releases).


109. See supra note 90 and accompanying text (discussing broad interpretation of "proceeding" in relation to WORLDMINE's U.S. site).

110. § 229.103.

111. See § 229.103 (describing "ordinary routine litigation" exception).

112. § 229.103, Instruction 5 (emphasis added). As observed with Item 101, no release subsequent to the Air Products and Chemicals, Inc. No-Action Letter, supra note 36, has expanded the disclosure language to include foreign proceedings. See supra notes 31-32, 35, 41, 45, 58 and accompanying text (quoting SEC releases' language inclusive only of proceedings arising from federal, state or local environmental provisions).

113. See MD&A Release, supra note 15, at 22,430 (describing two prong test); 17 C.F.R. § 229.303 (1993); supra part I.C.3 (describing MD&A disclosures); see also In re Caterpillar, Inc., supra note 87, at 63,054-55 (describing MD&A disclosure as applied to foreign operations with material events).

C. SEC DISCLOSURES AND WORLDMINE'S COUNTRY C SITE

WORLDMINE's third overseas site faces potentially significant environmental regulation; however, Country C rarely pursues enforcement.\textsuperscript{115} Here, several complications arise. First, as was the case with compliance costs in Country B, WORLDMINE need not disclose its Country C compliance costs because Item 101 does not apply to costs arising under foreign provisions.\textsuperscript{116}

Furthermore, Country C's non-enforcement complicates WORLDMINE's determination as to whether that nation's actions constitute a material proceeding under Item 103. WORLDMINE must balance the low probability of enforcement against the magnitude of the fines to determine materiality.\textsuperscript{117} WORLDMINE might conservatively estimate that these expenditures will remain material despite the low risk of enforcement.\textsuperscript{118} As with Country B's proceeding, however, WORLDMINE

\begin{itemize}
\item \textsuperscript{115} See, e.g., P.R. Skelton, \textit{J., Enforcement—A New Zealand Perspective}, in \textit{ENVIRONMENTAL LIABILITY}, supra note 20, at 263, 266-67 (describing New Zealand's Water Act as imposing fines up to NZ$150,000, and NZ$10,000 per day for a continuing offense, but noting administrative reluctance to enforce such regulations against major corporate taxpayers and judicial reluctance to grant injunctions); John G. Taberner & Susan J. Gibb, \textit{Environmental Law of Australia, in INTERNATIONAL ENVIRONMENTAL LAW AND REGULATION}, supra note 100, at Aus-1, §§ 3.2, 3.4 (discussing previous reluctance of Australian governments to prosecute environmental offenses and increasingly stringent legislation including $1 million civil fines and criminal penalties for violations); James Brooke, \textit{Latin America's Oil Rush: Tapping Into Foreign Investors}, \textit{N.Y. TIMES}, July 11, 1993, § 3, at 5 (noting a trend in some Latin American countries toward tightening lax enforcement of environmental laws); \textit{In Mexico, The Pollution Hurdle}, \textit{N.Y. TIMES}, Aug. 16, 1993, at A2 (noting that although Mexico has strong environmental laws, corruption and insufficient resources limit enforcement); Richard Mooney, \textit{Survey of Aluminum}, \textit{FIN. TIMES}, Oct. 28, 1992, at 34 (commenting that aluminum smelters in the former Soviet Union face no enforcement of environmental laws). \textit{See generally}, Malcolm Grant, \textit{Introduction}, in \textit{ENVIRONMENTAL LIABILITY}, supra note 20, at 213, 213-18 (discussing generally the paradox between the implementation of strict environmental regulations and the failures of enforcement).
\item \textsuperscript{116} 17 C.F.R. § 229.101(c)(1)(xii) (1993); see also supra notes 101-107 and accompanying text (discussing Country B compliance cost disclosures).
\item \textsuperscript{117} The hypothetical assumes Country C's fines are equivalent to those in the United States.
\item \textsuperscript{118} That is, WORLDMINE might conclude that a reasonable investor would consider this risk, however slight, "as having significantly altered the 'total mix' of information made available." Basic, Inc. v. Levinson, 485 U.S. 224, 232 (1988) (quoting TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976)); see also Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 517 (7th Cir. 1989) ("The \textit{anticipated} magnitude . . . may be small even when the total effect could be whopping.").
\end{itemize}
MINE may then elect the Item 103 loophole and characterize Country C's actions as exempt from disclosure.\textsuperscript{119}

Alternatively, because Country C rarely enforces its regulations, WORLDMINE could continue to risk noncompliance, hoping never to incur the fines. WORLDMINE may then conclude that Country C's proceedings are immaterial in light of the low probability of enforcement relative to the proceeding's potential magnitude. This second result ostensibly triggers Item 103's broad mandate under Instruction 5(C) to disclose any environmental proceeding to which a governmental agency is a party.\textsuperscript{120} Yet, Item 103's language excludes foreign proceedings from this mandate.\textsuperscript{121} Consequently, regardless of whether WORLDMINE characterizes Country C's proceedings as material or immaterial, Item 103's narrow language allows WORLDMINE to characterize these proceedings as "ordinary routine litigation" exempt from disclosure.

WORLDMINE encounters affirmative disclosure obligations under Item 303. If WORLDMINE determines that the compliance costs and proceedings will occur, MD&A disclosure is necessary.\textsuperscript{122} If the company determines instead that neither are "reasonably likely" to come to fruition, WORLDMINE must consider both under the second prong of the MD&A test, and assume that the compliance costs and fines will accrue.\textsuperscript{123} Under this assumption, WORLDMINE must disclose both because each would have a material impact on business operations.\textsuperscript{124}

In its financial statements, WORLDMINE must disclose the compliance costs and proceedings only if material. Prudence suggests disclosure of the compliance costs, noting uncertainties and recognizing the minimum amount of the expected range of

\textsuperscript{119} Instruction 5's abrogation of this exception extends only to proceedings arising under federal, state, or local provisions. 17 C.F.R. § 229.103 (1993).

\textsuperscript{120} See § 229.103, Instruction 5(C).

\textsuperscript{121} See § 229.103, Instruction 5(C) (including administrative or judicial proceedings "arising under any Federal, State or local provisions") (emphasis added); see also supra notes 108-112 and accompanying text (discussing Item 103's language exclusion as applied to Country B's proceeding).

\textsuperscript{122} This result is pursuant to the first prong of the MD&A test, see MD&A Release, supra note 15, at 22,430, under the hypothetical's assumptions that Country C's environmental provisions are substantively equivalent to those in the United States.

\textsuperscript{123} See MD&A Release, supra note 15, at 22,430.

\textsuperscript{124} See id.
compliance expenditures. In contrast, observing Country C's lax enforcement, WORLDMINE may generate a zero value for its minimum estimate of liabilities stemming from proceedings, ostensibly obviating the disclosure requirement as applied to those proceedings.

D. SEC DISCLOSURES AND WORLDMINE'S COUNTRY D SITE

The combination of lax enforcement and nominal fines characterizing Country D's environmental regime adds further wrinkles to WORLDMINE's disclosures. The ambiguous mandate to disclose Country D compliance costs pursuant to Item 101 parallels that of Countries B and C. Whereas WORLDMINE encountered additional ambiguity under Item 103 concerning the materiality of Country C's proceedings, because Country D rarely pursues enforcement and then imposes only nominal fines in its proceedings, such proceedings are not material, and WORLDMINE need not make any disclosure.

Under Item 303 analysis, WORLDMINE's compliance costs and proceedings in Country D fail to meet the first prong of the MD&A disclosure test. It is not "reasonably likely" that these compliance costs or proceedings will come to fruition. In contrast to Country C, however, under the second prong—assuming the compliance costs and fines accrue—WORLDMINE must disclose compliance costs, which would have a material impact on business operations, but not the proceeding, which imposes only a nominal penalty. Analysis under Regulation S-X concern-

125. See Staff Accounting Bulletin, supra note 15, at 64,283 (permitting disclosure of minimum estimates); see also supra part I.C.4 (discussing financial statement disclosures).
126. See Staff Accounting Bulletin, supra note 15, at 64,283 (permitting minimum estimate disclosure).
128. See supra notes 101-107 and accompanying text; supra text accompanying note 116 (discussing Countries B and C Item 101 disclosures).
129. Due to the language exclusion, Country D proceedings, like non-material proceedings in Country C, see supra notes 120-121 and accompanying text, sit outside the ambit of Instruction 5's mandate to disclose environmental proceedings.
130. See MD&A Release, supra note 15, at 22,430; see also supra part I.C.3 (discussing MD&A test).
131. See id.
ing WORLDMINE's financial statement reporting is identical to that for the Country C site: disclosure of compliance costs, but not proceedings.  

E. SEC DISCLOSURES AND WORLDMINE's Country E Site

Because WORLDMINE operates its Country E site in an environmental regulatory void, no disclosure obligations arise. No Item 101 obligations accrue because Country E imposes no regulation with which WORLDMINE must comply. Similarly, no regulation exists to give rise to any proceedings for disclosure pursuant to Item 103. That WORLDMINE expects no expenditures or proceedings to occur obviates MD&A reporting. The same factors release WORLDMINE from any obligation to report on its Country E site in its financial statements.

III. EFFICIENCY AND EQUITY FAILURES IN THE SEC'S DISCLOSURE REGULATIONS

As shown in Table 1, the foregoing analysis of WORLDMINE's environmental disclosure burden teases out several weaknesses in the SEC's current regulatory scheme as applied to extraterritorial environmental matters. Two broad criticisms emerge: the regulatory language is inconsistent and underinclusive, and political realities complicate materiality determinations of overseas environmental matters. Underlying these criticisms are considerations of equity and efficiency predicated on striking a balance between investors' interests and the registrant's disclosure burden.

132. See supra notes 125-126 and accompanying text (discussing Country C financial statement disclosures).

133. See, e.g., Joseph LaDou, Deadly Migration: Hazardous Industries' Flight to the Third World, TECH. REV., July 1991, at 46 (discussing the environmental impact of a shift of manufacturing operations to ill-prepared developing nations that have either no environmental regulations or little power to enforce those that are on the books).

134. The MD&A's forward-looking emphasis might impose an obligation on WORLDMINE to assume, under the second prong of the MD&A test, that Country E will implement an environmental regime. See 17 C.F.R. § 229.303(a), Instruction 11 (1993) (requiring foreign registrants to assess the material impact of overseas governmental, economic or political matters); MD&A Release, supra note 15, at 22,430 (giving an example wherein a registrant must disclose the material effects of possible regulations promulgated pursuant to recently enacted legislation). Such an interpretation, however, would require WORLDMINE to determine the scope of the new provisions, the penalties imposed, and the likelihood of enforcement, and then calculate whether a material effect would occur.

A. LANGUAGE FAILURES IN THE SEC'S ENVIRONMENTAL DISCLOSURE REGULATIONS

Table 1 shows that Item 303 and Regulation S-X obligate WORLDMINE to disclose its material compliance costs and proceedings in almost every country. In contrast, Item 101’s language permits the nondisclosure of compliance costs in Countries B, C and D. This inconsistency undermines the instructive value of the regulations and arguably obfuscates registrants’ disclosure obligations. Moreover, that Item 101 permits one corporation to withhold information concerning material environmental expenditures at an extraterritorial site, but obligates another corporation to disclose identical expenditures at its site in the United States, is inequitable. No policy basis exists for placing such disparate disclosure burdens upon registrants when, as in the hypothetical, the costs associated with two identical sites wield arguably equivalent material effects upon business operations.

The exclusionary language in Item 103 appears similarly inconsistent with Item 303 and Regulation S-X. Instruction 5 nullifies Item 103’s “ordinary routine litigation” disclosure exception only for proceedings arising out of federal, state, and local environmental provisions. Hence, this loophole remains for any extraterritorial proceeding brought by a non-U.S.-based regulatory agency, regardless of materiality. To permit such inequitable disclosure obligations undermines the SEC’s traditional policy goals: the protection of investors and the furtherance of fair, ordinary, and informed markets. Investors cannot make fully informed comparisons when corporations with identical material compliance expend-

136. See supra notes 101-107 and accompanying text; supra text accompanying notes 116, 128 (describing Item 101(c)(xii)’s exclusionary language in the context of Country B, C and D disclosure obligations).

Item 101(d), mandating the reporting of “any risks” inherent to foreign operations, likewise suffers from poor drafting. 17 C.F.R. § 229.101(d) (1993). That registrants must report on any foreign risks, regardless of materiality, imposes an enormous disclosure burden and is subject to abuse; registrants may choose to obfuscate important overseas risks with lengthy discussions on immaterial risks. Cf. Disclosure of Environmental Proceedings, supra note 23, at 84,287 (recognizing that registrants obscured significant environmental proceedings with lengthy descriptions of relatively inconsequential proceedings and that volume of disclosure materials interfered with and complicated investor and administrative review of business operations).

137. See supra notes 112, 119-121 and accompanying text (discussing WORLDMINE’s use of Item 103’s “ordinary routine litigation” loophole in Countries B and C).

138. See Proposed Environmental Disclosures, supra note 22, at 85,713.
tures or contingent proceedings liabilities pursue different disclosure strategies, thereby presenting investors with disparate and potentially misleading accounts of environmental liabilities under Items 101 and 103. Thus, a U.S. firm having only domestic operations, which faces a greater disclosure burden under these Items, functions at a competitive disadvantage when seeking to attract investors.139

B. AMBIGUITIES AND THE MATERIALITY STANDARD

The materiality standard requires that the registrant disclose any information that the reasonable investor would find important to the "total mix" of information about a corporation.140 The analysis, however, of the hypothetical revealed unexpected complexities when assessing the materiality of action involving WORLDMINE's overseas sites.

First, lax enforcement by host countries creates indeterminate disclosure obligations.141 Competing companies facing similar overseas proceedings could reach disparate conclusions as to the likelihood of enforcement, and consequently the materiality of compliance expenditures or proceedings, thus the potential for inconsistent reporting among companies.142 Such inconsistencies severely undermine the usefulness in comparing disclosure information for investment purposes.

In addition, operations in a weak or evolving environmental regime143 face additional uncertainties that complicate materi-

139. Based solely upon information presented in corporate filings, investors will choose to invest in the registrant with sites overseas (in Countries B, C, D or E, for example) for which no disclosure is made, rather than investing in the registrant that is required to disclose liabilities accruing to its U.S. site.


141. See supra notes 120-121 and accompanying text (discussing alternative materiality conclusions due to lax enforcement).

142. In addition, the indefinite materiality of proceedings due to lax enforcement may lead to different financial statement disclosures under Regulation S-X, as observed with WORLDMINE's nondisclosure of proceedings in Countries C and D. See supra notes 125-126 and accompanying text; supra text accompanying note 132.

143. In recent years, environmental regulatory development throughout the world has proceeded at a rapid pace. See G. Nelson Smith, III, A Comparative Analysis of European and American Environmental Laws: Their Effects on International Blue Chip Corporate Mergers and Acquisitions, 14 Hastings Int'l & Comp. L. Rev. 573, 574-75, 588 (1991) (noting that European environmental laws are 10 years behind U.S. laws and that many, including hazardous waste laws, are in rudimentary form); G. Nelson Smith, III, The Real Challenge to the Polish Revolution: Cleaning the Polish Environment Through Privatization and Preventive Market-Based Incentives, 19 Pepper. L. Rev. 553 (1992) (outlining
ality assessments. If, in the hypothetical, Countries C or D improves enforcement, or Country D increases its fines imposed for violations, or Country E implements environmental laws, these considerations might lead WORLDMINE to make broader disclosures concerning its sites in those countries. Indeed, under the second prong of the MD&A test and in light of the SEC's recent enforcement action against Caterpillar, Item 303 may require a registrant to hypothecate such overseas events and estimate their effect on a company's business operations. In so doing, however, the SEC places a heavy burden on those registrants less able to make such forward-looking evaluations of a particular nation's political and environmental regulatory development.

144. See In re Caterpillar, Inc., supra note 87, at 63,055.

145. The SEC's primary emphasis on the economic determinants of materiality is defensible on two grounds. First, despite NEPA's mandate to consider environmental protection, the SEC is not the proper organ to alter corporate environmental behavior. Cf. Rulemaking on Environmental Disclosure, supra note 39, at 86,292 ("The Commission cannot, itself, undertake to regulate corporate conduct which affects the environment.") Moreover, the problem of unchecked exploitation of the local environment rests not with corporate conduct but instead with the foreign nation's environmental regulatory regime. Improving this regime to impose material burdens for environmental liabilities will concomitantly force corporations in violation of those regulations to make appropriate disclosures and thereby modify corporate behavior. Cf. Wallace, supra note 76, at 1125-28 (discussing a market-oriented approach to environmental law compliance). It is inefficient to pursue such improvements through the use of U.S. securities disclosure laws. Instead, the more efficient solution is to modify the regime through direct diplomatic activity, see Exec. Order No. 12,114, supra note 20, § 2-2, or the imposition of sanctions through international environmental laws, see Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550, art. 4 (entered into force, Jan. 1, 1989) (imposing trade sanctions against countries exporting products containing or produced with banned or controlled substances).

In addition, in light of the SEC's mandate to protect investor's interests through the disclosure of economically relevant information, that environmental hazards in a regulatory void (such as in Country E) pose no material economic threat to business operations obviates disclosure.
Based on the criticisms outlined in Part III, the proposals for reforming SEC environmental disclosure regulations are twofold. This Note recommends that the SEC modify the current language in Items 101 and 103, and take additional administrative actions.

A. LANGUAGE MODIFICATIONS

The SEC should, pursuant to its broad authority under the 1933 Securities Act and the 1934 Securities Exchange Act, propose and execute regulatory language modifications. Specifically, the Commission should amend both Item 101 and Item 103 to reflect disclosure obligations concerning federal, state, local, and foreign environmental provisions. Item 101’s amendment effectively codifies the SEC’s position in its 1973 No-Action letter to Air Products, requiring the disclosure of any foreign environmental provision having a material impact on a company’s financial condition or business, and is consistent with a registrant’s obligations under Item 303.

Item 103’s language modification would also codify the SEC’s intent in 1973 to maintain an economically material threshold for the disclosure of foreign environmental proceed-

146. See supra notes 11-14 and accompanying text (describing SEC’s regulatory authority).

147. See Air Products and Chemicals, Inc., supra note 36, at 83,229; supra note 136 and accompanying text (discussing inconsistency between Item 303 and Items 103 and 103). The language of Item 101(c)(xii) should read, in pertinent part:

Appropriate disclosure also shall be made as to the material effects that compliance with Federal, State, local, and foreign provisions which have been enacted or adopted regulating the discharge of materials into the environment, or otherwise relating to the protection of the environment, may have upon the capital expenditures, earnings and competitive position of the registrant and its subsidiaries.


In addition, the SEC should modify the language of Item 101(d)(2) to require the disclosure of “[a]ny material risks attendant” to a registrant’s foreign operations. Cf. § 229.101(d)(2). Under this modification, the registrant would then necessarily balance “both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.” SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969); see supra note 136 (criticizing Item 101(d)’s current language).
ings to which a government is a party.\textsuperscript{148} Extending Instruction 5(c) to encompass all proceedings, except those below the $100,000 floor,\textsuperscript{149} would prevent registrants from obscuring descriptions of substantial foreign proceedings with information on insignificant foreign proceedings.\textsuperscript{150} The proposed modification would obligate the registrant to make equivalent proceedings disclosures regardless of domestic or foreign origin.\textsuperscript{151}

Absent such modifications, both Items impose a lighter environmental disclosure burden to corporations with extraterritorial sites as compared to corporations with U.S. sites. This inequitable treatment results in disparate environmental reporting—by corporations facing essentially equivalent material compliance costs or proceedings expenditures—which violates

\textsuperscript{148} See Air Products and Chemicals, Inc., \textit{supra} note 36, at 83,229. Item 103, Instruction 5 should then read, in pertinent part:

\textit{Notwithstanding the foregoing, an administrative or judicial proceeding (including, for purposes of A and B of this Instruction, proceedings which present in large degree the same issues) arising under any Federal, State, local, or foreign provisions that have been enacted or adopted regulating the discharge of materials into the environment or primarily for the purpose of protecting the environment shall not be deemed “ordinary routine litigation incidental to the business” and shall be described if:}

\begin{enumerate}
  \item Such proceeding is material to the business or financial condition of the registrant;
  \item Such proceeding involves primarily a claim for damages, or involves potential monetary sanctions, capital expenditures, deferred charges or charges to income and the amount involved, exclusive of interest and costs, exceeds 10 percent of the current assets of the registrant and its subsidiaries on a consolidated basis; or
  \item A governmental authority is a party to such proceeding and such proceeding involves potential monetary sanctions, unless the registrant reasonably believes that such proceeding will result in no monetary sanctions, or in monetary sanctions, exclusive of interest and costs, of less than $100,000; provided, however, that such proceedings which are similar in nature may be grouped and described generically.
\end{enumerate}

\textit{Cf. 17 C.F.R. § 229.103 (1993) (emphasis added).}

\textsuperscript{149} See 17 C.F.R. § 229.103, Instruction 5(C) (1993).

\textsuperscript{150} See Disclosure of Environmental Proceedings, \textit{supra} note 23, at 84,287-89 (discussing policy behind the $100,000 disclosure threshold to permit the omission from disclosure of immaterial governmental proceedings which, based on the registrant's reasonable belief, will result in inconsequential fines).

\textsuperscript{151} The SEC promoted the broad disclosure of domestic environmental proceedings, arguing that anytime that a governmental agency brings an action it must be predicated on the perception of a serious violation. \textit{See} Rulemaking on Environmental Disclosure, \textit{supra} note 39, at 86,295 (arguing that environmental violations which the responsible authority considers significant result in proceedings or litigation). This rationale applies equally to overseas proceedings. That a foreign governmental agency commences a proceeding against a registrant reflects that governmental agency's perception that the registrant has committed a significant violation.
the SEC's stated policy designed to protect the investors' interests and require disclosure of relevant economic information.\textsuperscript{152}

\textbf{B. Administrative Action}

The second set of proposals requires that the SEC undertake two administrative actions. First, the Commission should issue an interpretive release addressing the complexities regarding materiality determinations for extraterritorial environmental matters. Under the MD&A's two-prong test, registrants with material environmental matters in an environmental regime with lax enforcement face equivalent disclosure burdens to those borne by registrants in nations enforcing such regulations.\textsuperscript{153} The proper application, however, of the MD&A test to environmental matters in countries with evolving or no environmental regimes, like \textit{Countries D} and \textit{E}, is unclear. Given the SEC's emphasis on forward-looking disclosures, the Commission should discuss the extent to which a registrant must predict whether future environmental regulations will have a material effect on business operations.

To this end, the SEC's safe harbor provisions provide some guidance.\textsuperscript{154} If a registrant reasonably believes, or states in good faith, that a nation's environmental regime will remain weak or nonexistent, no obligatory disclosure arises.\textsuperscript{155} The safe harbor provisions therefore protect the registrant from liability based on the inaccuracy of forward-looking predictions concerning changes in a foreign nation's environmental regime when

\begin{itemize}
  \item \textsuperscript{152} See Proposed Environmental Disclosures, \textit{supra} note 22, at 85,713; see also \textit{supra} notes 21-23, 43 and accompanying text (describing SEC policy to protect investors' interests).
  \item \textsuperscript{153} Compare MD&A compliance costs disclosures among \textit{Countries A} through \textit{D}, \textit{supra} Table 1.
  \item \textsuperscript{154} See \textit{supra} note 70 and accompanying text (discussing safe harbor provisions); see also Wielgos v. Commonwealth Edison Co., 892 F.2d 509, 512-16 (7th Cir. 1989). In \textit{Wielgos}, Judge Easterbrook offers an illuminating discussion of the safe harbor provisions under 17 C.F.R. § 230.175 (1993). \textit{Wielgos}, 892 F.2d at 512-16. In affirming the lower court's holding that Commonwealth Edison held a reasonable belief as to the accuracy of cost estimates and operational dates for several nuclear power plants, Judge Easterbrook, writing for the court, stated, "[f]orward-looking statements need not be correct; it is enough that they have a reasonable basis." \textit{Id.} at 513.
  \item \textsuperscript{155} See \textit{supra} notes 130-131, 134 and accompanying text (discussing non-disclosure of environmental matters in \textit{Countries D} and \textit{E} pursuant to the MD&A test).
\end{itemize}
such predictions are made in good faith or upon reasonable belief.\textsuperscript{156}

Furthermore, to improve the efficiency of its review of registrants’ overseas environmental disclosures,\textsuperscript{157} the SEC should further broaden its relationship with the EPA to include the transmission of information on foreign environmental laws.\textsuperscript{158} The addition of these assessments to the pool of information available to investors and registrants generates several benefits.\textsuperscript{159} Registrants’ access to the EPA’s assessments of foreign environmental regimes may partially alleviate any increased disclosure burden,\textsuperscript{160} thereby improving the efficiency of registrants’ disclosure efforts. Moreover, universal access to such information fosters equity in that no advantage will accrue to, nor disadvantage registrants who have disparate capacities to assess foreign laws and the materiality of environmental matters thereunder.\textsuperscript{161}

\textsuperscript{156} See Wielgos, 892 F.2d at 514 (“Inevitable inaccuracy of a projection does not eliminate the safe harbor, however.”). The assessment of “reasonable belief” and “good faith” is highly fact specific. See id. at 515-16 (discussing facts, including other unpublished projections, which reflect upon the “reasonable basis” and “good faith” of published projections).

\textsuperscript{157} The SEC recently confirmed that it scrutinizes forward-looking MD&A disclosures of material foreign matters. See In re Caterpillar, Inc., \textit{supra} note 87, at 63,055.

\textsuperscript{158} See \textit{supra} note 80 and accompanying text (discussing the nascent SEC-EPA dialogue). Such information might include assessments of enforcement and quantification of penalties for noncompliance in other nations. Indeed, in 1979 President Carter ordered that the State Department, Council on Environmental Quality (CEQ), and other interested federal agencies exchange information on environmental matters with foreign nations. Exec. Order No. 12,114, \textit{supra} note 20, at § 2-2. In light of Congress’s recent efforts to dissolve CEQ, see H.R. 3512, 103d Cong., 1st Sess. (1993), the EPA is a logical successor to this task; see also Rulemaking on Environmental Disclosures, \textit{supra} note 39, at 86,295 n.16 (discussing conversations with environmental agencies to coordinate and formulate reporting standards).

\textsuperscript{159} See Wielgos, 892 F.2d at 514 (stating that the addition of information and analysis to that already assembled improves the accuracy of the collective assessment, “even though a given projection will be off the mark”).

\textsuperscript{160} Although a registrant’s disclosure burden will likely increase as it assesses the effects of foreign compliance costs and proceedings on its operations, the extent of this increase is unclear. Many companies currently collect environmental data through environmental audits and disclose the results to investors in environmental reports. KPMG Peat Marwick, \textit{supra} note 16, at 5, 14-16, 19. The individual corporation may choose to supplement its audits with or rely upon the EPA’s assessments, thereby reducing the need to expend resources to track foreign environmental legislation.

\textsuperscript{161} See Proposed Environmental Disclosure, \textit{supra} note 22, at 85,713 (describing traditional objectives of securities disclosures); see also Rulemaking on Environmental Disclosures, \textit{supra} note 39, at 86,295 (expressing concern that, if permitted to evaluate the significance of noncompliance with environ-
CONCLUSION

Analysis of the introductory hypothetical pursuant to the SEC's current environmental disclosure regulations evinces ambiguities and loopholes under which, other things being equal, U.S. corporations with overseas operations ostensibly face a weaker disclosure mandate than do businesses with domestic operations. In light of the potential magnitude of environmental liabilities, this result leaves investors unable to make reliable comparisons of the liabilities accruing to companies with domestic and overseas operations, thereby violating this fundamental objective of federal securities laws.

The remedy is twofold. First, the SEC should rewrite those regulations explicitly addressing environmental matters to extend disclosure obligations to include material compliance costs and proceedings arising under foreign environmental laws. In addition, the SEC should issue an interpretive release clarifying registrants' forward-looking reporting obligations with respect to weak and evolving foreign environmental regimes. Expanding the SEC's nascent dialogue with the EPA to include the exchange of information on foreign environmental laws will facilitate the Commission's evaluation of registrants' environmental disclosures and afford registrants access to standardized evaluations of such laws.