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"Overview of Environmental Disclosure"

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*/ The views expressed herein are those of Commissioner Roberts and do not necessarily represent those of the Commission, other Commissioners or the staff.

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OVERVIEW OF ENVIRONMENTAL DISCLOSURE

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I. INTRODUCTION

The importance of environmental disclosure is reflected in the offering documents and periodic reports filed with the Commission every day by issuers located throughout the country. I intend today to provide a brief overview of the environmental disclosure requirements applicable to companies under our federal securities laws as well as to emphasize that these requirements should be taken seriously.

II. OVERVIEW

A. Growing Awareness of Environmental Issues

As society strives to maintain and improve our environment, costs are imposed that may need to be disclosed to investors. Compliance costs associated with regulations restricting development and limiting harmful emissions can have a material affect on the operations of a corporation. Moreover, government regulations and the public's concern for the environment has spawned new industries and, at the same time, rendered "non-environmentally safe" products unfashionable. Perhaps even more significant, however, are environmental laws that can impose large liabilities, particularly with respect to past generators of waste materials. Indeed, the term "environmental due diligence" has acquired a relevance to participants in business transactions that would have been unimagined only a decade ago.

B. Environmental Liability

While both federal and state environmental laws have permeated the consciousness of many businesses, particular industries, such as the pharmaceutical, petroleum, chemical, waste management, and heavy manufacturing segments, among others, must be particularly sensitive to disclosure and accounting issues presented by these laws. For example, the Resource Conservation and Recovery Act ("RCRA") is a "cradle-to-grave" law affecting most manufacturers, that governs the generation, storage and disposal of hazardous materials.

Each year, U.S. industry produces an estimated 300 million tons of waste that has been classified as hazardous. Compliance with the requirements of RCRA has been estimated by the Environmental Protection Agency ("EPA") to cost businesses in excess of $20 billion per year. Similarly, the Clean Water Act and the Clean Air Act each impose annual compliance costs estimated at more than $30 billion.

Although environmental laws may affect the operating costs of issuers, much of the recent disclosure debate has focused on issuer liability under the Comprehensive Environmental Response, Compensation and Liability Act, known as the "SuperFund" legislation. Under this legislation, waste transporters and waste generators, as well as past and present owners and operators of hazardous waste sites, may be designated by the EPA as Potentially Responsible Parties ("PRP"). Unlike most fault based liability schemes, past or present owners of a hazardous waste site can be held liable without regard to whether they were responsible for the release of hazardous substances. Moreover, each PRP is "jointly and severely liable" for the cost of cleaning up the entire site. This expanding scope of environmental liability has produced a perhaps unanticipated affect on lenders and even governmental issuers of municipal conduit bonds that, through foreclosure or the offering process, acquire title to a hazardous waste site.

The potential for large losses attributable to environmental problems is an important concern that many investors will factor into their investment decision. One need only look at the newspapers in recent weeks to learn that potential environmental liability may scuttle even the largest acquisitions or may endanger even the largest of industries. Recently, for example, the press reported that a proposed acquisition by Northwest Airlines of Midway Airlines fell through at the last minute because of concerns, among other things, with potential liability arising from possible leaks in an underground fuel tank at Midway Airport in Chicago. For another example, it has been reported that one of the major threats to the solvency of the property - casualty insurance industry is the risk of contract reinterpretations that may impose enormous unforseen environmental cleanup costs.

Vigorous enforcement of environmental laws likely to occur in the decade to come have made environmental liability a matter of growing prominence for lenders, rating agencies, and acquisition-minded companies, among others. In response to these concerns, there already is a growing reluctance of traditional lenders, as well as trustees for bondholders, to exercise covenants that permit foreclosure on property securing defaulted debt.

Concern about environmental issues also is manifest in the shareholder proposals that corporations may be required to consider as they prepare for their annual meetings each year, particularly since the grounds for excluding such proposals are currently construed so narrowly. Shareholder proposals often attempt to link environmental concerns with the economic well being of a corporation. And, if successful, may establish new directions for the corporation.

For example, in a case currently before the D.C. Circuit Court of Appeals, Roosevelt v. DuPont, a shareholder is challenging a lower court decision allowing the exclusion of a proposal that would require DuPont to accelerate the phase out of chlorofluorcarbon ("CFC") production before 1995. CFCs, as we all know, have been linked to the depletion of the ozone layer. DuPont, which is the largest producer of CFCs in the world, already has begun a phase out that would eliminate CFC production by the year 2000. Yet the case will determine whether the timing of the phase out is outside the scope of an ordinary business decision and thus an appropriate matter for shareholder concern. Pursuant to a request from the Court of Appeals, the Commission presently is considering filing an amicus brief in the case.

III. PRINCIPLE REPORTING REQUIREMENTS

A. Historical Role of the Commission

As you are aware, our federal securities laws are designed to promote full disclosure of material information. The general antifraud provisions impose liability on persons who make false statements or omissions of material facts in connection with the purchase or sale of securities. These provisions apply to all securities transactions, including private placements and mergers of many businesses. In certain cases, these general antifraud provisions will require disclosure to investors of the material affect of environmental laws on an issuer.

In addition to complying with the general antifraud provisions of the federal securities laws, issuers registering public offerings of securities under the Securities Act, or filing periodic reports under the Exchange Act, must comply with the applicable line-item disclosure requirements under Regulation S-K. With the increase in regulation and environmental liability since the early 1970s, the Commission has attempted to refine the disclosure obligations raised by environmental legislation and the regulations promulgated thereunder.

In 1971, for example, the Commission first issued a release calling to the attention of issuers their disclosure responsibilities in connection with litigation and compliance costs associated with environmental requirements. A series of subsequent releases over the next two decades have sought to further refine the disclosure responsibilities of issuers subject to environmental laws. In addition, several prominent enforcement actions instituted by the Commission against issuers that failed to disclose known environmental liabilities and compliance costs have highlighted the importance of accurate disclosure in this area.

B. Regulation S-K

Three provisions of Regulation S-K have particular significance for issuers that are subject to potential environmental liabilities and risks. Item 101, for example, requires an issuer to provide a general description of its business. In addition, it requires specific disclosure of the material affects that compliance with federal, state and local environmental laws may have upon the capital expenditures, earnings, and competitive position of the issuer. An issuer must disclose any material estimated capital expenditures for environmental control facilities.

Item 103, for another example, requires that the issuer disclose any material pending legal proceeding, including specified proceedings arising under federal or state environmental laws.

Finally, the Management Discussion and Analysis ("MD&A") item, Item 303, requires management to discuss the issuer's historical results and its future prospects. This forward-looking disclosure is triggered by any "known" trends, demands, commitments, events or uncertainties that are reasonably likely to have a material affect on the issuer's operating results or financial condition. The purpose of the MD&A is to give investors a look at the company through the eyes of management. MD&A and the related financial statements are the heart of an issuer's disclosure document. Obviously, Item 303 would compel management to disclose the significant implications of environmental laws on future operations of the issuer.

IV. ACCOUNTING AND DISCLOSURE RELATING TO ENVIRONMENTAL LOSS CONTINGENCIES

Beyond these narrative discussions mandated by Regulation S-K, environmental matters also may have implications for the financial statements of issuers. Generally accepted accounting principles,

specifically FASB Statement No. 5, indicate that an estimated loss from a loss contingency must be accrued by a charge to income if it is probable that a liability has been incurred and that the amount of the loss can be reasonably estimated.

It is the responsibility of management to accumulate on a timely basis sufficient relevant and reliable information to make a reasonable estimate of environmental liability. If management determines that the amount of the liability is likely to fall within a range and no amount within that range can be determined to be the better estimate, the registrant is required to record at least the minimum amount of the range. Additional exposure to losses also should be disclosed and changes in estimates of the liability should be reported in the period that they occur. The measurement of the liability should be based upon currently enacted environmental laws and upon existing technology.

The recognition and measurement of the liability must be evaluated separately from the consideration of any expected insurance recoveries. If information available prior to the issuance of the financial statements indicates that it is probable that a environmental liability had been incurred at the date of the financial statements, the amount of the

company's liability should be recognized and recorded, if it can be estimated, regardless of whether the issuer is able to estimate the amount of recoveries from insurance carriers. In contrast, however, the Emerging Issues Task Force has indicated that the cost of improvements necessary to prevent further environmental contamination, or to comply with new regulations, may be capitalized.

V. UNCERTAINTIES

Having described the environmental disclosure requirements, let me also confess that determining the costs of regulatory compliance, and measuring the bottom line affect of potential environmental liability, in many cases may be difficult. The last decade has witnessed the enactment of a host of legislative and regulatory initiatives in the environmental area where the costs are yet uncertain. Environmental standards, for instance, may impose on issuers the requirement to use not merely the best available technology, but technology that does not yet exist and whose costs, in some cases, cannot accurately be measured. Moreover, sudden, and perhaps unpredictable, liability arising from accidental discharges of hazardous waste, including oil spills, may have a profound affect on the balance sheet of a company. Indeed, the law in this area is still evolving.

Fundamental interpretive issues affecting lenders, insurers and the role of the bankruptcy laws have yet to be clearly resolved. Moreover, although defeated in the most recent session of Congress, further legislative refinements are likely that may reduce the potential exposure of some persons, such as lenders.

Finally, although I can summarize for you the general accounting standards that are applicable to the contingent liabilities of any issuer, a great deal of discretion is left to management and auditors. The actual costs of remediating a hazardous waste or an asbestos site will depend upon the complexity of the problem and the technology determined to be most effective; the participant's share of responsibility for the total costs; and its ability to recover part of the costs from the other parties. All of these factors may not be immediately apparent.

In addition, FASB No. 5 predates the SuperFund legislation, and there is a paucity of specific guidance to help management and their accountants appropriately reflect environmental clean-up costs on their balance sheets. Moreover, due to the press of other projects, the Financial Accounting Standards Board is unlikely to provide additional guidance on accounting for environmental costs in the near future.

VI. ONGOING REVIEW

Although a number of issues have yet to be resolved, it is clear that aggressive enforcement of environmental laws will increase in the 1990s. "Environmental due diligence" is a phrase that will grow increasingly familiar to the attorneys that represent both public issuers and investors. Environmental issues must become a growing concern for corporate management. Yet today, a recent study by Price Waterhouse indicates that at the largest corporations, only 11% had adopted any written accounting procedures or policies to deal with environmental issues and less than 20% had established environmental oversight committees at the Board of Directors level.

At the Commission, the large dollar amounts of anticipated environmental liability costs has produced increased pressure to monitor the adequacy of issuer disclosure. During the past several years, the staff of the Commission's Division of Corporate Finance has been closely looking at the adequacy of environmental disclosure in connection with its review of filings. When the staff finds material omissions or deficiencies relating to environmental matters, it will request corrective disclosure and, in egregious cases, may refer the matter to the Division of Enforcement.

In order to enhance the disclosure in this area, a dialogue has been developed between the staffs of the Commission and the EPA. Through an informal understanding, the staff receives from the EPA lists of all companies that have been named as PRPs on hazardous waste sites. Information also is received concerning companies subject to the clean up requirements under RCRA; criminal cases under federal environmental laws; civil proceedings under environmental laws; and companies barred from government contracts under the Clean Air Act and the Clean Water Act. The staff currently utilizes this information in its review process. The staff of the Commission presently is considering whether this dialogue should be formalized through the execution of a memorandum of understanding with the EPA.

VI. CONCLUSION

Many issuers already are acutely aware of their responsibilities and potential liability under our environmental laws. Regardless of their sophistication, however, it is the responsibility of the business lawyers in this audience to make sure that your clients are familiar with their responsibilities to investors under our federal securities laws.

I expect that in the future many issuers will face significant losses due to environmental liability. I would challenge each of you today to acquaint yourselves with the environmental regulations and to focus seriously on whether your clients have adequately disclosed the short-term and long-term affects of environmental laws on their operations.